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209 Cal. 303

SHANNON v. NORTHWESTERN PAC. R. CO.

S. F. 13054.

Supreme Court of California.

April 16, 1930.

Railroads ⟹348(6) — Crossing — Collision — Contributory negligence — Evidence — Sufficiency.

Evidence, in action for personal injuries and damages to automobile sustained in collision at railroad crossing, *held* to show plaintiff contributorily negligent.

In Bank.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by William Shannon against the Northwest Pacific Railroad Company. From a judgment of nonsuit and dismissal, plaintiff appeals.

Affirmed.

Daniel A. Ryan and Vincent W. Hallinan, both of San Francisco (George F. Snyder, of San Francisco, of counsel), for appellant.

Stanley Moore, R. W. Palmer, and Orrick, Palmer & Dahlquist, all of San Francisco, for respondent.

SEAWELL, J.

Appeal from a judgment of nonsuit and dismissal.

Plaintiff brought this action to recover damages from the Northwestern Pacific Railroad Company on account of injuries to his person and damage to his automobile caused by the electric train of respondent striking and colliding with said automobile at Greenfield avenue crossing, a point on said railroad between San Anselmo and the city of San Rafael, at the hour of about 2:50 p. m., January 17, 1925. The section of the general double-track system of said railroad company over which said electric cars were operated at the time said injuries were inflicted extends in a general easterly direction from San Anselmo, crossing said Greenfield avenue, and terminating at San Rafael.

Appellant had taken his wife for a visit to the home of the Luchessi family, who were nearby neighbors, and was returning from the latter residence by way of Greenfield avenue, which crosses said railroad at grade, at right angles. Upon reaching the crossing, he observed an electric train on the southerly track moving easterly towards San Rafael. He paused his car at a distance of eight feet from the nearest rail and waited for said train to pass. When the last car passed, he proceeded to cross the double tracks and, when about half way across the northerly or second track, the car which he was driving was struck by an electric train coming from the east and badly damaged from the impact. Appellant sustained a broken collar bone, a fractured rib, painful bruises, and a number of minor cuts. Whether the trains were two or three-car trains is left in a state of uncertainty. There seems to be a slight curve in the railroad track looking easterly from said crossing, but it was not sufficient to seriously affect visibility for a distance of three or four hundred feet at least. Appellant testified that the eastbound train obstructed his view of the westbound train, and that certain trees and bushes near the track aided also in that respect. He also testified that the only whistle he heard sounded was the signal given by the eastbound train. Two or three other persons were questioned as to the blowing of the whistle, but their testimony was negligible on that issue. Plaintiff testified that upon crossing said tracks he went into the third gear, which meant that his mileage per hour was from three to five miles, and that he could have stopped his car in a distance of three or four feet. He also testified that the eastbound train was traveling at a high rate of speed. The westbound train was brought to a stop after the collision within the length of the train plus twenty feet, that is to say, the rear car was twenty feet past the point where the automobile was struck.

Appellant had resided for twenty-nine years within a very short distance of the crossing in question. He testified that he had crossed the track at that point more than one hundred times, and was so familiar with the train schedules that passing trains served him as a timepiece. He gave the impression that it was unusual for trains to pass at the point in question, but he produced testimony which clearly established the contrary fact.

We have examined the entire record in the case, and find nothing therein that would justify us in reversing the judgment. The learned trial judge, in passing upon the insufficiency of the evidence to sustain a judgment for appellant used the diagram or map prepared by the plaintiff to illustrate his position and said:

"And after Mr. Shannon did start up, until he got to this south rail, there is no question at all if he looked down there he could see three or four hundred feet down the track. And then going three to five miles an hour, he could have stopped, because anywhere along here would have been a place of safety. This track, the testimony shows, is straight for several hundred feet. To the west there is no indication of any train coming, or due or in danger of coming. So it seems to me if Mr. Shannon came out this far on the track and stopped and looked—without stopping, if he had looked—he would

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

have seen the train approaching from the east. * * * So it looks to me as though, much as I dislike to do it, I will have to grant the motion. [After discussion.] Well, I do not think I could look at it any other way except he was guilty of contributory negligence."

The court further stated that by the exercise of reasonable care on the part of appellant the accident would have been avoided. Upon an examination of the record, including the transcript of testimony, we find no grounds upon which its judgment may be overthrown.

Judgment affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SHENK, J.; RICHARDS, J.

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209 Cal. 301

SEGALOFF et al. v. FURMAN et al.

L. A. 10340.

Supreme Court of California.

April 15, 1930.

1. Appeal and error ⟹1011(1) — Trial court's findings — Conflicting evidence — Conclusiveness.

Court's findings on sharply conflicting evidence cannot be disturbed on appeal.

2. Pleading ⟹236(3) — Action on contract — Amendment of complaint — Supplemental contract.

Allowing trial amendment of complaint to set up supplemental guaranty contract making original contract sued on more certain as to amount and insuring payment of interest by defendants, *held* not abuse of discretion.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by M. Segaloff and others against E. H. Furman and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Frank Bryant, of Los Angeles, for appellants.

W. T. Craig, Frank C. Weller, and Finlayson, Bennett & Morrow, all of Los Angeles, for respondents.

SHENK, J.

This is an appeal from a judgment in favor of the plaintiffs in an action on a contract of guaranty evidenced by writings dated January 12 and 19, 1925, respectively.

The plaintiffs, Segaloff and wife and Greenberg, contracted to exchange certain real property owned by them in Hollywood for certain installment contracts for the sale of certain lots in a subdivision owned by the defendants in Orange county. As a part of the same transaction, the defendants guaranteed in writing that whenever the payments on any of said installment contracts should be delinquent and remain unpaid for three months after June 1, 1925, the defendants would pay the installments in default and would thereafter pay the installments upon said delinquent contracts until the same should be paid in full. Delinquency occurred as contemplated by the contract of guaranty. Demand was made on the defendants for payment in accordance therewith. Upon failure to comply with the demand this action was brought. The signing of the contract was admitted, but the answer set up a special defense of want of consideration, alleging that the sole consideration for the contract of guaranty was certain oral promises made by the plaintiffs at the time the contract was executed which promises had not been performed, and the further special defense of fraud, alleging that the plaintiffs made the alleged oral promises with the intention of not performing the same.

[1] The evidence as to the issues framed by the pleadings was sharply in conflict, and the court, within its province, found thereon in favor of the plaintiffs. Under familiar rules such findings may not be disturbed on appeal.

The contract of guaranty recites the execution of the contract of exchange. The documentary evidence fully supports the contention of the plaintiffs that the contract of guaranty was a part of the consideration running to the plaintiffs in the contract of exchange.

[2] We find no abuse of discretion on the part of the trial court in allowing an amendment to the complaint to be filed during the course of the trial setting up the supplemental contract between the parties of date January 19, 1925. The purpose of the supplemental contract was to make, on behalf of the defendants, the terms of the original contract of guaranty more certain with reference to the amount of the guaranty and on behalf of the plaintiffs to insure the payment by the defendants of interest as well as principal to become due under the contract of guaranty in the event that delinquencies occurred on said contracts of sale. The agreements dated January 12 and January 19, 1925, respectively, constituted one contract of guaranty and as such were properly so impleaded in the complaint as amended.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

We find no error in the record, and the findings support the judgment.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.

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209 Cal. 206

SENECA CONSOL. GOLD MINES CO. v. GREAT WESTERN POWER CO. OF CALIFORNIA.★

Sac. 4147.

Supreme Court of California.

March 28, 1930.

Rehearing Denied April 24, 1930.

1. Pleading ⟹129(1) — Allegations — Failure to deny — Admission.

Allegations in complaint not denied by defendant are admitted by implication.

2. Waters and water courses ⟹51 — Riparian rights — Flow of water.

Riparian landowner has right to natural flow of water in its accustomed channel unless another has acquired superior right by license, grant, or prescription.

3. Waters and water courses ⟹46 — Riparian right — Generation of electricity.

Use of stream for generation of electricity is legitimate exercise of riparian right.

4. Waters and water courses ⟹152(8) — Riparian right — Adverse use.

Evidence *held* to establish that impounding of water by upper proprietor for generation of electricity was adverse to lower riparian owner's right, and not merely exercise of riparian right.

It was admitted by stipulation that the impounding of the water by upper proprietor was not confined to flood or freshet waters, but extended also to natural flow of stream, and that water not required for generation of electricity was stored and later discharged at time necessary for generation of electricity.

5. Waters and water courses ⟹152(6) — Upper proprietor — Use of stream — Presumption.

Use of stream by upper proprietor will be presumed to be riparian and not adverse until facts are brought home to lower proprietor showing adverse use.

6. Waters and water courses ⟹51 — Riparian rights — Flow of water.

Lower riparian proprietor *held* not entitled to flow of constant invariable specific quantity of water.

7. Waters and water courses ⟹40 — Riparian right — "Tenancy in common."

Riparian right is in its nature a "tenancy in common," and not a separate or severable estate.

8. Waters and water courses ⟹152(7) — Diversion — Riparian right — Damages.

Evidence as to plans of lower proprietor to use waters, extent of project and probable cost thereof, would not be proper matters to be considered in assessing damages for diversion by upper proprietor.

9. Waters and water courses ⟹152(9) — Riparian right — Violation — Damages.

Market value of property with and without water right would be basis of damages for violation of riparian right to natural flow of water.

In Bank.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by the Seneca Consolidated Gold Mines Company against the Great Western Power Company of California. Judgment for plaintiff, and defendant appeals.

Reversed.

Rehearing denied; SHENK and CURTIS JJ., dissenting.

Guy C. Earl, W. H. Spaulding, and Warren Olney, Jr., all of San Francisco, for appellant.

L. H. Hughes, and H. B. Wolfe, both of Quincy, and Brobeck, Phleger & Harrison, of San Francisco, for respondent.

PRESTON, J.

This appeal involves a conflict of claims to the right of use of the waters of the North fork of the Feather river at certain points thereon in Plumas county. The record is large and the briefs of counsel are numerous and voluminous, but we intend to confine this discussion within comparatively narrow limits.

Plaintiff, a corporation, the owner of certain lode mining claims, on the 9th day of August, 1924, sued defendant public utility corporation to enjoin it from diverting the natural and normal flow of the waters of said stream above plaintiff's lands. The complaint is in two counts. The first is predicated upon its prescriptive right in said stream, and the second upon its riparian right therein. Defendant answered, framing its pleadings to call into operation the provisions of section 534 of the Code of Civil Procedure and the chapter on "Eminent Domain," first making categorical denial of some of the allegations of the complaint, admitting directly and by implication other allegations, but resting its defense in the main upon a claim of prescrip-

★Rehearing denied.

tive rights in said waters, estoppel, and the statute of limitations. At the same time it also filed its cross-complaint, pleading in effect that, if any rights to the use of said stream by plaintiff, other than its prescriptive right to 2,500 miners' inches of water, be found to exist, that it be allowed a judgment condemning such rights pursuant to the law of eminent domain.

The cause was tried beginning on the 4th day of May, 1927. The trial was in two parts. The equitable issues were heard by the court and the issue as to damages by the court sitting with a jury. The court first announced its conclusion respecting the rights of the parties, finding the extent and measure of plaintiff's prescriptive right and further finding in plaintiff a riparian right in the remainder of the normal flow of said stream in addition; then it defined concretely both of these rights; submitted to the jury the issue of damages; received its verdict; made formal findings embracing the verdict and all the other facts, and thereafter entered its judgment declaring the rights of plaintiff and decreed an injunction as prayed unless the amount of the verdict, $350,000, was deposited in court or a bond given in lieu thereof within the time provided by law. Defendant has appealed on a full record.

The above outline will aid us in our consideration of the material facts, which we shall now set forth. The North fork of the Feather river is a natural water course, with well-defined bed and banks, having its source in the Sierra Nevada mountains, and being fed and supplied for its normal and natural flow from creeks and springs, and in particular from a large spring situate in Big Meadows, Plumas county. Plaintiff, at the commencement of the action, was the owner of some five different lode mining claims, the first of which was known as the White Lily, located on April 4, 1896. All are traversed by said stream. From that date plaintiff's predecessors in interest began to divert and plaintiff and/or said predecessors have since continuously diverted the waters of said stream by dam, ditch, flume, and pipe line to the said claim and have used them for operating a quartz stampmill thereon, and also for mining, milling, irrigation, and domestic purposes, as well as for the generating of electric power for said mine. The amount of this diversion is one of the questions in dispute. Defendant conceded it to be to the extent of 2,500 miners' inches. The court, however, found it to be 4,240 miners' inches or 106 second feet.

The court found also that, prior to the inception of any rights on the part of defendant in said stream, plaintiff located and made discovery upon a second mining claim, known as the Addie Bell lode claim, and that it, too, was entitled to riparian rights in said stream superior to the appropriative claims of defendant. Defendant disputes the finding that discovery of said Addie Bell claim was made prior to the inception of its rights.

As to the three remaining claims of plaintiff, the court found that said upper appropriation made by defendant was superior to the riparian rights otherwise adhering therein.

In 1902 the predecessors in interest of defendant posted notices of appropriation of the waters of said stream at the intended points of diversion, being points on said river above the property of plaintiff. These notices were regular in form, properly posted, and work thereunder was pursued in the manner provided by law for the perfecting of appropriative rights. In the year 1913 the predecessors of defendant, as a part of this development, constructed a dam across said stream about six miles above the mining claims of plaintiff, thereby restraining the natural flow as well as the flood waters of said stream, flooding the said Big Meadows and creating a large artificial reservoir commonly known as Lake Almanor. The object of this development was the storing of the normal and flood waters of said stream for the purpose of generating by its use electric energy for sale to the public.

At about the same time defendant, or its predecessors, also completed the first unit of its plan by constructing a power house on the said stream at a point known as Big Bend, some thirty miles below said mining claims of plaintiff. Said power house was built to use the flow of said river at said point in the generation of electric current. From the year 1913 to the year 1921 there was no other outlet for said dam except down the said Feather river. Defendant used said dam for the purpose of storing in said reservoir such waters as it required for the operation of its said power house, and later discharged down said river such waters from said reservoir at such times and in such amounts as were necessary for the convenient and successful operation of its said power plant, bearing in mind always and respecting the prescriptive rights of plaintiff. In the year 1921 defendant completed the construction of diversion works to take from said Lake Almanor into a reservoir in Butt valley, and thence to another power plant constructed by it and called the Caribou plant, situated also on said stream below the claims of plaintiff, and above the plant at Big Bend, a portion of the waters of said stream, and from the year 1921 to the commencement of this action defendant has diverted from said lake and passed around the claims of plaintiff, and discharged into said stream below said claims a part of said water so stored in said reservoir and has used the water so diverted for the generation of electric energy at said last-mentioned power house. At the time of the commencement of this action defendant was engaged in constructing a cut in the bottom of said Lake Al-

manor, leading to the entrance to said tunnel from said lake into Butt valley, through which it could take more of the waters of said reservoir than it had theretofore diverted, and the court found it to be, and admittedly it is, the intention of defendant, when authorized by law so to do, to divert around plaintiff's land all of the waters of said stream in excess of the prescriptive right to which plaintiff is finally found to be entitled.

Many contentions are made by defendant for a reversal of the judgment, a number of which will be referred to in passing, but, to our mind, the underlying proposition which determines the course of this appeal is whether or not defendant has, by its acts and conduct, gained a prescriptive right over plaintiff in and to the use of any of the usual or normal flow of said stream. As above intimated, the court accorded to defendant no preferential right therein, and, moveover, declined to allow the jury to give consideration to any such claim by defendant. If any such right existed, then defendant was entitled to have it weighed in assessing the amount of damage done plaintiff's lands by the proposed diversion of the stream. If a material element tending to reduce the damages suffered by plaintiff was denied consideration, then, of course, the error was prejudicial. In order to realize the importance of this issue, it is necessary to state further findings of the court.

The court found, as already noted, that plaintiff's prescriptive right in said stream for the use of said mining claims was 4,240 miners' inches or 106 second feet of water; also: "That the White Lily Quartz Claim and the Addie Bell Quartz Claims are riparian to the North Fork of the Feather River and that the riparian rights attached thereto are superior to any right of defendant in and to any of the normal flow of the waters of the North Fork of the Feather River." "That it is not true that since the year 1913, or at any other time, or at all, that defendant has openly and notoriously, or openly, or notoriously, under claim of right or otherwise, increased and diminished the volume of water in said river at will, but on the contrary the Court finds that prior to August, 1921, that the water passing through the lands of plaintiff has at all times been equal to or in excess of 581.-05 second feet of water." The court also found that "plaintiff is entitled to have the waters of the North Fork of Feather River flow in their original and natural channel and without obstruction, interruption or diminution, and without diversion thereof, not exceeding 581.05 second feet. * * *" The court also made the finding that "plaintiff is entitled to have by reason of use and under the stipulations between the parties 4240 miners' inches flow down at all times, in the natural channel of the North Fork of Feather River without restriction or interruption, and that in addition thereto plaintiff is entitled to have flow down without interruption by defendant, 475 second feet of the waters of the North Fork of Feather River, as the riparian owner of the White Lily and Addie Bell Quartz Mining Claims."

In its charge to the jury, while deliberating upon the issue of damages, the court instructed it as follows: "The Court has also found that the plaintiff, Seneca Consolidated Gold Mines Company, are entitled, by reason of such riparian ownership, to have flow through said mining claims throughout the year an amount of water equal to the ordinary usual and normal flow of said river for the months of July, August and September as shown by the evidence, the mean of which has been testified to be 581.05 second feet or 23,242 miners' inches of water measured under a four-inch pressure."

It will thus be seen that in effect the jury were told that plaintiff had a right to a specific concrete amount of water and was entitled to have the same at all times flow by its lands. In other words, the riparian right of plaintiff was defined to be a constant specific right to so many second feet of water measured, not at defendant's dam, but at its own property. The implication from the findings above quoted is that defendant has no prescriptive right whatever in the normal waters of the stream, but, on the contrary, held and enjoyed only the right to divert and store what is known as extraordinary flood waters, in which no riparian right usually inheres. In other words, the court's findings preclude any claim on the part of defendant to a prescriptive right to store, impound, or manipulate to any extent the normal flow of the said stream.

The question then is: Does the evidence support such an implied finding? Admittedly for more than nine years defendant operated said reservoir. Admittedly its action was open and notorious and it paid all taxes assessed against it. By a stipulation of the parties it was conceded that its storage was not confined to the flood or freshet waters, but extended also to the "natural flow" of said stream. By the same stipulation it was admitted that said dam was used "for the purpose of storing in the reservoir created thereby such water of the north fork of the Feather River as was not at the time required for the operation of the defendant's said power house at Big Bend and later discharging down such river such water from said reservoir at such times and in such amounts as was necessary for the operation of said Big Bend power plant."

[1] It was alleged in plaintiff's complaint and by implication admitted by failure of defendant's answer to deny, as follows: "That defendant, by means of said dam, so constructed as aforesaid, prevents the normal and natural flow of said North Fork of Feath-

er River from flowing in its natural channel down, through, over and across the lands of plaintiff; that said defendant by the manipulation of a gate in said dam is able to increase and diminish the volume of water, flowing in said North Fork of Feather River below its said dam, at will, and that said defendant so does, thereby rendering it unsafe for plaintiff, its agents, servants and employees to be on or along said stream on the property of plaintiff and thereby making it impossible for plaintiff to regulate, in any manner, its diversion of the waters thereof or to maintain its diversion works and equipment to plaintiff's great and irreparable damage and for which plaintiff has no plain, speedy, or adequate remedy at law." There is therefore, under the undisputed admission of the parties, a complete refutation of the claim that defendant has stored for all these years only storm waters of said stream.

Furthermore, the only other reliable evidence introduced on the subject was the records of defendant's company as to the discharges from said reservoir during the period intervening between 1916 and 1924, inclusive, from which it is clear that for months at a time few or no discharges were permitted from said reservoir. This fact is conceded by respondent. In other words, during the periods of high water, the stream would be largely fed by tributaries below defendant's dam and the necessity for water from the reservoir would be slight, and during said periods defendant would store practically all the waters of said stream reaching its dam and thus build up a supply for use during the seasons of low water.

But respondent contends that the uniformity of flow at its lands during the period of heavy run-off was maintained by the influx of water above its lands and below defendant's dam. It must be here specially noted that these waters are not to be diverted by defendant, and respondent is not entitled to consider them in ascertaining the existence of a prescriptive right in defendant nor as an element of injury on the taking sought. Furthermore, that the use by defendant was by the court thought to be adverse seems to follow from its finding that, as to the three other mining claims of plaintiff, defendant owned an appropriative right in the entire stream in excess of the prescriptive right of plaintiff, for the court in that connection charged the jury as follows: "You are instructed that as to all the lands of the Seneca Company except the White Lily and Addie Bell Claims, the power company has, by reason of the priority of its appropriations, the superior right to the water of the river in excess of 106 second feet and that you are not in any way, directly or indirectly, to take into consideration the value, if any, which the waters of the river may have for use upon any lands, either of the Seneca Company or anyone else, other than the two claims mentioned, the White Lily and the Addie Bell."

Respondent, however, meets this contention by the assertion that defendant during all this storage was itself a riparian owner, and that the storage carried on was in the exercise of its riparian right and not adverse to its riparian right. Citing Pabst v. Finmand, 190 Cal. 124, 211 P. 11. This contention it supports by the further statement that up to the inception of this proceeding it had enjoyed the use of all the water of the stream it needed.

In view of the above-noted contention, a general definition of the right of storage in a riparian proprietor seems to be required of the court. The question in another form is: May a riparian owner, when the stream carries more water than is necessary for the propulsion of his mill or power plant, store such surplus water until he shall be able to use it in a contemplated dry season to follow?

[2] The riparian doctrine comes down to us from the common law, and it has been repeatedly defined in this state; hence little time need be spent in recounting the holdings of the courts in this regard. A few citations will suffice.

"* * * Every owner of land, through which a natural stream flows, has a usufruct in the water of the stream as it passes along, and has an equal right with those above and below him to the natural flow of the water in its accustomed channel, at its usual level, without unreasonable detention or substantial diminution in quantity or quality, and that none of the owners can make any use of it prejudicial to the rights of the other owners, unless he has acquired a right to do so by license, grant, or prescription." Kinney on Irrigation and Water Rights (2d Ed.) vol. 1, p. 939, § 543. Citing Paige v. Rocky Ford Canal, etc., Co., 83 Cal. 84, 21 P. 1102, 23 P. 875; Chauvet v. Hill, 93 Cal. 407, 28 P. 1066, and other decisions. See, also, Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 P. 607, and volume 25, Cal. Jur., pp. 1060 et seq., where the cases are collated.

[3] The use of the hydraulic effect of the stream for the generation of electric current is, of course, a legitimate exercise of the riparian right. Mentone, etc., v. Redlands, 155 Cal. 323, 100 P. 1082, 22 L. R. A. (N. S.) 382, 17 Ann. Cas. 1222; Herminghaus v. Southern California Edison Co., supra.

But to what extent may such owner detain, store, or impound the waters before the right ceases to be a riparian one and becomes an adverse or appropriative right which may ripen into a prescriptive one, is the question? Little has been said on this point by the courts in recent years. In the days of the old mills, when the momentum of the stream upon the overshot wheel furnished the power, this question was present, and received thoughtful con-

sideration by the courts, particularly in New York, Massachusetts, and Texas. The logic of the positions then taken seems to be entirely sound and to be controlling here.

In Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631, 634, it is said: "And the momentum of the stream may be resorted to as a power for making it available, or it may be turned by a proprietor on his own land by a dam, or by any other means which he may find appropriate for the purpose. Yet, unless he has acquired the right of doing so by grant, license, or such adverse possession as will give him the right by prescription, he cannot do it in a manner that will unreasonably detain the water, not consumed, from the riparian owners below, or throw it back beyond the line where it passes from the land of the owner above him. For every party must exercise his own rights, and use his own property in such a manner as shall not cause detriment to that of another."

In 40 Cyc. p. 606, we find the matter summed up as follows: "A riparian owner has a right to erect a dam across the stream on his land, and to detain the water for such reasonable time as may be necessary to raise the requisite head, and accumulate such a quantity as will enable him to use the water for the purpose of his machinery; but he cannot, as against a lower riparian owner, by means of a storage dam erected on his own land, detain such surplus water of the stream as he may not require for his present use until it may be wanted by him in a dry season. * * *"

Probably the best considered case on the subject to be found anywhere is the case of Clinton v. Myers, 46 N. Y. 511, 7 Am. Rep. 373. Quoting from the syllabus, paragraphs 1 and 2, it is said: "No riparian proprietor has a right to use the water of a stream to the prejudice of other proprietors above or below, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He may use the water while it flows over his land as an incident thereto, but he cannot unreasonably detain it, or give it another direction, but must return it to its ordinary channel when it leaves his estate. A party has a right to erect a dam across a stream upon his land, and such machinery as the stream in its ordinary stages is adequate to propel, and if, in seasons of drought, it becomes inadequate for that purpose, he may detain the waters for such a reasonable time, as may be necessary to raise the requisite head to enable him to use it advantageously and profitably upon such machinery. He has no right to erect machinery, requiring for its propulsion more water than the stream furnishes at its ordinary stages, and operate such machinery by accumulating the water and discharging it upon those below in unusual quantities to their prejudice. Nor has he a right to create a reservoir, and detain and store the water therein for future use in a dry season." This doctrine has been reaffirmed in New York in several recent cases. See Fulton County, etc., Co. v. Rockwood Mfg. Co., 205 App. Div. 787, 200 N. Y. S. 225; United P. B. Co. v. Iroquois P. & P. Co., 226 N. Y. 38, 123 N. E. 200; Little Falls Fibre Co. v. Ford & Son, Inc., 249 N. Y. 495, 164 N. E. 558, and Ford & Son v. Little Falls Fibre Co., 50 S. Ct. 140, 74 L. Ed. —, decided January 6, 1930, which is indirectly in point.

See, also, as directly in point, Still v. Palouse Irr. & Power Co., 64 Wash. 606, 117 P. 466, 467, which concerns a stream in Washington much like in its habits the stream under consideration here. Defendants were enjoined by a lower riparian proprietor from storing the water of the natural flow for future use, and the court there said: "Water may not thus be gathered into reservoirs for future use, when it may best suit the convenience and use of one riparian owner, and thus deprive other riparian owners of their use and service of the stream in its natural condition, unless such right is exercised under a valid prior appropriation."

[4] It is plain, therefore, that the use of the stream by defendant was adverse and not in the exercise merely of a riparian right. The use was as much adverse and could have been as readily enjoined as if the diversion had been to another watershed for use on nonriparian lands.

[5] The holding in the case of Pabst v. Finmand, 190 Cal. 124, 211 P. 11, when properly understood, is not in conflict but in accord with these views. It is true that if an upper proprietor is making a certain use of the stream, which may or may not, from the face of the act, be intended as an adverse claim against the proprietor below, it will, when the use is under inquiry, be presumed to be a riparian and not an adverse one, until facts are brought home to the lower proprietor showing the use above to be adverse. This must be true because of the long line of cases which hold that the lower riparian proprietor may enjoin a nonriparian use on the stream above him, even though no present damage is done upon the ground that such use may ripen into a prescriptive right. See 26 Cal. Jur., pp. 538, 539, where the cases are collected.

The foregoing discussion is in reality but a confirmation of the reasoning of this court in Herminghaus v. Southern California Edison Co., supra, on practically a parallel state of facts, the only difference being that in that case the court found the storage to be an unreasonable exercise of the riparian right, while here we have impliedly a contrary finding. The facts are not in dispute. The question is then one of law. In describing the situation in the above-cited case, Mr. Justice

Richards uses this language (200 Cal. 110, 111, 252 P. 607, 619): "* * * And as to said waters as a whole and to the extent of their retention in said reservoirs, their ultimate return to the river would depend, not at all upon the claims and asserted rights of lower riparian owners to the usual, natural, and ordinary flow of said waters, but altogether upon the will and convenience of the defendants in their proposed utilization of said waters for power production." And in portraying the legitimate result of the reasoning employed by defendant in behalf of the right of storage, he uses the following language: "The asserted right of the defendants herein as riparian owners along said river and incidentally the asserted rights and claims of all those who have appeared herein as amici curiæ claiming similar rights in similar rivers in this state, would, if permitted, put an end to the whole doctrine of riparian rights, not only as to these plaintiffs and all other lower riparian owners similarly situated, but also as to the defendants themselves, since any person or aggregation of persons having the financial ability and acquiring a riparian ownership in lands above those of the defendants along the yet higher reaches of said river would thus become entitled to exercise all the rights which the defendants are here claiming, even against them, with the resultant drying up of the defendants' own reservoirs."

The essence of the riparian right for power, therefore, is that the land owner is entitled to the benefit of the hydraulic effect of the natural flow of the stream measured by its drop from the highest point to the lowest on his land. He, too, may make such temporary detention in forebays or reservoirs as will insure him this right, but a detention of surplus water above his needs, from a wet season to a dry one, when he may utilize it, is not a use of the stream as it flows and is in plain violation of the correlative rights of proprietors below. The defendant thus possessing prescriptive rights in the stream, they are conclusively presumed to be injurious to the riparian right of plaintiff. See authorities cited in 26 Cal. Jur., supra. If then the riparian right has suffered a damage, in that it has been invaded by prescription, in a valuation of the real property thus affected, this fact must be considered.

[6] At this point respondent replies that, conceding a prescriptive right to have been acquired, that fact is unavailing here, as the storage of the storm and natural waters of the stream in the manner carried on by defendant and their release in the manner done by it were and are a distinct benefit to plaintiff, in that the flow of the stream was equalized and made uniform, pointing to the fact that 581.05 second feet was the average flow during the summer months of July, August, and September; that in the period of high water, and when the dam was closed, the tributaries below the dam furnished this constant amount of water, so that at all times and during all seasons plaintiff has enjoyed a constant, steady flow at its lands of 581.05 second feet; that it owns a prescriptive right to 106 second feet and has an uncontestable right to 475 second feet as riparian proprietor. This position is specious, but is it sound?

[7] In the first place, a diversion of the whole stream during the time of the influx of tributaries below the dam and above plaintiff's land would not injure plaintiff in the least, as its prescribed quota of the water would not, during such period be disturbed. Again, under this theory, plaintiff is not benefited unless this undisturbed factor comes to the rescue and compensates it for the water taken by defendant. It is, therefore, unjust to defendant to have this influx below, which it will not and could not disturb, capitalized and made to swell the injury resulting to plaintiff from the proposed taking. Moreover, the water right that plaintiff is entitled to have considered is its water right in a state of nature, or, in other words, on the stream as it is wont by nature to flow, and not in a stream which defendant by an immense outlay has regulated to provide uniformity of volume and duration. It seems, in other words, that defendant may have been assessed with damages for bestowing a benefit on the plaintiff. Again, grave question exists as to the right of the jury to assess damages on the basis of a riparian water right in 475 second feet of water, constant and uniform flow. No stream in a state of nature would yield any such uniformity. Indeed, the riparian right is in its nature a tenancy in common and not a separate or severable estate. The moment a right in a natural stream is specifically defined in a concrete inflexible amount, at that moment the right becomes one of priority and not riparian. This question was before the Oregon supreme court in the case of Caviness v. La Grande Irr. Co., 60 Or. 410, 119 P. 731, 735, where it was said: "In the very nature of things, a court cannot fix in advance by its decree what quantity of water will be reasonable in the future for the use of a riparian proprietor claiming the duty of water in that character. * * * The reason is that among riparian owners the contingencies of the future are so many and varied respecting the amount of rain or snow fall, the heat or humidity of summer, the alternation of crops, and the like, that it is quite impracticable, if not impossible, to determine in advance the question of the duty of water for each riparian owner. Besides, a decree of that kind would be a virtual partition of the water from an estate in common to one in severalty, although there would be no rule whereby the estate of any single owner could be determined, owing to the unknown factors already noticed." See, also, to the same effect, Little

Walla Walla Irr. Co. v. Finis Irr. Co., 62 Or. 348, 124 P. 666, 670, 125 P. 281.

In Pabst v. Finmand, supra, at page 129 of 190 Cal., 211 P. 11, 13, it is said: "A riparian owner is entitled to a reasonable amount of water for use on his riparian lands. What is a reasonable amount varies with the circumstances of each particular case and also varies from year to year, for the amount which might be reasonable in a season of plenty might be manifestly unreasonable in a season of drought."

But, in this case, the whole evidence was founded upon and the jury instructed upon the supposed right of plaintiff to a constant, invariable, specific quantity of water. This basis is necessarily artificial, impossible, and admittedly is the result of a computation of averages during three special months over a long period of years. The evidence shows that many years this average did not obtain. Constancy and uniformity are most valuable elements in producing electric current by the use of water power. The evidence of such discharges during such period is, of course, admissible, but the jury should not be told that plaintiff as a riparian owner was entitled to any specific concrete amount of water. In other words, the right is riparian and not a prescriptive or other prior one. The necessary conclusion from the above facts is that the verdict of the jury in fixing damages in this cause cannot be sustained.

The same is also true of the judgment respecting injunction, entered following said verdict. The language of the paragraph relating thereto is as follows: "That the defendant be and it is hereby enjoined and restrained from storing, withholding or diverting the waters of the North Fork of the Feather River as to reduce the flow thereof below 581.05 cubic feet per second." This clause is based upon a similar finding, and it cannot be sustained by the evidence. It required defendant to allow 581.05 second feet of water to pass through the outlet of its dam at all times. Admittedly this is contrary to the evidence of the right above discussed and sustained, which attached by prescription. The court found that 581.05 cubic feet of water measured the flow to which plaintiff was entitled through its lands, which was quite a different matter for between the dam and plaintiff's lands during certain seasons of the year large quantities of water flow into the stream from tributaries so that this number of second feet measured at plaintiff's lands and at the dam are quite different things. In fact, the dam is practically closed for certain periods of the year. Defendant might for a number of months during the year close the dam entirely and still plaintiff would have his 581.05 second feet of water. The judgment, therefore, in this respect cannot be sustained.

[8, 9] These conclusions make it unnecessary to consider the question as to whether the extent of the prescriptive right of plaintiff is or is not 4,240 miners' inches or 106 second feet. This finding is based upon evidence which at another trial may be different and from which different conclusions might be drawn by the trial court. The same observation is true with respect to the defense of estoppel, for this claim too is founded solely upon a question of fact, the evidence on which may or may not be the same on a second hearing. For the same reason it is unnecessary to determine whether a discovery was made upon the Addie Bell claim prior or subsequent to the year 1902. We prefer to leave all questions not inconsistent with the views herein expressed open so as not to prejudice either party upon retrial of the case. It must be said, however, that the testimony as to the plans of plaintiff to use said waters, the extent of the project and the probable cost thereof, were not proper matters to be considered by the jury in assessing damages. San Joaquin & Kings River Canal & Irr. Co. v. Stevinson, 63 Cal. App. 767, 220 P. 427. The court also on request should have told the jury that the value of the property to plaintiff, with or without the water right, was not the basis, but the market value alone, with and without the water right, was the basis of damages.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.

I concur in the judgment of reversal: SHENK, J.

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209 Cal. 251

VAIL v. JONES et al.★
L. A. 9682.

Supreme Court of California.
April 1, 1930.

Rehearing Denied April 28, 1930.

1. Process ⚷149 — Service — Evidence — Sufficiency.

Evidence *held* to support finding of trial judge that deceased was duly and personally served with process in action by defendants to quiet title.

Administrator sought to set aside judgment against deceased quieting title to certain realty. There was no direct evidence that process in previous action had ever been personally served upon deceased, but she knew of the action, and

★Rehearing denied.

there were other facts from which the inference might be drawn that she was served.

2. Process ⚷127 — Service — Jurisdiction.

Jurisdiction does not depend upon proof of service, but upon fact that service has been made.

SHENK, J., and WASTE, C. J., dissenting.

In Bank.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Suit by Albert Vail, as administrator of the estate of Annie H. Vail, deceased, against G. H. Jones and others. From the judgment, plaintiff appeals.

Affirmed.

Superseding opinion of District Court of Appeal in 277 P. 909.

Rehearing denied; WASTE, C. J., and SHENK, J., dissenting.

Crouch & Sanders, of San Diego, for appellant.

Herbert C. Kelly, of San Diego, for respondents.

LANGDON, J.

Plaintiff brought an action to vacate a prior judgment against his intestate and to quiet title. He alleged his appointment and qualification as administrator; that on July 10, 1923, and subsequent thereto and until the time of her death, Annie H. Vail was the owner in fee and in the possession of certain described property in the county of San Diego, Cal.; that on said day the defendant Jones commenced an action against the said Annie H. Vail wherein and whereby he alleged that he was the owner of, was in the possession of, and was entitled to the possession of, said real property, and that said Annie H. Vail had no right, title, or interest therein, and asked that it be so decreed; that Jones was never the owner of said property nor any portion thereof and was never in the possession or entitled to the possession of any part thereof; that a summons was duly issued in said action on July 10, 1923, and on the 27th day of August, 1923, the same was returned to the clerk of said court with an affidavit thereon of one A. A. Crosbie wherein he deposed and said that he had served the said Annie H. Vail with said summons and complaint on July 25, 1923, by delivering and leaving with her personally, in the county of Kern, state of California, a copy of said summons attached to a copy of the complaint; that in truth and in fact, the said A. A. Crosbie did not serve the said Annie H. Vail with the said summons, or with a copy thereof, or with the said complaint or with a copy thereof, on the said 25th day of July, 1923, or at any other time, nor was the said Annie H. Vail ever served with the said summons or with the said complaint by any other person or in any other manner and at the time of her death, she did not have, nor at any time prior thereto did she have, any notice of or knowledge of, the commencement of the said action or of any of the other proceedings thereafter therein had and taken.

It is then alleged that in the said action the default of defendant Annie H. Vail was entered, and thereafter C. H. Jones, the plaintiff, was adjudged and decreed to be the owner, in possession and entitled to the possession of all of the said real property, and that the said Annie H. Vail had no right, title, or interest in the same.

In the second cause of action, plaintiff claims Annie H. Vail to have been the owner of the property at the time of her death; that the defendants claim some interest in the same, which claim is without right, and it is prayed that the judgment and decree before mentioned against Annie H. Vail be vacated, annulled, and set aside, and that claims of the heirs at law of Annie H. Vail be quieted against the claims of the defendants.

The defendant Jones denied the allegations of the complaint with reference to the title of Annie H. Vail and also denied that he was never the owner nor entitled to the possession nor in the possession of the property in question. He denied, on information and belief, that Annie H. Vail had not been personally served with summons, and alleged that she had, at all times, full knowledge and notice of the pendency of said action and of all proceedings therein had and taken.

A second defense was that the claim of plaintiffs was barred by various sections of the Code of Civil Procedure. The third and fourth defenses and the cross-complaint set out in detail the facts and circumstances alleged to have occurred with reference to the transaction between the parties whereby the defendant Jones claims to have acquired title to the property, consisting of a tax sale at which Jones was the purchaser and many other matters, which will appear, in so far as they are material to our inquiry, in the findings hereinafter mentioned.

The trial court went extensively into the evidence for days, and found, among other things: "That it is not true that Annie H. Vail was the owner in fee of or in the possession of, or entitled to the possession of the property described in the complaint or any portion thereof on July 10, 1923, or at any other time subsequent thereto. That it is not true that defendant Jones was never the owner of said property and it is not true that said defendant Jones was never in the pos-

session of said property, and it is not true that said Jones was never entitled to the possession of said property, and on the contrary, the court finds that said Jones was, on the 10th day of July, 1923, and at all times since July 10, 1923, had been and now is the owner in possession and entitled to the possession of all the property described in the complaint."

[1] With reference to the service of summons in the quiet title action in which Jones was plaintiff, the court found: "That in truth and in fact the said A. A. Crosbie did not serve the said Annie H. Vail with the said summons or with a copy thereof or with the complaint or with a copy thereof on the 25th day of July, 1923, or at any other time; that it is not true that the said Annie H. Vail was never served with the said summons or with the said complaint by any other person, or in any other manner; that it is not true that at the time of her death she did not have notice and knowledge of the commencement of said action or of any of the other proceedings thereafter therein had and taken; that it is not true that said Annie H. Vail did not, prior to the time of her death, have notice of or knowledge of the commencement of said action, or of any and all of the proceedings in said action taken and had." The court finds that said Annie H. Vail was in fact served with summons attached to a copy of the complaint in said action, and the court further finds that said Annie H. Vail did in fact have notice of and full knowledge of the commencement of the said action and of any and all proceedings thereafter therein had and taken.

The court then finds the facts with reference to the levy of taxes upon the property, delinquency, sale, and purchase by Jones and other matters unnecessary to this decision, but all of which establish equities strongly in favor of Jones.

The decree was that plaintiff take nothing, and that defendant Jones was at the time of the commencement of the action and now is the owner in possession and entitled to the possession of all the property described in the complaint.

Although A. A. Crosbie, marshal at Taft, where Annie H. Vail resided, contradicted his official record of service upon Annie H. Vail, by his testimony that he had handed copies of the summons and complaint, not to Annie H. Vail, but to Caroline Vail, her daughter, for the mother, and the court found in accordance with such testimony that Annie H. Vail had not been served with summons by said Crosbie, the court, nevertheless, found that "Annie H. Vail was in fact served with the summons attached to a complaint in said action."

This finding is supported by permissible inferences from the following facts: Disinterested witnesses testified of calling at the home of the Vail family, where Mrs. Annie H. Vail, her son and daughter, lived, and of discussing with all three of them the action to quiet title and the prior tax sale upon which it was founded; that all three knew of the action and about the service of summons. It seems pertinent to add that this testimony of disinterested witnesses is directly contradictory of the testimony of the daughter, an interested witness, that the mother never knew about the action to quiet title brought by Jones. The daughter also testified that, when the summons and complaint were handed to her, her mother was in the house with her. The house was a small four-room house. The daughter did not remember whether the door was open between the room where her mother was sitting and the room where the papers were delivered by Crosbie. She also stated that her mother depended upon her for everything, and that she, the daughter, attended to all the mother's business matters at all times.

There are also presumptions of service arising from the recitals of the judgment in the quiet title action, wherein it was recited that Mrs. Annie H. Vail had been duly, regularly, and personally served with process therein.

[2] In the face of all these facts and circumstances, inferences and presumptions, and the clear equities of the case, the trial court correctly found that Mrs. Annie Vail had been duly and personally served with process.

It cannot avail appellant that the proof of service made in the quiet title action differed from the fact of service, and, therefore, it becomes unimportant whether the service was made by Crosbie, as he alleged in his return, or whether it was made by some one else, as would follow from the trial court's finding as to service. Jurisdiction does not depend upon the proof of service, but upon the fact that service has been made. Lindley v. Lindley, 49 Cal. App. 631, 633, 194 P. 85; In re Newman, 75 Cal. 213, 16 P. 887, 7 Am. St. Rep. 146; Sichler v. Look, 93 Cal. 600, 29 P. 220.

The foregoing discussion disposes of the important and controlling question involved in the action and on the appeal. Unless this court were to repudiate the finding of the trial court that service of summons and complaint had, in fact, been made upon Annie H. Vail, the judgment must be affirmed. Under all the facts and circumstances of this case, such action by an appellate court seems unwarranted.

The judgment is affirmed.

We concur: RICHARDS, J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.

SHENK, J.

I dissent. It appears beyond controversy that Annie H. Vail, defendant in the former action, was not personally served with sum-

mons therein as required by section 411 of the Code of Civil Procedure, nor was service waived. It is not pretended that any one other than Crosbie attempted to serve the summons, and he failed, as found by the court, to serve it on Annie H. Vail. Furthermore, I think the tax deed, which is the foundation of the defendant's title, is void, as pointed out in the opinion of the District Court of Appeal written by Mr. Justice Houser, 277 P. 909. The plaintiff offered at the trial to reimburse the defendant on account of any moneys paid out by him in pursuit of the tax title or in or about the property. Because of the lack of jurisdiction on the part of the trial court in the former action and further because of the fatal defects in the tax proceedings relied upon by the defendant, the plaintiff's title should be quieted upon proper reimbursement to the defendant.

I concur: WASTE, C. J.

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209 Cal. 306

WHEAT et al. v. THOMAS et al.

L. A. 10828.

Supreme Court of California.

April 17, 1930.

1. Specific performance ⚷16 — Enforcement inequitable — Increase in values — Land.

Where then reasonable price was named in agreement for land sale, later increase in values would not render enforcement of contract inequitable.

2. Specific performance ⚷105(3) — Laches.

Plaintiffs beginning specific performance suit within three months after dismissal of defendant's suit, in which they had filed cross-complaint, *held* not guilty of laches.

The evidence showed that plaintiffs made a continuous effort to effect a consummation of sale of the land, and that from January, 1922, until dismissal in August, 1923, they were active in defending themselves against dilatory tactics practiced by defendant in her own action, and in endeavoring to have their rights adjudicated through issues raised by their cross-complaint, and that within two months after dismissal they made tender to defendant and during third month thereafter they instituted specific performance action.

3. Specific performance ⚷6 — Test of mutuality.

Test of mutuality in specific performance action is mutuality of remedy—whether agreement is such that equity court would decree specific performance for either party (Civ. Code, § 3386).

Civ. Code, § 3386, provides that neither party to an obligation can be compelled specifically to perform it, unless the other party has performed or is compellable specifically to perform.

4. Specific performance ⚷28(2), 32(3) — Land contract — Uncertainty — Lack of mutuality.

Contract for sale of land to be awarded vendor in partition suit, together with water rights then or thereafter existing, *held* not uncertain or to lack mutuality (Civ. Code, § 3386).

5. Waters and water rights ⚷254 — Land contract — Construction — Water rights.

In contract for sale of land to be awarded vendor in partition suit, clause regarding water rights *held* to contemplate rights which at time of performance would run with land.

The clause with reference to water rights was "together with all * * * water rights now or hereafter existing in * * * connection with said property including rights to water through ownership in or other relationship with any water company now or hereafter supplying or formed to supply water to lands of which property or any part thereof is a part."

6. Waters and water courses ⚷254 — Appurtenances — Water company's shares.

One claiming shares in mutual water company are appurtenant to land must prove it (Civ. Code, § 324).

7. Waters and water courses ⚷254 — Appurtenances — Water rights.

Where court found there were no water rights, language of land contract with reference thereto was surplusage, and only rights running with land would pass under specific performance decree.

8. Vendor and purchaser ⚷8 — Land contract — Title in vendor.

It was immaterial whether vendor could have compelled decree in partition suit, where title was vested in her when performance of land contract was sought.

9. Vendor and purchaser ⚷39 — Validity of contract — Wife's signature to mortgage.

Provision of land contract requiring mortgage to be executed by buyers' wives did not render contract void (Civ. Code, § 3390, subd. 5).

Civ. Code, § 3390, subd. 5, provides "the following obligations cannot be specifically enforced * * * 5. An agreement to procure act or consent of wife of contracting party."

10. Appeal and error ⟹1073(1) — Harmless error — Decree —Land contract — Wife's signature to mortgage.

Vendor could not complain of provision requiring mortgage to be executed by purchasers' wives, where specific performance decree required payment in cash (Civ. Code, § 3390, subd. 5).

11. Vendor and purchaser ⟹8 — Land contract — Title in vendor.

Contract for sale of land to be awarded vendor in partition suit *held* binding enforceable contract.

The contract provided that, if title did not vest in vendor by stated date, purchasers should have certain option with reference to purchase, but title had vested in vendor before date specified.

12. Appeal and error ⟹1009(2) — Land contract.

Trial court's finding under persuasive evidence that plaintiffs were entitled to specific performance of land contract was conclusive (Civ. Code, § 3387).

Civ. Code, § 3387, provides that it is to be presumed that breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation.

In Bank.

Appeal from Superior Court, Los Angeles County; Daniel C. Deasy, Judge.

Action by W. R. Wheat and another against Josefa B. Thomas and another, to compel specific performance of a contract for the sale of real property. From a decree for plaintiffs, defendant named appeals.

Affirmed.

Constan Jensen, of Los Angeles, for appellant.

Barker & Keithly, of Los Angeles, for respondents.

PRESTON, J.

The judgment for plaintiffs is affirmed.

Defendant Thomas seeks by this appeal to avoid the decree which requires her to specifically perform a certain written contract whereby plaintiffs agreed to purchase and she agreed to sell certain real property comprising a part of the Rancho East Laguna, situate in Los Angeles county, Cal. Her objections to the decree are numerous, varied, interwoven, and supported mainly by undeveloped argument; hence, we find it impractical to discuss all of the matters urged, but we have examined the record thoroughly and find evidence, convincing and abundant, in support of the findings and judgment, and also find the numerous contentions made by appellant to be untenable.

The facts, as gleaned from the evidence, particularly that evidence which directly supports the findings, are in substance as follows: Upon the death of one Arcadia B. De Baker in 1913, appellant, one of her heirs, succeeded to an undivided interest in the abovementioned tract, consisting of some 755 acres known as Rancho East Laguna. The De Baker estate was administered by the Title Insurance & Trust Company, with which company Mr. J. H. Coverley was connected in one capacity or another for a period next prior to 1923 of about twenty years, being vice president and trust officer thereof in December, 1921, at which time, as appellant's attorney in fact, he executed the agreement here sued upon. As such trust officer, Mr. Coverley had charge of said De Baker estate and general control of said tract of land. It was in this official capacity also that he became acquainted with appellant about the year 1915, at which time she was desirous of having the title company look after her affairs and effected an arrangement with it to that end. The company made several sales for her account of land held for subdivision, loaned money to her and otherwise handled part of her business, including her interest in said estate, and Mr. Coverley personally represented her in the partition action instituted by some of the De Baker heirs through which she was eventually awarded the property here involved.

Appellant took frequent trips abroad. During her absences Mr. Coverley was intrusted with the handling of her affairs. On three different occasions she gave him powers of attorney, under the last of which the transaction before us was consummated. Said power of attorney, bearing date May 2, 1921, was prepared by another trusted officer of the title company; it gave Mr. Coverley full power of disposition, with two exceptions, over lands and tenements owned by or in which appellant had an interest, and full power to act for her in a transaction of the character of that before us. It was duly executed by appellant, certified by a notary, delivered to Mr. Coverley, and thereafter recorded. Mr. Coverley testified that he would have preferred that it run to the title company, but that appellant expressly desired that it be in his name because she wanted him to know everything that was done for her. He further testified that he had instructions from her and the power of attorney was drawn for the particular purpose of selling everything that she

had, aside from the two excepted parcels, if he could get what in his opinion was her adequate price for it.

Appellant left for Europe shortly after the execution of said document. About a month previous to her departure an interlocutory decree had been entered in said partition action, fixing her undivided interest in said tract at .04998008 thereof, but no specific land had been allotted to her. She had requested Mr. Coverley to obtain a large parcel of cheap land rather than a smaller parcel of higher priced land, and he so informed the referees, with the result that on November 12, 1921, about a month prior to execution of the agreement in suit, the referees appointed to partition the property, filed their report, recommending that such a parcel be awarded to her, describing it. On November 29, 1921, about a week prior to the execution of said agreement, their report, as modified, was confirmed by the court. The final decree in partition, however, was not filed and entered until January, 1922.

A short time prior to December 6, 1921, plaintiffs, upon recommendation of a third party, called on Mr. Coverley, who had never seen them before, for information relative to land in that vicinity, having in mind the purchase of any property available at a fair price. In the course of their conversation Mr. Coverley described the land under partition to them. They were immediately interested, and after several subsequent meetings they agreed to purchase the parcel thereof to be awarded to appellant.

On December 6, 1921, therefore, said agreement, the basis of this action, was duly executed by Mr. Coverley, as attorney in fact for appellant, and by plaintiffs as buyers, appellant thereby agreeing to sell to plaintiffs the real property therein described situate in the Rancho Laguna "together with all * * * water rights now or hereafter existing in * * * connection with said property * * * including the rights to water through ownership in or other relationship with any water company now or hereafter supplying, or formed to supply water to lands of which this property, or any part thereof, is a part." The purchase price was to be $21,250, $500 thereof being payable in cash, $4,812.50 at the time of delivery of the deed, and the balance of $15,937.50 "by first mortgage upon said property, executed by the Buyers, and their wives (if married) * * * due three years after date of the delivery of said deed," etc. Said agreement further provided that all parties understood that the property was in litigation in said partition action, that no decree had been entered therein awarding it to the seller, but that such a decree was expected and contemplated; that, however, if by March 6, 1922, legal title had not vested in the seller, the buyers could elect either to demand the return of all their money or take, without warranties of any kind, whatever title the seller then had. This agreement was prepared by one of the attorneys for the title company, and signed by plaintiffs without submission to their own attorney. They were financially able to make the payments required thereunder, and left with Mr. Coverley as earnest money their check for $500. The matter then went into escrow and from time to time they paid in further amounts to be credited on the $4,812.50 payment, although it was not due until delivery to them of the deed.

Testimony offered respecting the value of the property was conflicting; however, that the above purchase price represented the fair market value thereof was confirmed by a number of witnesses, and the evidence fully supports the findings of the court in this behalf as well as its finding as to the rental value thereof.

The final decree filed in the partition action in January, 1922, awarded said parcel to appellant, provided for payment of costs, and also awarded her a .072459 interest in the water and water rights created by the setting apart of a certain acreage for the development of water for the benefit of all the other property in said tract.

About this time appellant returned from Europe and learned of the sale, which met with her decided disapproval, and she so informed Mr. Coverley. He assured her that he had acted in good faith and to the best of his ability. He also informed her that the sale had been consummated and it was too late to withdraw. Thereafter, however, and on January 20, 1922, she revoked the power of attorney given to him, notified the title company that she repudiated the sale, and a few days later notified plaintiffs that she disaffirmed and rescinded said contract. On January 21, 1922, she commenced an action against Mr. Coverley, the title company, these plaintiffs and certain fictitious defendants, to rescind said sale, praying that the transaction be adjudged invalid. In said action the court immediately issued a temporary order restraining defendants from proceeding with the matter, and on January 22d it issued an injunction pendente lite against the title company and Mr. Coverley for the same purpose. Demurrer and answer were thereafter filed therein, together with a cross-complaint by these plaintiffs, asserting their rights under said contract and praying for its enforcement, and they later, on October 10, 1922, made and served on appellant's attorney a written offer of performance thereof. Notices and proceedings were had from time to time in said action. Appellant, however, opposed all efforts of the cross-complainants, plaintiffs here, to have it set for trial, and finally, in August, 1923, she dismissed it.

In the month of October following, plaintiffs made to appellant another tender of performance, and on November 29, 1923, they instituted this action, praying that said contract be specifically enforced and that appellant be required to execute to them, upon their full performance, a good and sufficient deed to said property. Appellant, aside from her other contentions, claimed that, by reason of a discovery of oil in the vicinity just prior to the time of the sale, land values increased rapidly and surrounding property was leased for oil development purposes; that the purchase by plaintiffs was purely a speculation in oil lands; that the land awarded her was worth many thousands of dollars more than they contracted to pay for it and, if required to carry out said agreement, made without her knowledge, she would sustain a great and irreparable monetary loss and would be defrauded of a valuable estate.

The court found that practically all of the allegations of the amended complaint were true, except that the rental value of appellant's property, at time of purchase, was $1,500 per annum instead of the larger sum alleged in said pleading; that at said time the value of said land was not $200,000, nor was it more than the sum of $21,000; nor was said purchase price grossly or at all disproportionate to the value of the land. It further found that there were no water rights or rights to water in connection with said land at the time of making said contract of sale or thereafter derived through ownership in or relationship with any water company or association. Following these findings, judgment was rendered for plaintiffs, decreeing that appellant be required to perform fully said agreement of sale. Thereafter she prosecuted this appeal.

Appellant claims that enforcement of the contract against her will be unjust, unreasonable, and inequitable; that it must fail for lack of mutuality in that its provisions are uncertain and unenforceable because it bound her to convey future unknown water rights; the title to be conveyed was contingent upon the entry of a final judgment in a partition action, which entry she could not compel; the consideration must partially fail as respondents' wives, not being parties to the contract, could not be compelled to execute said required mortgage; the contract was a mere option, and plaintiffs had an adequate remedy at law.

[1] Appellant also makes minor contentions with respect to defects in the pleadings and errors in rulings on the evidence, all of which, upon examination, we find to be without merit and unworthy of discussion. We likewise find no merit in the claim that the enforcement of this contract will work an injustice against appellant in view of the holding above announced with respect to the sufficiency of the evidence to sustain the findings of the court with respect to the sale and rental values of said land at the date of sale. There is also competent evidence to the effect that at that time the land had no monetary value for oil development purposes. A then reasonable purchase price having been named in the agreement of sale, any later increase in land values would not, of course, render enforcement of said contract inequitable.

[2] Neither is there merit in the claim that respondents were guilty of laches. The evidence shows, as is apparent from the above statement of facts, that they made a continuous effort to effect a consummation of the sale. From January, 1922, until dismissal in August, 1923, they were active in defending themselves against the dilatory tactics practiced by appellant in her own action, and in endeavoring to have their rights adjudicated through the issues raised by their cross-complaint therein. Within two months after said dismissal they made another tender to appellant, and during the third month thereafter they instituted this action. Blame for any undue delay may therefore be laid at the doorstep of appellant.

[3] The test of mutuality in an action of this character is defined by section 3386 of the Civil Code, which provides: "Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance." In other words, the test here is mutuality of remedy—whether the agreement is such that at the suit of either party a court of equity would decree specific performance against the other. See 23 Cal. Jur., p. 447, § 20, et seq. See, also, Thurber v. Meves, 119 Cal. 35, 50 P. 1063, 51 P. 536, holding that while it is a general rule that mutuality of remedy is essential to authorize the specific performance of a contract, this rule does not require that such mutuality shall exist in all cases at the inception of the transaction.

[4] Bearing in mind the above doctrine, we find no lack of mutuality and no uncertainty in said contract—and particularly we find no such lack by reason of the above-quoted provision thereof which, appellant claims, binds her to convey future unknown water rights. In this behalf appellant contends that respondents' claim that said clause contemplates only water rights appurtenant to and running with the land cannot avail them, as under the partition decree water rights in connection with the land were especially created by the award to her of said undivided interest in four water-bearing and reservoir lots. She further claims that the action of the trial court was inconsistent in finding that

there were no water rights of any kind in connection with the land, and yet decreeing, as a conclusion of law, that respondents were entitled to a deed from her "conveying all of the property the subject of said contract" and ordering her to convey the land, "together with all water rights, if any, existing in connection with said property or any part thereof."

[5] It would seem that by the insertion of said clause there was in the contemplation of the parties only the giving of those rights which, at the time of performance of the contract, were appurtenant to and running with the land and would, without special mention, have passed by the deed anyway by implication of law. This is apparent from the testimony of Mr. Coverley that at the time of the sale articles of incorporation for a mutual water company to serve the tract were in the course of preparation, and the value of rights of way for water and other purposes was considered at the time the purchase price was fixed.

[6] The right of a stockholder in a mutual water company to receive water by virtue of his ownership of stock is real property, but the shares themselves are personalty and do not pass upon a conveyance of land unless they are appurtenant thereto; they may become appurtenant by the adoption of appropriate provisions in the by-laws of the water company under section 324 of the Civil Code, but one claiming that they are appurtenant, is required to prove it. See 26 Cal. Jur. 449 et seq., and cases in note; also Imperial Water Co. v. Meserve, 62 Cal. App. 593, 217 P. 548, and Palo Verde, etc., Co. v. Edwards, 82 Cal. App. 52, 254 P. 922.

[7] In this case no proof was offered and no claim made that the water stock of said company was appurtenant to the land or that the passing of ownership thereof was contemplated by the contract. In fact, the court specifically found that there were no water rights of any kind in connection with the land; hence, as both contract and decree require appellant to convey only such water rights "if any," and the court found there were none, it is clear that the language complained of became mere surplusage and only such rights will pass to plaintiffs as, running with the land, would pass in any event by implication of law.

[8] It is likewise immaterial whether appellant could have compelled a decree in said partition suit as title was vested in her when performance was sought. "It is the settled rule in this state that the vendor need not have even an inchoate title at the time of the contract; that he may sell land to which he has no title, and the contract will be valid and enforceable if, when the time for performance arrives, he is able to furnish the title he contracted to convey." Anderson v. Willson, 48 Cal. App. 289, 294, 191 P. 1016, 1019; see, also, Backman v. Park, 157 Cal. 607, 108 P. 686, 137 Am. St. Rep. 153; Lemle v. Barry, 181 Cal. 6, 9, 183 P. 148; Estate of Fulmer, 203 Cal. 693, 701, 265 P. 920, 58 A. L. R. 430.

[9, 10] Appellant complains of that clause of said agreement which provides that the deferred portion of the purchase price shall be secured by first mortgage upon said property "executed by the buyers, and their wives (if married). * * *" It is her contention that inasmuch as the wives were not parties to the agreement and could not have been compelled to execute such a mortgage, the agreement is by said provision rendered unenforceable under section 3390, subdivision 5, of the Civil Code, which provides: "The following obligations cannot be specifically enforced * * * 5. An agreement to procure the act or consent of the wife of the contracting party. * * *"

It is true that said provision was itself unenforceable, but it did not thereby render the contract void (Armstrong v. Sacramento, etc., Co., 52 Cal. App. 110, 115, 198 P. 217). In other words, the contract, aside from said provision, was valid and binding and the provision was not a vital portion thereof. It did not render the contract unenforceable, but became immaterial because the decree entered does not require the giving of a mortgage. The mortgage contemplated by the contract would have been due three years after delivery of the deed by appellant; that time having elapsed, the decree removed the formality of a mortgage and provided for payment of the full purchase price in cash. Appellant should not complain of the clause, therefore, as it cannot prejudice her rights in any respect.

[11] The terms of the document are a complete answer to appellant's contention that it was a mere option depending upon the sufficiency of the showing of title. From the language thereof, it is clear that the agreement was intended to be and was, in fact, a binding contract of purchase and sale. The sale was thereby made subject to the contingency that, if legal title did not vest in the seller by a stated date, the buyers should have a certain option with respect to the purchase, but title vested in the seller long before that date and, therefore, as the contingency never arose, the provisions relating to it, which might be termed a collateral option, failed and became ineffective. Far from being prejudicial, said contingency was evidently inserted for appellant's own protection, to relieve her from any possible liability for damages in case the partition decree should not be entered in the manner anticipated.

[12] Lastly, we believe that specific performance of said contract was the only adequate remedy available to plaintiffs. Section

3387 of the Civil Code announces the rule in this behalf—that "it is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation. * * *" This presumption is not overcome by the claim that plaintiffs, being mere oil speculators, had no real desire for any particular parcel; thus pecuniary compensation would afford them an adequate remedy. The evidence shows that respondents, having looked over land in the vicinity, desired, whatever their purpose, to secure this special property and so contracted in writing to purchase it rather than other available portions of the tract. The situation is not altered because by a provision in said contract they undertook to protect themselves against a possible shifting of the allotments of land recommended by said referees in the partition proceeding. To put it another way, the trial court, under persuasive evidence, expressly or impliedly found that specific performance was the remedy to which respondents were entitled, and such finding is conclusive.

The decree entered by the court also takes care of respondents' obligation to appellant for payment of taxes, and in other respects equitably adjudicates her rights; hence our conclusion that it must be affirmed.

We concur: WASTE, C. J., and SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

NARVER v. CALIFORNIA STATE LIFE INS. CO.★

Civ. 142.

District Court of Appeal, Fourth District, California.

April 15, 1930.

Rehearing Denied May 6, 1930. Hearing Granted by Supreme Court June 12, 1930.

1. Insurance ⟹146(3) — Uncertainties — Ambiguities — Construction.

Ambiguous provisions in life policy, capable of two constructions, should be construed most favorable to insured.

2. Insurance ⟹146(3) — Ambiguous provisions — Construction.

Insurer cannot defeat ambiguous policy by construction, if reasonable construction upholding insurance can be had without doing violence to language used and parties' clear intention.

3. Insurance ⟹150 — Indorsement or rider — Effect — Life policy.

Indorsement or rider on life policy, relating to short-term premium until beginning of first policy year, *held* not policy separate from main policy.

Indorsement provided, in substance, that in consideration of payment in advance of a short-term premium, insurer agrees to pay amount insured if death of insured shall occur before February 28, 1928, which is beginning of first policy year.

4. Insurance ⟹150 — Indorsements.

Indorsements on insurance policy form part of insurance contract, and policy with indorsements and riders thereon must be construed together.

5. Insurance ⟹186(5) — Premiums — "Payment" — Note — Acceptance.

Insured's note, given and accepted as payment of premiums under life policy, *held* to constitute "payment."

[Ed. Note.—For other definitions of "Payment," see Words and Phrases.]

6. Insurance ⟹445(3) — Effective date — Life policy — One year — Suicide.

Under ambiguous terms of life policy, application, premium receipt, and indorsement considered as whole, policy *held* effective on November 28, 1927, warranting recovery where insured committed suicide more than year thereafter.

Suicide clause in life policy provided that in case of suicide committed while sane or insane, within one year from effective date, recovery should be limited to total amount of premium paid. Various recitals in policy showed effective date to be February 28, 1928; that policy and application therefor should constitute entire contract between parties. Application provided that effective date should be determined by payment of premium with application. Receipt for first premium delivered on October 25, 1927, recited that insurance shall take effect and be in force from day of approval at home office if premium is fully paid with application, or upon manual delivery of policy to applicant during lifetime, and good health and full payment of premium thereon if premium has not been paid with application. Short-term indorsement in consideration of additional premium made policy effective from November 28 to February 28, 1928, following, and recited that latter date should be beginning of first policy year. Policy was issued on November 28, 1927, and delivered on or about December 1st. Insured committed suicide on December 10, 1928.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes
★Rehearing denied. Hearing granted. 294 P. 393.

Action by Emma S. Narver against the California State Life Insurance Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

C. E. McLaughlin, of Sacramento, for appellant.

Ugene U. Blalock, of Los Angeles, for respondent.

MARKS, J.

Respondent is the widow of Chester Narver and the beneficiary named in an insurance policy issued by appellant on his life.

On October 28, 1927, the deceased made his application to appellant for a policy of insurance upon his life in the sum of $5,000, and on the same day executed his promissory note to appellant in the sum of $176.95 in payment of the premiums to accrue under said policy until February 28, 1929. The promissory note was subsequently paid. The deceased took his medical examination and the policy was issued by appellant on the 28th day of November, 1927, and delivered to deceased on or about December 1st of the same year.

The insurance policy contained the following paragraph: "This policy is incontestable after one year if all premiums shall have been duly paid, except as to provisions and conditions relating to any double indemnity or total and permanent disability benefits which may be issued in connection herewith. In case of suicide of the insured, committed while sane or insane, within one year from the date hereof, the limit of recovery hereunder shall be the total amount of the premium paid."

Above the signature of the president and secretary of the insurance company on the policy appears the following: "In witness whereof, California State Life Insurance Company has caused this policy to be signed by its President and its Secretary of Sacramento, California, this twenty-eighth day of February, 1928. Which is the date of this policy."

The policy further provided that: "This policy and the application therefor (a copy of which application is attached hereto when issued) constitute the entire contract between the parties hereto."

Attached to and made a part of the policy under this clause was the application for insurance, in which the following appears: "I further agree that the effective date of any policy which may be issued hereon shall be determined as follows: (a) If the premium be fully paid with this application, such policy shall take effect at twelve o'clock noon of the day upon which this application is approved by the company at the home office."

In the report of the medical examiner, a copy of which was attached to the policy, there appears the following: "I have verified each of the foregoing answers on this page and on the first page hereof and adopt them as my own, and warrant that they are full, complete and literally true answers to the questions against which they are written. I further agree that if during the first year following the date of any policy issued hereon I commit suicide, whether sane or insane, the only liability under any policy issued thereon shall be for a fixed sum equal to the actual cash premium paid to the company on said policy."

On October 25, 1927, there was delivered to the insured a receipt, the material parts of which were as follows:

"178248 October 25, 1927.

"Received of Chester Narver One Hundred Seventy-six and 95/100 Dollars in full for fifteen months the first annual premium on Five Thousand dollars insurance. Countersigned by Harvey Stewart. Agent."

"The insurance shall take effect and be in force: (a) At twelve o'clock noon of the date of approval at the home office of the Company, if the premium be fully paid with the application; (b) Upon manual delivery of the policy to the applicant during his lifetime and good health and full payment of the premium thereon, if such premium has not been paid with the application."

"California State Life Insurance Company. J. R. Kruse, President. Do not detach this receipt except for delivery to applicant for full settlement of premium. This is the only form of receipt authorized by the company to be given to an applicant for a premium collected when the application is taken. California State Life Insurance Company. Sacramento, California."

Attached to the policy of insurance as an endorsement or rider, was the following:

"November 28, 1927.

"In consideration of the payment in advance of a Short Term Premium of Twelve and 60/100 Dollars, California State Life Insurance Company agrees, subject to the provisions of this policy and the application therefor, to pay the amount insured hereunder if the death of the insured shall occur prior to February 28, 1928, which is the beginning of the first policy year. Double indemnity and Total Disability Benefits, if either thereof be stipulated in this policy, are not included herein, and neither shall be effective until noon of the date herein stated, and then only if the premium for the first policy be fully paid.

"[Signed] Arthur Luddy, Asst. Secretary."

Insured committed suicide on December 10, 1928. Proofs of his death were made and delivered to appellant, and demand was made

upon it by respondent for the sum of $5,000, which payment was refused. On January 3, 1929, appellant tendered to respondent the sum of $164.35, which was the amount of the premium on the policy of insurance for the year commencing February 28, 1928.

Respondent brought this action to recover on the policy of insurance, and, after a trial in the court below, without a jury, the court found all facts in her favor and rendered judgment against appellant for the principal sum of $5,000.

Appellant presents two grounds upon which it asks this court to reverse the judgment of the trial court. The first is that, as it maintains there were two policies of insurance issued to deceased, one being a short-term policy commencing on November 28, 1927, and ending on February 28, 1928, the premium for which was $12.60, and the other a twenty-year nonparticipating policy commencing on February 28, 1928, the premium being $164.35, payable annually on the 28th day of each February. The second ground upon which the reversal is asked is a corollary of the first, namely: That since the policy of insurance in effect on December 10, 1928, did not become operative until February 28, 1928, one year had not elapsed at the time of the suicide of the insured, and that, therefore, the principal sum of $5,000 could not be collected, but that only the annual premium paid, $164.35, was recoverable. The exact questions presented upon this appeal do not seem to have been decided in California.

[1, 2] It is a well-recognized rule of law that if any uncertainties or ambiguities appear in an insurance policy which may be solved by either one of two reasonable constructions, the one which is most favorable to the insured and which will give life, force, and effect to the policy should be adopted. The insurance company, having prepared the policy and all documents used in connection with its issuance, should not be heard to put such a construction upon an ambiguity, caused by it, as will defeat the policy and take from the beneficiary the very purpose and object of the insurance, if a reasonable construction upholding the insurance can be had that does no violence to the language used and the clear intention of the parties. Pacific Heating & Ventilating Co. v. Williamsburg, etc., Co., 158 Cal. 367, 111 P. 4; Welch v. British American Assurance Co., 148 Cal. 223, 82 P. 964, 113 Am. St. Rep. 223, 7 Ann. Cas. 396; Witherow v. United American Insurance Co. of Pennsylvania (Cal. App.) 281 P. 668. With this rule in mind, we will proceed to a consideration of the contract of insurance involved in this appeal.

[3, 4] Appellant contends that the indorsement, or rider, on the main policy of insurance, which put in effect the insurance from November 28, 1927, to February 28, 1928, was a policy of insurance complete in itself and a contract separate and distinct from the main policy. With this we cannot agree. Taken by itself, this indorsement means nothing. Of itself, it is not a contract in any sense of the word. By its terms it refers to the main policy and the application therefor, and, except as specifically excepted in the indorsement, it put the provisions of the policy into force and effect. Indorsements on an insurance policy form a part of the insurance contract (25 Cyc. of Law and Procedure, 743), and the policy of insurance with the indorsements and riders thereon must be construed together as a whole. Sharp v. Scottish Union National Ins. Co., 136 Cal. 542, 69 P. 253, 615.

[5, 6] Considering the policy of insurance as a whole, we find a most obvious and patent ambiguity as to its date. The closing paragraph of the main policy gives February 28, 1928, as its date. The application for the insurance, of which there was only one, and which was made a part of the contract of insurance, contains the direct statement that "if the premium be fully paid with this application such policy shall take effect at twelve o'clock noon of the day upon which this application is approved by the Company at its home office." The application was approved and the policy actually issued on November 28, 1927. It was registered with the insurance department of the state of California on November 29, 1927, and delivered to deceased two days later. His note was given and accepted as payment of the premium and was therefore a payment of them. Harrigan v. Home Life Ins. Co., 128 Cal. 531, 58 P. 180, 61 P. 99. The receipt given to the insured by the company contained language identical with that in the application as to when the policy should take effect. From these documents the insured was justified in assuming that his policy of insurance became effective at noon on November 28, 1927. Why the date of February 28, 1928, was used at the close of the policy is not entirely clear. It is not an unreasonable conclusion, in fact it is entirely probable, that it was inserted for the convenience of the parties to fix the due date of the future annual premiums.

We therefore conclude that the policy of insurance was made operative and put in effect by the short-term insurance rider and under all the terms of the policy the date of this instrument became the date of the policy. We are aided in reaching this conclusion by four decisions from other jurisdictions, namely, Krebs v. Philadelphia Life Ins. Co., 249 Pa. 330, 95 A. 91, Ann. Cas. 1917D, 1184; Jefferson Standard Life Ins. Co. v. Wilson (C. C. A.) 260 F. 593; Fox v. New York Life Ins. Co., 211 Ill. App. 406, and American Na-

tional Insurance Co. v. Thompson (Tex. Civ. App.) 186 S. W. 254. The first two of these cases present facts identical with the one we are considering, and the other two, very similar facts. In the case of Krebs v. Philadelphia Standard Life Ins. Co., supra, the policy of insurance was issued upon application of the insured on July 19, 1913. It was dated on October 1, 1913. An indorsement providing for short-term insurance from August 1 to October 1, 1913, was placed upon the policy when issued. The policy was delivered prior to August 1, 1913, and the insured committed suicide on August 24, 1914. It contained a provision that "self destruction, while sane or insane, within one year from the date hereof, is not a risk assumed by the company under this policy," which, in effect, is similar to the language used in the policy issued by appellant.

The Supreme Court of Pennsylvania was of the opinion that if the date of the policy was to be considered as the date appearing on the main instrument, there would be no liability under its terms, the suicide of the insured having occurred within one year from that date, but that if its date were to be taken as the date of the short-term insurance indorsement, the liability of the company would be fixed. The court held that the short-term insurance indorsement did not constitute an insurance policy in itself, and that therefore, it incorporated in its provisions enough of the terms of the main policy to make it a complete contract of insurance. It having incorporated the provisions of this contract it must be held to have incorporated all of them not expressly excepted, as the company could not be permitted to select, as included, the portions favorable to it and reject the others. The court held that there was but one contract of insurance which was in effect on the date of the short-term insurance indorsement, and that as there was an ambiguity in the policy itself, such ambiguity must be construed against the company and in favor of the insured, and affirmed the judgment of the trial court against the insurer.

In the case before us it would have been a simple matter for the appellant to have used such language in the several documents constituting the contract of insurance, so that there would have been no question of its meaning. The company did not do so, and it cannot complain because the trial court, following the usual rule of construction, resolved such ambiguities against it and in favor of the insured.

Judgment affirmed.

We concur: BARNARD, Acting P. J.; OWEN, Justice pro tem.

105 Cal. App. 84

LOWERY v. HALLETT.

Civ. 3835.

District Court of Appeal, Third District, California.

April 4, 1930.

1. Automobiles ⚷245(87)—Guest held not contributorily negligent as matter of law in making no protest or suggestion to automobile driver respecting speed.

One injured when automobile in which he was riding ran into tree after going around curve in road at speed of over 50 miles an hour *held* not guilty of contributory negligence as matter of law in making no protest or suggestion to driver respecting speed, though he was watching speedometer and knew speed at which car was going.

2. Automobiles ⚷244(35)—Prima facie evidence of violation of statute in exceeding speed limit becomes conclusive on failure of other evidence to contradict and overcome it (California Vehicle Act, § 113, as amended by St. 1927, p. 1436, § 30).

Prima facie evidence of violation of California Vehicle Act (St. 1923, p. 553) § 113, as amended by St. 1927, p. 1436, § 30, in exceeding speed limit fixed by subdivision (b), as declared by subdivision (c) becomes conclusive on failure of other evidence to contradict and overcome it.

3. Trial ⚷296(4, 5)—Instructions not referring to issue of contributory negligence held not prejudicially erroneous, in view of other instructions and rulings on evidence (California Vehicle Act, § 113, as amended by St. 1927, p. 1436, § 30).

In action for injuries to guest in automobile, instructions to find for plaintiff, if defendant drove car faster than 35 miles per hour in violation of California Vehicle Act (St. 1923, p. 553) § 113, as amended by St. 1927, p. 1436, § 30, and such violation was proximate cause of accident, instruction that defendant was negligent as matter of law, if he drove car in violation of subdivision (a), and instruction to find for plaintiff if defendant failed to exercise ordinary care, and plaintiff was injured by reason thereof, *held* not prejudicially erroneous because not referring to issue of contributory negligence, in view of other instructions and court's rulings on evidence.

4. Appeal and error ⚷1107—Statute limiting right of injured guest in vehicle to recover against driver was inapplicable to appealed case pending when statute became effective (California Vehicle Act, § 141¾, as added by St. 1929, p. 1580).

Where guest in automobile recovered judgment against driver for injuries sustained when automobile, going at excessive speed, ran off road, and appeal from judgment was pending when California Vehicle Act, § 141¾, as added by St. 1929, p. 1580, became effective, limiting guest's right of recovery, such statute, not being retroactive, was inapplicable.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Jeff Lowery against L. P. Hallett. Judgment for plaintiff, and defendant appeals.

Affirmed.

For former opinion herewith adopted, see 282 P. 388.

Carr & Kennedy, of Redding, and Irving D. Gibson, of Sacramento, for appellant.

Felix M. Cunningham and Vincent W. Hallinan, both of San Francisco, amici curiæ.

Carter & Smith and L. C. Smith, all of Redding, for respondent.

FINCH, P. J.

This is an appeal by the defendant from a judgment in favor of the plaintiff for damages. The facts upon which the judgment is based are as follows:

At the time the alleged injuries were suffered by the plaintiff, he and the defendant were residing on a ranch near Redding. The defendant "wanted to see the country over there at Goose Valley," and he asked the plaintiff "to go along with him and show him the country"; the plaintiff being familiar therewith and the roads leading thereto, while the defendant was not. The plaintiff accepting the invitation, the parties proceeded on the contemplated journey in the defendant's Buick touring car, driven by the defendant. A part of their course was along the highway running easterly from Redding to Burney. When they had reached a point within about 3 miles of Burney, they came to a straight and comparatively level stretch of road about a mile in length, at the end of which the highway curves to the left. The defendant drove over this stretch of road at a speed of between 50 and 55 miles an hour, and continued around the curve at the same speed until his automobile ran off to the right and into a large tree about 290 feet from the commencement of the curve, thereby causing the injuries for which the plaintiff claims damages. During all this time the plaintiff, who is a half-blood Indian, was watching the speedometer, and knew the speed at which the automobile was going, but he made no protest or suggestion to the defendant in relation thereto. The plaintiff testified that he did not make any protest because he was "afraid he would go faster," and that he "thought he would slack up a little" at the curve.

[1] Appellant contends that the plaintiff was guilty of contributory negligence as a matter of law, and that a nonsuit should have been granted. A similar contention was considered and answered in the negative by the Supreme Court in Shields v. King, 277 P. 1043, and in Benjamin v. Noonan, 277 P. 1045. Those cases and the authorities cited therein are deemed decisive of this.

[2, 3] Complaint is made of the following instruction, given at the plaintiff's request:

"You are instructed that the maximum speed at which a motor vehicle was permitted to travel on the public highway in the State of California on the 21st day of August, 1927, was thirty-five miles per hour, and if you believe from the evidence that the defendant, L. P. Hallett, was driving the automobile in which the plaintiff was riding, at a rate of speed in excess of thirty-five miles per hour at the time the accident happened, the said defendant was operating said automobile in violation of the law of the state of California, and if said violation was the proximate caues of the accident, defendant was guilty of negligence as a matter of law, and if said negligence was the proximate cause of the injury to plaintiff, your verdict must be in favor of the plaintiff."

Another instruction to the same effect was given. Admittedly the instruction is erroneous in stating that the speed limit was 35 miles an hour at the time of the accident, August 21, 1927. California Vehicle Act (St. 1923, p. 553) § 113, as amended by St. 1927, p. 1436, § 30.

The error in the instruction was not prejudicial, however, because the uncontradicted evidence is to the effect that the speed was negligently excessive. The plaintiff testified that the defendant was driving in excess of 50 miles an hour at the time of the accident. No attempt was made to overcome this evidence. The defendant did not testify in the case, and his silence tends to strengthen the case made by the plaintiff.

The court, after reading subdivision (a) of section 113 as amended, instructed the jury that, if the defendant drove his automobile in violation of that subdivision, "he was guilty of negligence as a matter of law, and if such negligence was the proximate cause of the injury to plaintiff, your verdict must be in favor of the plaintiff." In another instruction the court stated that, if the defendant "failed to exercise ordinary care in the operation of the automobile, * * * and that by reason of the failure of said defendant to exercise ordinary care in the operation of said automobile, plaintiff received the injuries complained of, it is your duty to return a verdict in favor of the plaintiff." No reference is made in any of the four instructions mentioned to the issue of contributory negligence. Appellant contends that all of such instructions are prejudicially erroneous by reason of such omission. It may be conceded that, considering the instructions abstractly, they are incomplete and inaccurate, but, under the circumstances of this case, later to be considered, they are not deemed prejudicial. Two subsequent instructions, given at the defendant's request, are as follows:

"If you find from the evidence that plaintiff was guilty of any negligence which proximately contributed to his alleged injury, or was guilty of any lack of ordinary care, whether by doing an act or by omitting to do what a person of ordinary care and prudence would have done under the same or similar circumstances, and such lack of ordinary care, act or omission, if any such there was, proximately contributed in any degree to the accident, and without which the accident would not have occurred, then you cannot go further and apportion the negligence, if any, between the parties, but in such event plaintiff was guilty of contributory negligence which defeats his recovery and your verdict must be in favor of defendant and against plaintiff."

"I further instruct you that a passenger in an automobile operated by another not for hire is required to use ordinary care for his own safety. If he is aware that the operator is carelessly operating the automobile, or is carelessly rushing into danger, it is incumbent upon him to take such steps as an ordinarily prudent person would take under the same circumstances for his own safety.

"I therefore instruct you that if you find from the evidence that said plaintiff, while a passenger in the automobile in which he was injured, by the exercise of ordinary care could have avoided the injuries which he received, and that such failure of plaintiff to exercise ordinary care proximately contributed to his injuries then your verdict should be for the defendant."

Since the evidence shows that the defendant was guilty of negligence as a matter of law, the only issue in the case, other than as to the amount of damages, was the alleged contributory negligence of the plaintiff. During the cross-examination of the plaintiff he repeatedly stated that he made no protest or suggestion to the defendant in relation to the speed of the automobile. Thereafter counsel for the plaintiff, misconceiving the effect of the decision of this court in Brown v. Davis, 84 Cal. App. 180, 257 P. 877, moved the court, in the presence of the jury, to strike out all such testimony. The court granted the motion, saying in effect that the plaintiff's conduct, or omissions, did not constitute contributory negligence. Thereafter, counsel for the plaintiff, thinking that possibly he had led the court into error, moved the court to change the ruling striking out the aforesaid evidence, and the court granted the motion, saying:

"The motion to withdraw the objection to the questions as propounded and also the motion to strike out the answers of the plaintiff, and the motion to withdraw the objection to said answers will be granted and the objection will be overruled and the answers will stand and the court will instruct the jury that they are to disregard the remarks of the court in regard to whether or not such acts proximately contributed to the injury of the plaintiff, and that it will be the duty under the instructions of the court and the law and the evidence as offered to determine whether such acts on the part of the plaintiff proximately contributed to his injury and not to consider the remarks of the court in determining that question as to whether or not such acts were contributory negligence."

After all the things mentioned had occurred, and after the court had given the instructions on contributory negligence quoted herein, it seems impossible that the jurors could have been misled by the omission of any reference to the issue of contributory negligence in the first four instructions referred to herein. Presuming that they were persons of ordinary intelligence, they must have understood that any contributory negligence on the part of the plaintiff was sufficient to bar a recovery. It is by no means certain that jurors would understand such instructions, standing alone, to exclude the consideration of contributory negligence. It has been held that the use of the words "the proximate cause" of negligence "necessarily implies that it is the only proximate cause." Straten v. Spencer, 52 Cal. App. 98, 106, 197 P. 540, 543. See, also, Douglas v. Southern Pacific Co., 203 Cal. 390, 393, 264 P. 237, and Saltzen v. Associated Oil Co., 198 Cal. 157, 161, 244 P. 338. If the word "proximate," as used in the instructions under consideration, had been preceded by the word "only" or "sole," there would have been no error in the omission of any reference to contributory negligence. What is said herein is not intended as an approval of the form of those instructions, but only as reasons for holding that, under the particular facts of this case, they are not prejudicially erroneous.

Appellant complains of the court's refusal to give other requested instructions on the subject of contributory negligence, but the instructions on that subject herein set forth clearly cover the questions of law involved, and, from what has already been said, it appears that the jurors must have fully understood their duty in that connection.

[4] Appellant contends that section 141¾ of the California Vehicle Act (St. 1929, p. 1580), providing "in substance that no guest in a vehicle upon a public highway has a right of recovery against the driver for injuries sustained, except through intoxication, willful misconduct or gross negligence of the driver, * * * applies to the instant case and that any previous right of action of plaintiff fell with the enactment of this section." The appeal from the judgment herein was pending in this court at the time section 141¾ became effective. In Krause v. Rarity

(Cal. App.) 285 P. 879, 888, a case involving a similar situation, it was held that "section 141¾ of the California Vehicle Act is not retroactive and has no bearing whatsoever upon the case at bar." This holding was expressly approved by the Supreme Court in Smellie v. Southern Pacific Co., 287 P. 343, decided April 1, 1930.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

BORCHERS BROS. CO. v. CIAPARRO et al.★

Civ. 4002.

District Court of Appeal, Third District, California.

April 4, 1930.

As Modified on Denial of Rehearing May 3, 1930. Hearing Granted by Supreme Court June 2, 1930.

1. Landlord and tenant ⟹109(1) — Leased premises — Surrender — Acquiescence.

Lease may be terminated by surrender of leased premises and landlord's acquiescence in surrender.

Such surrender is termed surrender by operation of law and is based upon doctrine of estoppel, and arises where owner of premises is party to act in conjunction with some act on part of tenant, validity of which landlord is estopped to deny.

2. Landlord and tenant ⟹109(4) — Leased premises — Surrender — Acquiescence — Evidence.

Landlord's acquiescence in tenant's surrender of leased premises may be evidenced by landlord's acts and is best evidenced by landlord's taking possession and assuming authority as owner.

3. Frauds, statute of ⟹63(2) — Lease — Surrender.

Under statute of frauds, surrender of term can be effected only by express written consent of parties or by operation of law.

4. Landlord and tenant ⟹109(4) — Leased premises — Surrender — Acceptance.

Mere statement by lessor that lessee may move out *held* not to terminate leasehold until surrender and acceptance has actually been made.

5. Landlord and tenant ⟹109(4) — Leased premises — Surrender — Acceptance — New tenant.

Landlord's mere attempt to secure new tenant, where landlord has not taken possession after surrender or reletting, *held* not acceptance of surrender by former tenant.

6. Landlord and tenant ⟹112½ — Leased premises — Surrender — Acceptance — Evidence — Sufficiency.

Evidence, in landlord's action to restrain injury or removal of buildings, *held* insufficient to show landlord consented to or accepted surrender of lease.

Appeal from Superior Court, Yolo County; J. O. Moncur, Judge.

Action by the Borchers Bros. Company, a corporation, against Antonio Ciaparro and others. Judgment for defendants, and plaintiff appeals.

Reversed.

Busick & Leeper, of Sacramento, for appellant.

A. G. Bailey, of Woodland, for respondents.

JAMISON, Justice pro tem.

By its amended complaint appellant seeks to restrain respondents from injuring or removing certain buildings and property from land owned by it, and theretofore leased to respondents Ciaparro, Fenech, and Borg, and by its supplemental complaint seeks to recover damages from them for tearing down and removing buildings and property belonging to appellant, from said leased premises. Judgment was rendered in favor of respondents, from which appellant has appealed.

It appears from the evidence that on May 2, 1927, the said Ciaparro, Fenech, and Borg leased from appellant the 50 acres of land described in the complaint, for a term of ten years and two months, and thereupon entered into possession of same, and continued in such possession until April 3, 1929. Respondent Grech acquired an interest in said lease some time after its execution. On April 21, 1927, an agreement was entered into between the city of Sacramento and respondents Fenech, Borg, and Ciaparro by which for a period of ten years from the date they were given the exclusive right to collect and carry away all swill and garbage from all hotels, restaurants, hospitals, and clubs situate in said city. The agreement further provided that said respondents should establish a ranch for the purpose of feeding said swill and garbage to hogs. The said lease provided that the leased premises were to be used by the lessees to aid in the performance of the said agreement, and it further provided that if for any reason whatever the said agreement with said city should be or become unenforceable or void, or if the lessees should be prevented from gathering the garbage

★Rehearing denied. Hearing granted. 295 P. 1035.

aforesaid, or if, without the fault of the lessees, they should be prevented by law, or pursuant to law, from using said premises for the purpose of raising hogs thereon, then at the option of the lessees the lease should be deemed canceled and of no further force or effect, and all liability of the lessees thereunder should cease.

Respondents, in their answer, set forth as a defense to said action that on the 12th day of December, 1928, a judgment was given and was entered on December 15, 1928, in the case of I. K. Ohaver v. Phillip Fenech, Sam Borg, Antonio Ciaparro, John Doe Number One, John Doe Number Two, John Doe Number Three, in the superior court of the state of California, in and for the county of Yolo, in an action therein pending, which judgment restrained and enjoined these respondents from shipping to, or receiving at Borchers Bros. ranch, being the property described in the lease, any garbage or other similar materials, and from feeding said garbage, or other similar material, to hogs on said Borchers Bros. Company ranch. That said injunction was granted without any fault of respondents. And further allege in said answer that by the provisions of said lease, if respondents were ever prevented by law or injunction, from using said premises for the purpose of feeding garbage to hogs, or raising hogs thereon, or carrying out the terms of that certain contract between respondents and the city of Sacramento, described in said lease, that thereupon defendants would have the right to cancel same, and that on the ——— day of January, 1929, they gave notice to plaintiff that they canceled and rescinded the lease. That said lease has been canceled by virtue of the terms of said lease, and that appellant has accepted said cancellation when offered by respondents.

The trial court found that on the ——— day of January, 1929, the lease was rescinded, terminated, and extinguished, and of no further force or effect.

Inasmuch as the lease provides that any alteration in, or improvements on the leased premises, made or constructed by the lessees, shall remain on said premises after the expiration of said term or extension, it becomes necessary to determine whether or not there is substantial evidence to support the said finding of the court that the lease was rescinded or canceled.

It is apparent that the judgment in the said case of Ohaver v. Fenech et al. did not render the lease void, nor give respondents the option of so declaring. That portion of the lease bearing upon this question is to the effect that if the said contract with the city of Sacramento became unenforceable or void, or if the lessees be prevented from gathering the garbage mentioned in said contract, or if, without their fault, the lessees be prevented from raising hogs on the leased premises, then at their option they may cancel same. The said judgment in no manner prevented, or affected the enforcement of the said agreement with the city of Sacramento, nor did it prevent the gathering of the garbage named therein, nor restrain or enjoin the said lessees from continuing to use said leased premises for raising hogs thereon.

The said case of Ohaver v. Fenech et al. was before the Supreme Court upon an application for a supersedeas (273 P. 555, 557), and in passing upon the effect of the injunction granted by the trial court, the following language was used: "It is contended by appellants [respondents in the instant case] that these restrictions upon the disposal of said garbage will necessarily require the removal by them of the hogs from the locality in which they are now maintained, and that the effect of said injunction will therefore be to compel them to take affirmative action in removing said hogs. This does not necessarily follow. The appellants may feed their hogs other food and maintain them in such a manner as not to render them a nuisance to their neighbors. So long as they pursue this course, the prohibitive terms of the injunction above set forth will not make it necessary for them to make any change in the locality in which their hogs are kept."

In addition to claiming that the effect of the said judgment gave them the option of declaring the lease void, respondents allege in their answer that on the ——— day of January, they gave appellant notice that they canceled and rescinded the said lease. No proof was offered to support this allegation. They claim, however, that appellant verbally agreed to the cancellation or surrender of the lease, and in support thereof produced the following evidence: Fenech testified that he had three or four talks with George Borcher; that Borcher asked him when he was going to move, and he said, when they picked a place, and that in the presence of Grech, Ciaparro, and witness Borcher, asked when they were going to move, and Fenech said that they would move right away; and in reply to this Borcher said, "Because I want to rent the place." He further testified that Borcher went with him to look at two places, and at one place he said, "This is the best place you fellows can get for hogs." And then he said, "When you move out there, I am going to raise pigs there." Ciaparro testified that he said to Borcher: "What you think if we appeal the case? Are you satisfied with $150 a month?" And Borcher said, "No, I have got a man I can get $500 for the ranch." He told me three or four times, "When are you going to move? When are you going to get out of here?" And I told him, "Just as soon as we can find a place to get out." Grech testified that Borcher asked him when they were going to move, and he said as soon as they were ready at the

other place. Grech then said to him, "Why are you in such a hurry?" And he said: "Well, because I have got a fellow here to put a deposit on the place and I am losing $500 a month while you stay here. As soon as you move out of here, I make money. I am losing money right along." And on cross-examination he testified as follows:

"Q. You knew that Mr. Borcher wanted some money to have him release you from the lease, didn't you? A. I don't know such a thing like that. What I know, I thought the lease was canceled when it was in court, when we lost the case. I thought we had to move out of there; I thought the lease was canceled. We lost the case and the lease is canceled and Mr. Huston himself tells us that the lease is canceled." (The Mr. Huston referred to was one of respondents' attorneys in the injunction suit.)

"Q. And that is your only reason for believing that this lease is canceled, is that right? A. Yes, so they never talk to me about money at all.

"Q. You said that your only reason for believing the lease was canceled was the decision of the court? A. Well, what I know, Borcher, the way he was talking to me, looks like the lease was canceled, and when he is going to raise the hogs and sheep and cattle there himself and ask me to move out of there. He says he is going to start business himself."

Fenech testified on cross-examination as follows:

"Q. You recall that the court rendered the decision in the injunction matter? A. Yes.

"Q. Isn't it a fact that you thought that they canceled the lease? A. That is what I thought, yes.

"Q. And isn't that the only reason for thinking so, the decision of the court? A. Yes."

On redirect examination this witness further testified:

"Q. Well, now, you say that he told you to get off, didn't you? A. Yes.

"Q. And you said you would when you got a place? A. Yes.

"Q. And you thought the lease was terminated by that didn't you? A. Yes, sure."

W. H. Greenlaw, Jr., a witness produced by respondents, testified that Borcher told him that he hoped respondents would get off immediately because he wanted possession of the place himself; that he had a chance for greater money than they were paying him. No date is given as to the time of this conversation. On cross-examination he testified that some month and a half after, "when the thing was over," Borcher told him that the boys had made a mistake in not accepting his proposition, which was an offer of $4,000, and he to keep the improvements and releasing them from the lease. D. G. Nunnelly was also produced as a witness by respondents. He testified that in December or January, Borcher took witness to the leased premises and wanted him to give him figures as to what witness thought the 20 acres across on the west of the road could be sold for. Witness asked him if he could do that under the lease, and he replied, "Well, they are going to get off, and we can do that anyway, as soon as they get off." This witness further testified that nearly every time he met him Borcher talked about their going to get off the ranch, and on one occasion asked witness what he thought the premises could be used for after they got off; that if they moved off, they would have to do something, go in with him; he wanted to go in with them, or something of that kind. The foregoing is practically all of the evidence introduced by respondents that tended in any way to show that appellant consented to or acquiesced in the rescission, cancellation, or termination of said lease.

Robert W. Huston, called by the appellant, testified that he had been attorney for respondents in the injunction suit; that some time in January, 1929, he had a conversation in his office with respondents and Mr. O'Connor, an attorney, who had been associated with witness as attorney for respondents in said injunction suit; that at said meeting O'Connor asked witness if he would talk with Borcher and see if a settlement could be reached. Witness finally consented to do so. All those present then discussed the matter. The result was that witness was to have a talk with Borcher and ascertain what sort of a settlement or understanding they could come to relative to the surrender of the premises. Pursuant to this arrangement he had a talk with Borcher and Borcher offered to let them take certain buildings and improvements off the rented premises and cancel the lease for $6,000. Witness then communicated the proposition to respondents, and they refused to accept it. He then had another talk with Borcher, and leaving out some of the property to be removed, Borcher reduced the offer to $3,000 or $3,500. The conversation of witness with Borcher was about a week before this action was begun, and the last conversation witness had with any of the respondents was with Grech some two or three days before this action was commenced.

Appellant admitted that respondents told him they were going to move off of the leased premises, but denied that he ever at any time agreed to release respondents from the lease, or to rescind or cancel it.

[1-5] A lease may be brought to an end by the surrender of the leased premises and the acquiescence in such surrender by the landlord. Such acquiescence is perhaps best evi-

denced by his taking possession of the property and assuming again all the authority over it of an owner in possession. Baker v. Eilers Music Co., 26 Cal. App. 371, 146 P. 1056; Steel v. Thompson, 59 Cal. App. 191, 210 P. 430. This surrender may be evidenced by some act on the part of the party against whom the surrender is claimed. This kind of surrender is termed a surrender by operation of law, and is based upon the doctrine of estoppel, and arises where the owner of the premises is a party to an act in conjunction with some act on the part of the tenant, the validity of which act the owner or landlord is estopped to deny. Underhill on Landlord and Tenant, vol. 2, 1198. Under the statute of frauds a surrender of the term can be done only by express consent of the parties, in writing, or by operation of law, when the parties do something that implies that both have consented. Welcome v. Hess, 90 Cal. 507, 27 P. 369, 25 Am. St. Rep. 145. A mere statement by the lessor to the lessee that he may move out if he desires, does not become of binding effect in terminating the leasehold until a surrender and acceptance have actually been made. 15 Cal. Jur. p. 795; Steel v. Thompson, 59 Cal. App. 191, 210 P. 430; Voss v. Levi, 33 Cal. App. 671, 166 P. 359. Merely attempting to secure a new tenant for premises previously leased, but which have been vacated without taking possession, or in fact reletting, is not an acceptance of the surrender by the former tenant. Melone Co. v. Acquistapace, 73 Cal. App. 199, 238 P. 734, 736. In this last-named case the court said: "A surrender is the yielding up of an estate for life or years to the reversioner or remainderman. Under the statute of frauds it can be done only by express consent of the parties in writing, or by operation of law when the parties do something which implies that both have consented. These acts are such as would estop the parties from disputing the fact of surrender, and which would not be valid unless the term were ended; as, for instance, a new lease accepted by the tenant or the resumption of possession by the landlord if the tenant acquiesces, or the giving of a lease to another. * * * The tenant, subject to the covenants * * * is the owner for the term. If he leaves the demised premises vacant, and avows his intention not to be bound by his lease, his title still continues, unless the landlord has accepted the offer of surrender. Merely attempting to secure a new tenant, without taking possession or in fact reletting, is not an acceptance of the surrender. * * * Chase v. Oehlke, 43 Cal. App. 435, 185 P. 425."

[6] In the case under consideration there is no evidence that there was any written agreement between appellant and respondents rescinding, canceling, or terminating the lease, nor is there any evidence that appellant ever took possession, or assumed possession of the leased premises after respondents removed therefrom. Nor, in the opinion of this court, is there any substantial evidence that appellant ever consented to or accepted a surrender of the lease. Such being the case, it is unnecessary to pass upon the question as to whether or not the improvements placed upon the leased premises are trade fixtures subject to removal by the lessees upon the termination of the lease.

For the reasons aforesaid the judgment must be and is hereby reversed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

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105 Cal. App. 127

DOZIER v. HILLMAN.

Civ. 6884.

District Court of Appeal, First District, Division 1, California.

April 8, 1930.

1. Appeal and error ⟹1001(1), 1010(1) — Review — Verdict — Decision — Absence of substantial evidence.

Verdict or decision will not be sustained where there is no substantial evidence to support it.

2. Witnesses ⟹336 — Conviction of felony — Credibility.

In action on note, maker's admission of conviction for felony tended to impeach his credibility, notwithstanding subsequent pardon (Code Civ. Proc. § 2051).

3. Evidence ⟹589 — Contradictory testimony — Affecting credibility.

In action against maker of note, his contradictory and evasive testimony, with other evidence, justified court in refusing to credit his testimony.

The original answer had admitted execution of note, but alleged payment. A supplemental answer, filed after trial had begun and after maker had learned of death of secretary of payee corporation (to whom payment was alleged to have been made), denied execution of note, claiming it to be a forgery.

4. Appeal and error ⟹994(3) — Review — Credibility of witness.

Credibility of witnesses was question for trial court in action on note (Code Civ. Proc. § 1847).

5. Evidence ⚷571(1) — Weight of expert testimony — Question for trial court.

In action on note, weight to be given testimony of handwriting experts was question for trial court (Code Civ. Proc. § 1847).

6. Appeal and error ⚷1010(1) — Review — Findings — Evidence — Conclusiveness.

Trial court's findings, there being evidence to support them, could not be disturbed on appeal.

7. Bills and notes ⚷474 — Provision for attorneys' fees — Absence of denial — Admitting liability.

In action on note providing for attorneys' fees, failure to deny allegation that $1,000 was reasonable fee admitted liability to some extent, but not for $1,000.

8. Bills and notes ⚷534 — Reasonable attorney's fees — Discretion of court.

In action on note providing for reasonable attorney's fees, amount thereof is to be determined by court in its discretion.

9. Appeal and error ⚷984(5) — Action on note — Attorney's fees — Discretion of court.

Court's discretionary action in determining reasonable attorney's fees recoverable in action on note will not be disturbed except for abuse thereof.

10. Bills and notes ⚷534 — Action on note — Excessive attorney's fee.

In action on note for $3,227, trial requiring three days, with additional time for settling pleadings and presenting motion, attorney's fee of $1,000 *held* excessive by $500.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Maud Watson Dozier, executrix of the estate of Thomas B. Dozier, deceased, against C. D. Hillman. From a judgment for plaintiff, defendant appeals.

Modified and affirmed.

L. L. James and C. K. Bonestell, of San Francisco, for appellant.

C. F. Kimball, of San Francisco, for respondent.

PER CURIAM.

This is an action brought by Thomas B. Dozier, since deceased, to recover from C. D. Hillman the sum of $3,227, with interest, according to the terms of a promissory note purporting to have been executed by Hillman on November 8, 1921.

The note was made payable to Laymance Real Estate Company, a corporation, and was by it transferred before maturity to Dozier. The defendant in his answer to the complaint admitted the execution of the note, but alleged payment. In a supplemental answer he denied the execution of the note, alleging the same to be a forgery.

The trial court found in Dozier's favor, and entered judgment accordingly, with attorneys' fees in the sum of $1,000.

The defendant, who has appealed, contends that the finding that he executed the note is not supported by the evidence, and that the allowance of the above amount as an attorney's fee was an abuse of discretion.

The testimony shows that the document in question was indorsed for the corporation by William J. Laymance, its secretary, and delivered to Dozier for a valuable consideration shortly after its date. It appears that the defendant over a period of years had considerable business both with the company and its secretary. On April 4, 1923, Dozier sent a letter to the defendant, stating that the note (describing it) had been transferred to him and requesting payment. The defendant made no reply to this letter, but admits its receipt. Suit was commenced on the note and an amended complaint filed in the action on January 25, 1927. Thereafter two other letters passed between the parties; one dated August 2, 1927, was sent by the defendant, stating in effect that the note had been fully paid to William J. Laymance and making no claim that the same was a forgery. In reply Dozier on August 4, 1927, denied the statement that the note had been paid. Defendant's answer, alleging payment, was filed on August 31, 1927; his supplemental answer, denying the execution of the note, was filed on October 13, 1927, which was after the trial of the cause had commenced. The trial opened on September 14, 1927, and on that day the defendant, who was called as a witness for the plaintiff, testified in substance that he executed the note, but that he paid the same to William J. Laymance within three days after its date, and that payment was made in cash and by the conveyance of certain real property in Oregon. On this occasion it was announced by plaintiff's counsel that Laymance had died, a fact of which defendant, according to his testimony, had before been ignorant. The defendant after the filing of his supplemental answer testified that the only note executed by him to the corporation was dated June 25, 1920, and was for $2,262, payable six months after its date. In support of this claim he produced a receipt from the company dated June 21, 1920, stating that an account due the company for that amount had been paid by defendant by the execution of such a note. The defendant at this stage of the trial testified that the payment previously referred to by him was made upon this note and not upon the one in

question. In this connection, however, the books of the company were produced, from which it appeared, as testified by its clerk who handled the transactions and made the entries in the regular course of business, that the principal sum of the note mentioned in the receipt with the accrued interest thereon and certain charges for insurance premiums, water, and taxes against the defendant, aggregating $3,227, were included in the note in question, the amount of which was credited to defendant's account with the company. It was also shown that the company kept a real estate account, which showed no transfer of any real property from the defendant. It was also testified by M. J. Laymance, the president of the company, that the defendant shortly before the trial stated to the witness that he had executed a note for about $3,000 to William J. Laymance, of whose decease he had just learned, and asked the witness if he knew of the transaction; that defendant further stated that there was a deposit in a bank in Portland, Or., to which the deceased or the company was entitled, and also that certain land in that state stood in one of their names; that defendant failed to divulge the name of the bank or the location of the land, but stated in substance that if the witness would help him in connection with the note in question he would assist the witness in recovering the property in Oregon. Two witnesses who qualified as handwriting experts, and a banker familiar with defendant's signature, testified for the defense, and each expressed the opinion that the note sued upon was not signed by the defendant. As against this testimony appears that of Dozier who was also shown to be qualified and who, after stating the grounds therefor, testified that in his opinion the signature affixed to the instrument was that of the defendant. The defendant on cross-examination admitted that he had been convicted of a felony, namely, using the mails to defraud, stating, however, that he was subsequently pardoned.

[1-6] While a verdict or decision will not be sustained when there is no substantial evidence to support it, here not only was there evidence tending to impeach the credibility of the defendant, namely, the admission of his conviction of a felony (Code Civ. Proc. § 2051), and this notwithstanding his pardon (People v. Hardwick, 204 Cal. 582, 269 P. 427, 59 A. L. R. 1480), but his testimony was in many particulars contradictory and evasive. This, considered in connection with the other evidence in the case, was sufficient to justify the trial court in refusing to credit his testimony, and to support the conclusion that the defense of forgery was conceived after he learned of the death of Laymance. The credibility of the witnesses, as well as the weight to be given the testimony of the experts, were questions for the trial court (Code Civ. Proc. § 1847; Dunphy v. Dunphy, 161 Cal. 380, 119 P. 512, 38 L. R. A. (N. S.) 818, Ann. Cas. 1913B, 1230; Rolland v. Porterfield, 183 Cal. 466, 191 P. 913), and there being evidence tending to impeach the testimony of the defendant, and evidence which contradicted the conclusions of his witnesses on the question of the execution of the note, the determination of the trial court cannot be disturbed on appeal (27 Cal. Jur., Witnesses, § 157, p. 186).

[7-10] The note contained the provision that: "* * * In case suit is instituted to collect this note or any portion thereof I promise to pay such additional sum as the court may adjudge reasonable as attorneys' fees in said suit." The complaint alleged the sum of $1,000 to be a reasonable attorney's fee, which allegation was not denied. Where a note makes provision for reasonable attorneys' fees, such fees are in the nature of special damage under the contract (De Jarnatt v. Marquez, 127 Cal. 558, 60 P. 45, 78 Am. St. Rep. 90), and the failure to deny the reasonableness of the amount asked was not an admission of liability to the extent charged, but simply an admission of liability to some extent (Landwehr v. Gillette, 174 Cal. 654, 163 P. 1018). The amount to be allowed is to be determined by the court in its discretion, and it is only for an abuse of discretion that its action will be disturbed. Baker v. Eilers Music Co., 175 Cal. 652, 166 P. 1006. While in the present case three days were required for the trial of the issues of fact, and additional time was spent in the settlement of the pleadings and the presentation of the motion for leave to file a supplemental answer, yet we are of the opinion that the attorney's fee allowed, considering the amount of the claim, was excessive and should be reduced. It is our conclusion that the sum of $500 is in view of the facts a reasonable allowance for attorney's fees, and that the judgment should be modified accordingly.

The judgment is modified by deducting the sum of $500, and as so modified is affirmed. It is further ordered that each party bear his own costs on appeal.

105 Cal. App. 195

HILL v. WALSH.

Civ. 4019.

District Court of Appeal, Third District, California.

April 12, 1930.

1. Replevin ⟹59 — Description of property — Certainty.

Property sought to be recovered in action in claim and delivery must be described with reasonable certainty.

2. Replevin ⟹104 — Judgment — Description of property — Judgment roll.

Description of property in replevin judgment may be aided by entire judgment roll.

3. Replevin ⟹104 — Description of property — Judgment — Sufficiency.

In action in claim and delivery, description of property in judgment *held* sufficient under pleadings.

The property was described in complaint, findings, and judgment as "2 Buck rakes, 2 Mowers, 4 Wagons," etc., of specified value. The complaint was demurred to generally, but no uncertainty or ambiguity was suggested. In the answer, no point was raised regarding uncertain description, but instead plaintiff's right to possession of property was denied and claim of superior right was alleged, and it was also insisted that third persons asserting interest in property should be made parties.

4. Appeal and error ⟹1170(1) — Reversal — Proving error.

To justify reversal, it must be shown not only that error exists, but that some right has been abridged thereby, or fair hearing prevented. (Const. art. 6, § 4½).

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by Mary C. Hill, administratrix of the estate of Thomas P. Hill, deceased, against Patrick Walsh, Jr., and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

N. J. Barry, of Susanville, and W. M. Kearney, of Reno, Nev., for appellants.

J. E. Pardee, of Susanville, and R. M. Rankin, of Willows, for respondent.

PARKER, Justice pro tem.

This is an action in claim and delivery for the recovery of certain personal property. Plaintiff had judgment for the return of the property, or for the value thereof, in case a return could not be made. From this judgment, defendants appeal on the judgment roll alone.

But one point is presented on the appeal. Appellants contend that the judgment is too uncertain to be enforced or enforceable, and that there is no description of the property sufficient to enable an officer, executing the judgment, to identify the property.

As indicated, we have before us the judgment roll alone.

The complaint alleges among other things, that certain personal property is in possession of defendants, and describes that property as follows:

Article	Value
2 Buck rakes	$ 125.00
2 Mowers	125.00
4 Wagons	200.00
5 Hay nets	50.00
1 Grain binder	70.00
1 Derrick and equipment	135.00
2 Side-delivery rakes	135.00
2 Sulkey rakes	70.00
1 Tractor	1,350.00
Stoves and household goods	175.00
1-500 gallon tank on wheels	90.00
1 Grain drill	50.00
1 6-disc tractor plow	225.00
1 Walking plow	10.00
1 2½ h. p. gas engine	50.00
Sundry tools and implements	75.00
Total	$2,935.00

In the trial court's findings of fact, the property is again described in exactly the same manner, and in the judgment it is ordered that plaintiff do have and recover from defendants the possession of the property described in plaintiff's complaint as follows: (Here follows the same description, including values, as hereinbefore tabulated.) The judgment providing the alternative of payment of values found in case delivery could not be made.

Appellant relies mainly upon the California cases cited as follows: Welch v. Smith, 45 Cal. 230; Kelly v. McKibben, 54 Cal. 192; Cooke v. Aguirre, 86 Cal. 479, 25 P. 5; Hawley v. Kocher, 123 Cal. 77, 55 P. 696; Lamus v. Engwicht, 39 Cal. App. 524, 179 P. 435. In Welch v. Smith it is said: "The description of goods recovered is obviously insufficient to sustain a judgment in replevin unless, perhaps, it be aided in this instance by reference to the description set forth in the complaint. On looking into the complaint, however, the description there given is, if possible, even less definite than that found in the judgment." It might be noted that the judgment in the case of Welch v. Smith was for the restitution and possession of goods described as "Buckwheat, valued at three hundred and sixty-five dollars and seventy-five

cents; sweet potatoes, valued at thirty-nine dollars; Irish potatoes, valued at one hundred and sixty dollars; [and] squash valued at one hundred and forty-five dollars."

In Kelly v. McKibben, supra, it is said: "The mode of describing the property recovered in the judgment is not one that we can conscientiously recommend as a precedent. But the description is not uncertain. That is certain which can be made certain."

In Cooke v. Aguirre, supra, the judgment of the lower court was reversed for many reasons and the last to be stated was as follows: "It contains no sufficient description of the property nor does it refer to any other pleading or paper for such description."

In the case of Hawley v. Kocher, supra, the decision was on the lower court's sustaining of a demurrer for uncertainty.

[1, 2] The last-cited case, Lamus v. Engwicht, supra, is authority only to the point that an action in replevin will not lie to recover "shares of stock" in a corporation, and does not aid us here. The cited cases support the claim of appellant to the extent that the property sought to be recovered in an action in claim and delivery must be described with reasonable certainty. But these decisions are likewise in accord on the point that in such an action the recitals or description in the judgment may and must be aided by the entire record comprising the judgment roll. And as a corollary to this we have the constitutional provision, section 4½, article 6, of the state Constitution, declaring, in effect, that error must work injustice in the case under review before a judgment should be set aside. With these principles in mind, we review the record before us.

[3] The complaint of plaintiff describes the property as hereinbefore indicated. Defendants entered a general demurrer to the complaint, but make no specification of uncertainty or ambiguity. The demurrer being overruled, defendants answered. In the answer, no point is urged as to the uncertain description. On the contrary, by answer, the defendants deny that plaintiff is entitled to the possession of the property mentioned in the complaint, or any part thereof. They allege that they have an interest in the property against the claims of plaintiff. Defendants then set up that they held a chattel mortgage covering the said property, which chattel mortgage provided that upon breach the mortgagees might take possession of the chattels mortgaged. They then allege the breach, and the further fact that plaintiff did thereupon turn over to them the possession of all of the personal property mentioned in the complaint, and that defendants, since that time, have been in the sole, exclusive, and undisputed possession thereof. Further, defendants plead the pending of another action, and allege that the same identical rights between the parties are involved in the former suit and the one at bar, and that the nature, object, and character of said former suit is the same as the nature, character, and object of the suit at bar. Further, the answer sets up the claim that other persons, not parties to the suit, assert some interest in the property, and defendants ask that these persons be made parties, as necessary to a complete determination of the controversy. Defendants pray a decree establishing their lien upon the property and their right to retain possession thereof. The findings are against defendants on all issues, and the judgment follows.

[4] We may adopt the language of the court in the case of Kelly v. McKibben, supra, as follows: "The mode of describing the property recovered in the judgment is not one that we can conscientiously recommend as a precedent." But where the pleadings leave no possible doubt concerning the identity of the particular articles in controversy, and all of the issues presented and tried are framed upon mutual assent as to the specific property involved, it, indeed, comes with poor grace to attempt to defeat the judgment by a claim that possibly some third person reading the judgment could not immediately identify the property therein named. Surely, the defendants, under the record, could not have been misled. They have admitted under oath their ability to deliver the property described in the complaint, and have asked the judgment of the court for a decree establishing their right to retain it. It is not enough to establish, academically, the presence of some error to justify a reversal. Appellants must go further and show that some right of theirs has been abridged, or that, by reason of the error complained of, a fair hearing and determination has not been accorded them.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; PLUMMER, Acting P. J.

SONOMA COUNTY v. DE WINTON.★

Civ. 3847.

District Court of Appeal, Third District, California.

April 10, 1930.

Rehearing Denied May 10, 1930. Hearing Denied by Supreme Court June 9, 1930.

1. Eminent domain ⟹204 — Construction of road — Benefit to land not taken — Evidence — Admissibility.

Evidence of benefit to land not taken for road previously used by county only with owner's permission, *held* admissible.

2. Judgment ⟹715(1) — Estoppel — Subsequent action — Identical questions.

For judgment to constitute estoppel, it must appear from record or extrinsic evidence that identical questions were determined in former action (Code Civ. Proc. § 1908, subd. 2, and § 1911).

Code Civ. Proc. § 1908, subd. 2, declares judgment conclusive in respect to matters adjudicated, while section 1911 provides that only that is deemed to have been adjudged in former action which appears on its face to have been adjudged or was actually and necessarily included therein or necessary thereto.

3. Judgment ⟹739 — Conclusiveness — Matters not adjudicable.

Judgment is not conclusive of matters not adjudicable in former suit.

4. Judgment ⟹715(3) — Enjoining county from using road — Award of damages — Res judicata — Condemnation proceeding.

Judgment enjoining county from using road and awarding damages *held* not res judicata in condemnation proceeding.

The issues in the former case were ownership of roadway, county's right to continue use thereof as public highway, and damages for injuries to owner's improvements in construction thereof, while issues in condemnation proceeding were necessity of land for public road, value of land taken, damage to land not taken, and benefit thereto.

5. Judgment ⟹958(1) — Injunction against using road — Consideration in condemnation proceeding — Instruction — Issue of permission.

Instruction that judgment roll was admitted in condemnation proceeding, on issue whether injunction against using road was granted because owner's permission was not given to construct it "exactly" as it was, *held* not erroneous.

6. Eminent domain ⟹145(4) — Construction of road — Condemnation proceeding — Instruction — Benefit to land not taken.

Instruction not to deduct benefit to land not taken for county road, by work done without owner's consent before complaint was filed, *held* properly refused.

7. Eminent domain ⟹223 — Construction of road — Benefit to land not taken — Failure to find — Waiver of objection — Requested instruction — Failure to object.

Defendant requesting instruction to deduct benefit to land not taken for county road from damages thereto, and not objecting to verdict not stating amount of such benefit, waived objection (Code Civ. Proc. §§ 619, 1248).

Code Civ. Proc. § 1248, requires the court or jury to ascertain and assess value of land taken, damage to land not taken, and benefit thereto, while section 619 provides that jury may again be sent out if verdict is insufficient in not covering issues submitted.

Appeal from Superior Court, Sonoma County; Ross Campbell, Judge.

Action by Sonoma County against W. W. De Winton to condemn a right of way for a county road. From a judgment on a verdict for the value of the land taken only, defendant appeals.

Affirmed.

Superseding opinion 283 P. 381.

Fabius T. Finch, of San Francisco, and Barrett & McConnell, of Santa Rosa, for appellant.

Carl Barnard, Dist. Atty., of Santa Rosa, and E. J. Dole, Asst. Dist. Atty., of Petaluma, for respondent.

JAMISON, Justice pro tem.

This action was brought by respondent to condemn a right of way for a county road over the land of appellant. The issues as to the value of the land taken, severance damage and benefit to land not taken were submitted to a jury, which returned a verdict in favor of appellant for the sum of $354 for the land taken, and no damages for severance from the land not taken. From the judgment rendered upon this verdict appellant has appealed. Appellant produced evidence tending to prove that the land taken was of the value of $1,500; that the damage to the land not taken was from $25,000 to $45,360, and that no benefit was conferred upon the land not taken by the construction of the road. Appellant then offered in evidence the judgment roll in an action brought by appellant against respondent and theretofore tried and determined. It appears from the find-

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes
★Rehearing denied. Hearing denied by Supreme Court.

ings contained in this judgment roll that this former action grew out of an agreement entered into between appellant and respondent in the year 1919, by the terms of which appellant agreed, in consideration of the sum of $250, to grant to respondent a right of way 40 feet wide over and across his said land, the outside edge of said right of way to be at least 30 feet from the top bank of the Russian river at a point easterly from appellant's upper house, and the construction of said road to be completed within one year from the date of said agreement; that in accordance with said agreement respondent entered upon appellant's land and did some work toward laying out and constructing said road, but did not pay appellant the $250, nor place the outside edge of the work which respondent did toward the construction of said road at least 30 feet back from the top back of the river at a point easterly from the upper house of appellant on said property; that, by reason of promises made by respondent that it would carry out and perform its part of said agreement, appellant extended the time within which to perform said work to December 20, 1920, but at this date respondent not having complied with its promises, appellant elected to consider said agreement terminated; that thereupon respondent requested appellant to reinstate its rights to construct said road and did again enter upon the premises and dig out and excavate a road through said land of appellant; that during the year 1922 two separate agreements were entered into by said parties providing for a board of arbitrators to determine the value of the land covered by the said right of way and to assess the damage appellant had sustained, but neither of these agreements was carried into effect; that from time to time respondent continued work upon said road and by January 1, 1924, had constructed a roadway through appellant's said land over which it was possible for vehicles to travel, but was not smoothed off or put in good condition.

On October 25, 1925, appellant commenced an action against respondent, reciting in his complaint the aforesaid facts, and demanding that respondent be enjoined from the further use and occupation of said right of way, and for damages for injuries caused to appellant's land by the construction of said road. Upon the trial of the issues involved in that action, judgment was rendered in favor of appellant enjoining respondent from the further use of said road, and for damages in the sum of $100. This judgment was rendered July 21, 1927, and the present action was commenced on August 11, 1927. The strip of land sought to be condemned by the present action is the same strip over which the road was theretofore constructed. When the said judgment roll was offered in evidence the attorney for appellant suggested to the court that it be considered as a record to the court, and not to the jury, for the reason that the said judgment roll consisted of long documents which would be difficult for the jury to follow, and that the court should, in its instructions to the jury, set forth the legal effect of said judgment roll, or such portions as might be applicable to the case, and to this suggestion the attorney for respondent assented. The record then recites that the judgment roll was thereupon admitted in evidence under the aforesaid circumstances and for said purposes. Respondent then produced testimony as to the value of the land taken, and also evidence as to the benefit conferred upon the property not taken by the construction of the road. The entire tract of land owned by appellant through which the right of way runs is twenty acres, and the amount within the said right of way is 1.4 acres.

Appellant does not question the sufficiency of the evidence to support the verdict. He maintains, however, that the court erred in admitting certain evidence, and in giving and refusing to give certain instructions hereinafter referred to, and that the verdict of the jury upon which the judgment is based is incomplete and insufficient to support the judgment.

It was stipulated by the parties to the present action that the right of way sought to be condemned in this action follows the lines of the road constructed by respondent under the agreement of 1919. And it was also stipulated that the value of the appellant's land sought to be taken by the present action and damages to land not taken should be ascertained as of the date of the trial, to wit, December 17, 1928. This last stipulation was unnecessary for the reason that section 1249 of the Code of Civil Procedure provides that where the issue is not tried within one year from the date of the commencement of the action, unless the delay was caused by the defendant, and in this case there is no evidence of any such delay, the compensation and damages shall be deemed to have accrued at the date of the trial. This action was commenced August 17, 1927, and was tried December 17, 1928.

[1] Appellant contends that the court erred in permitting respondent, over his objection, to produce evidence tending to show the value of the benefit conferred upon the land not taken by reason of the construction of said road. He bases this contention upon the ground that respondent, at all times since it began the construction of said road, has been a trespasser on his said lands, and therefore cannot offset any damage to which appellant may be entitled by proof of benefits conferred upon the land arising by or through the trespass. He cites several cases in his effort to support this contention. The one upon which he appears mainly to rely

is that of Pinney v. Borough of Winstead, 83 Conn. 411, 76 A. 994, 20 Ann. Cas. 923. This was a case where the town wrongfully entered upon Pinney's land and constructed a street thereon without condemnation proceedings and without Pinney's consent. Pinney brought an action against the town for damages arising from this trespass. The case was tried upon the theory that the taking was permanent. No proof was offered by the town tending to show that the construction of the street benefited the remaining land. Judgment was given the plaintiff for the value of his land that was taken, only. However, in that case the court held that even if benefits had been proven, they could not have been offset against plaintiff's judgment, for the reason that the law is well established that a trespasser cannot, when compensation is sought for his trespass, be heard to say, in his defense, that he has benefited plaintiff by his wrongful act.

These cases are not in point for the reason that there is no evidence to the effect that during the time respondent was using or occupying the said road it was a trespasser. In his complaint in the former action appellant alleges that he had permitted respondent to enter upon his said land and do the work on said road up to the commencement of that action, and in its findings in said former action the court specifically found that respondent went upon and took possession of the strip of land which it used and occupied as a road and highway across the land of appellant in the year 1919 by his permission and has ever since the year 1919 used and occupied same by the permission of appellant. There is no evidence that since the commencement of the former action respondent has continued to use or occupy the said strip of land for highway purposes or has continued to use or occupy it for any purpose. There being no evidence that respondent has used or occupied the said strip of land otherwise than with the permission of appellant, the objection to the introduction of this evidence was properly overruled.

[2-4] Appellant also claims that the court erred in giving instruction No. 5, which was given by the court of its own motion. By this instruction the jury was told that the judgment roll in the former action was admitted in evidence upon the issue, joined by the allegation contained in the complaint in the instant action, to the effect that respondent entered upon appellant's land and constructed said road with his permission, and appellant's denial thereof and assertion that an injunction was granted appellant in the former action because permission was not granted to construct the roadway exactly as it was constructed. That issue, being thus joined on this allegation, permitted the reception in evidence of said judgment roll, but this did not alter the issue which the jury was to determine, namely, the market value of the land sought to be condemned, and the damage, if any, to the remaining land by severance of the land sought to be condemned from the remainder of the tract. Apparently, the object the court had in view in giving this instruction was to inform the jury, complying with appellant's suggestion made at the time said judgment roll was admitted in evidence, of the extent to which the jury should give consideration to the said judgment roll in the determination of the issues before it. In the former trial no issues were involved regarding the value of the land occupied by the road, nor of damages to the land not taken by reason of severance therefrom of the land occupied by the road, nor of benefits conferred upon the land not taken by the construction of the road. It appears to have been an action to enjoin respondent from further occupying or using said road because it had failed to perform its agreements thereto relating, and for damages arising from such failure. By section 1908, subdivision 2, of the Code of Civil Procedure, the effect of a judgment is conclusive in respect to the matters adjudicated, and, by section 1911 of said code, that only is deemed to have been adjudged in a former action which appears on its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto. In order that a judgment in one action may constitute an estoppel against the parties thereto in a subsequent action, it must be made to appear, either upon the face of the record or by extrinsic evidence, that the identical questions involved in the issues to be tried were determined in the former action. Beronio v. Ventura County Lumber Co., 129 Cal. 232, 61 P. 958, 79 Am. St. Rep. 118; Agnifili v. Lagna, 204 Cal. 262, 267 P. 705.

The issues in the former case were the ownership of said roadway and the right of respondent to continue the use of it as a public highway, together with damages for injuries inflicted upon appellant's improvements by respondent in its construction of said highway.

The present action is a proceeding to condemn a strip of land for a public highway over the said land of appellant, and the issues involved in this case are whether or not said strip of land is necessary for public use as a right of way for a public road, the value of the land embraced within said right of way, the damage to the land not taken by the severance therefrom of the land taken, and the benefit, if any, accruing to the land not taken, by the proposed highway. A judgment is not conclusive of any matter which, from the nature of the case, the form of the action, or the character of the pleadings,

could not have been adjudicated in the former suit. Black on Judgments, vol. 2, p. 944. In the case of Lillis v. Emigrant Ditch Co., 95 Cal. 553, 30 P. 1108, 1110, after stating that the judgment is not conclusive as to any matter which only comes collaterally in issue, the court said: "A fact or matter in issue is that upon which the plaintiff proceeds by his action, and which the defendant controverts in his pleadings, while collateral facts are such as are offered in evidence to establish matters or facts in issue; and notwithstanding they may be controverted at the trial, they do not come within the rule."

In the former case the allegations of the complaint, except those relating to damages to improvements, are substantially the same as the facts found by the court hereinbefore set forth. The answer of respondent thereto is a denial of those allegations and a claim of ownership of said roadway by adverse user. The judgment of the court in that case enjoined and restrained respondent from trespassing upon appellant's said land and from using or attempting to use any roadway existing thereon and for damages. We are of the opinion that the judgment in the former action is not res judicata as to any issue or matter involved in the present action.

[5] Appellant objects to the word "exactly" used in this instruction. In view of the fact that there is nothing in the findings indicating how many inches or feet respondent deviated from the agreement of 1919 in laying out and constructing the said road, we cannot say that the said word was used improperly. In fact, the allegations contained in the complaint in this condemnation action, relative to permission theretofore given by appellant to respondent to enter upon said land and construct a highway there, were unnecessary and immaterial allegations and doubtless would have been stricken upon motion. We are unable to see wherein appellant was injured by this instruction.

[6] Appellant contends that the court erred in refusing to give his proposed instructions Nos. 1 and 2. Instruction No. 1 is as follows:

"It is your duty to determine these damages as of the date of the filing of the complaint in this action, which was on August 11, 1927.

"Sonoma County actually constructed the road through Mr. de Winton's property as the road now exists long prior to the filing of the complaint in this action; but the county so constructed the road without Mr. de Winton's consent and without having paid him anything for the right of way, and in so doing, the county exceeded its rights.

"Therefore, in ascertaining the value of the land taken for the right of way in this case, and the damage to the adjoining property, you must consider the value of that property with the road already constructed. That road belonged to Mr. de Winton and you are not to deduct from the value of the land taken and the damages done to the adjoining property any benefits which you believe he may have received by reason of any work done in constructing the road prior to August 11, 1927."

Aside from the fact that this instruction required the jury to assess the damage as of the date of the commencement of the action instead of the date of the trial, it is somewhat difficult to determine just what it means. Apparently its purpose was to instruct the jury that the road theretofore having been constructed by the county, the jury could not consider the matter of any benefit which the land not taken might receive from the county making it a public road by the condemnation proceedings. In other words, the county having built the road, whatever benefit it was to the adjoining land of appellant had already accrued, that is to say, had accrued when the road was built and consequently no benefit would accrue at the time of the condemnation suit. At the time this condemnation suit was instituted the road was a private road and will remain such until the final judgment of condemnation. The question of who may have built the road is wholly immaterial in this action. The benefit, if any, that accrues to the land not taken, accrues when the road becomes a public highway, that is to say, when it becomes a permanent highway operated, used, and maintained by the public, affording ingress and egress to and from the land not taken. This instruction was properly refused.

Instruction No. 2, proposed by appellant and refused by the court, is as follows: "You are instructed that it has been decided in a prior action by Mr. de Winton against Sonoma County that this road was built by the County in its present location without Mr. de Winton's consent and against his will, and you are required to accept that as a fact conclusively established in this case."

This instruction was also properly refused for the reasons hereinbefore set forth.

This appeal was brought up on a bill of exceptions which set forth briefly the evidence produced by the respective parties, pro and con, as to the value of the land taken, and benefits and damages to land not taken. Other than this no other statement of the evidence produced at the trial of the present action is contained in said bill of exceptions, except the judgment roll in the former case.

[7] Lastly, appellant contends that the judgment in the present action is void for the reason that the jury failed to find by its verdict the amount of the benefit which the land not taken will receive by the construction of the road. Section 1248, Code of Civil Procedure, provides that the court or jury

must ascertain and assess, first, the value of the land taken; second, the damage which will accrue to the land not taken by reason of the severance; and, third, the benefit, if any, which the construction of the road may be to the land not taken. The verdict of the jury was in the following words: "We, the jury in the above entitled action, render the following verdict: Question No. 1. What is the value of the strip of land of defendant W. W. de Winton, sought to be condemned by plaintiff? Answer, $354.00. Question No. 2. What is the damage, if any, to the balance of the land not sought to be condemned by reason of its severance from the land sought to be condemned by plaintiff? Answer. None." Appellant cites cases from other states, notably, Michigan and Colorado, to the effect that the aforesaid requirements are mandatory, and calls attention to the case of Butte County v. Boydston, 64 Cal. 110, 29 P. 511, which he claims supports this contention. In this latter case no assessment of the value of the land taken, nor damages to that not taken, nor benefits, by the improvement, to the land not taken, were assessed at all, nor payment, or tender of compensation made, and under those circumstances the court held that the owner could not be deprived of his land, and that any judgment rendered against him would be illegal and void, while at the same time the court said: "But the value of the land, the damage, if any, and the benefit, if any, must be separately assessed, in order that the compensation may be adjudged and paid." While section 1248 of the Code of Civil Procedure plainly requires that the value of the land taken, the damage to that not taken, and the benefit, if any, to the remaining land should be separately stated, yet in this case we find that the omission from the verdict of the value of the benefit to the remaining land, by the construction of the road, was mainly brought about by appellant himself.

Instruction No. 24, which was given to the jury at the request of appellant, reads in part as follows: "If you believe that Mr. de Winton's property, on either side or both sides of the proposed right of way, has sustained any special benefit by reason of the construction of this road, you may deduct the value of such benefits from the damages to be awarded to the land on each side of the right of way." Then again, when the jury returned into court with the aforesaid verdict, defendant made no objection to the fact that it failed to state the amount of the benefit, if any, to the remaining land. The case of Ft. Lyon Canal Co. v. Farnan, 48 Colo. 414, 109 P. 861, 862, was an action in eminent domain, where the jury failed to find the benefit to the remaining land, and no objection was made thereto at the time the verdict was returned. The court there said: "Had counsel for petitioner, as it was his duty to do, at the time the verdict was returned and before the jury was discharged, if of opinion that the same was not sufficiently certain, made that objection, the verdict doubtless would have been forthwith corrected to show, with greater particularity if that were necessary, exactly what the jury did in fact pass upon and find. * * * Beside it may well be held that petitioner waived his right to question it, either as to form or substance, by failing to urge objection thereto in apt time." If the verdict is insufficient in not covering the issues submitted, the jury may again be sent out. Section 619, Code Civ. Proc. Had appellant desired to have the verdict of the jury specify the amount of the benefit, if any, to the land not taken by the construction of the road, he should have so informed the court at the time the verdict was returned; otherwise, he waived this requirement. Benson v. Southern Pacific Co., 177 Cal. 777, 171 P. 948; Bloomberg v. Laventhal, 179 Cal. 616, 178 P. 496; Van Damme v. McGilvray Stone Co., 22 Cal. App. 191, 133 P. 995. He also waived it by his instruction No. 24, hereinbefore quoted. It is a fair presumption that following this instruction the jury, in assessing the damage to the land not taken, by reason of the severance, and in assessing the benefits accruing to the remaining land, found that the benefits equaled or exceeded the damage, and therefore could give appellant no damage for the severance.

From an examination of the entire case, including the evidence, we are of the opinion that the alleged errors of which complaint is made did not result in a miscarriage of justice. Section 4½, art. 6, Const.

The judgment is affirmed, appellant to recover costs on appeal.

We concur: FINCH, P. J.; PLUMMER, J.

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105 Cal. App. 137

Ex parte BERMAN.

Cr. 1940.

District Court of Appeal, Second District, Division 2, California.

April 2, 1930.

1. Witnesses ⟹305(1) — Deposition — Waiver — Self-incrimination.

Giving deposition was not waiver of privilege against self-incrimination.

2. Witnesses ⟹305(1) — Employment as fiduciary — Waiver — Privilege.

By accepting employment as agent or fiduciary, one does not thereby waive or lose privilege against self-incrimination.

3. Witnesses ⟹308 — Answer — Incriminating tendency — Privilege.

Unless it is manifest that answer cannot possibly incriminate, witness' privilege when asserted must be respected.

4. Witnesses ⟹307 — Self-crimination — Claim of privilege — Court's duty.

When witness asserts privilege against self-incrimination, court, before committing for contempt, must determine that no direct answer could tend to incriminate.

5. Witnesses ⟹307 — Self-incrimination — Claim of privilege — Fraud.

If answer actually tends to incriminate, witness is not guilty of contempt for fraudulently asserting privilege, intending thereby to protect others.

Application by Jacob Berman for a writ of habeas corpus against the Sheriff of Los Angeles County to secure release of petitioner from custody upon a commitment for contempt of court.

Petitioner discharged.

Otto Christensen, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., Robert P. Stewart, Chief Deputy Dist. Atty., A. H. Van Cott, and William McKay, Deputy Dist. Attys., Hewitt, McCormick & Crump, Joseph L. Lewinson, and F. Walton Brown, all of Los Angeles, for respondent.

IRA F. THOMPSON, J.

[1] The petitioner was ordered confined in the county jail of Los Angeles county for contempt of court in refusing to answer twenty-five questions asked of him upon the taking of his deposition in a cause pending in the superior court, the confinement to continue until he should purge himself of the contempt by making answers to the interrogatories. The reason assigned for his refusal was that to answer the questions might tend to incriminate him.

Testimony was given by the former president of the board of directors of the Julian Petroleum Corporation to the effect that petitioner was employed by him some time in the spring of 1925 and placed in charge of the stock transfer department of that company where he continued to work until May 2, 1927. There was also testimony, and the petitioner admitted, that his deposition had been taken in a case pending in the superior court of Los Angeles county, entitled R. Guenther v. H. J. Barneson et al. All of the questions, for the refusal to answer which the petitioner was committed, relate to this deposition. Thirteen questions and answers therein were separately read to the witness, and he was asked if he had not been asked the question and made the answer. With one exception only, substantially the following question was put to him: "I ask you whether the answer just read is not a true statement of fact in response to the question just read?" In each instance the witness declared his wish to stand upon his constitutional right and refused to answer the question upon the ground that it might tend to incriminate him. The substance of the thirteen questions thus propounded in the Barneson deposition may be stated as follows: (1) Whether the witness had had some connection with the Julian Petroleum Corporation from some time in 1924 until May 3, 1927; (2) a brief description of that connection and when it originated; (3) the nature of the business transactions conducted by the witness with a man named Streeter of Barneson & Co., stockbrokers; (4) whether the witness and Streeter had transactions by which they borrowed money "one from the other"; (5) whether the witness didn't buy and sell stock to, and borrow money from Streeter; (6) when the witness first bought stock from him; (7) whether he bought stock through Streeter; (8) whether the usual transaction under which he placed orders with Streeter to buy stock was to buy it on the Los Angeles stock exchange; (9) over what period of time these transactions extended; (10) during what period of time the witness had business with Streeter by which he sold the latter stock of the Julian Petroleum Corporation; (11 and 12) whether these stock purchases through Barneson & Co. commenced some time in 1926; (13) whether the witness could fix more definitely the time when he first sold stock to Streeter or Barneson & Co. after the former had associated himself with that firm. The superior court judge, before whom the deposition was being taken and who adjudged petitioner to be guilty of contempt, found that the witness had been employed by the Julian Petroleum Corporation and had charge of the transfer of stock of that corporation from about January 1, 1926, until May 2, 1927, and that by reason of such employment he waived any privilege he might otherwise have had against disclosing his transactions in connection therewith or against testifying in the action. He also found that petitioner waived his privilege by giving his deposition in the case of Guenther v. Barneson et al. And he also made a finding to the effect that to answer the questions would not tend to criminate the petitioner of perjury and that he did not claim his privilege in good faith or "through any belief—that his answers to all or any of said questions would or might tend * * * to incriminate him, but the refusal * * * to answer each and all of said questions was * * * for the purpose of shielding and protecting defendants in this case. * * *"

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

We have, therefore, to examine first the contention that petitioner, by giving his deposition in the case of Guenther v. Barneson et al., waived his privilege against testifying, assuming for the purpose of this as well as the succeeding question, that to answer the interrogatories would tend to incriminate the petitioner. The problem is not entirely new. In Overend v. Superior Court, 131 Cal. 280, 63 P. 372, 374, the prosecuting witness who had testified at the preliminary hearing of one against whom a criminal complaint had been filed, refused to testify at the trial in the superior court on the ground that his evidence might tend to criminate him. The trial judge thereupon found that the witness had waived his privilege by testifying at the preliminary hearing and sentenced him for contempt. The Supreme Court says, in reviewing the judgment of contempt: "It appears that the trial court based its judgments of contempt largely upon the ground that the witness had, without objection, testified at the preliminary examination of Minnie Campbell, and for that reason had waived his right to refuse to testify at the trial upon the ground that his evidence would tend to convict him of a felony. The position of the trial court in this regard is untenable. This question of waiving the privilege is discussed and decided in Temple v. Commonwealth, 75 Va. 896, and Cullen v. Commonwealth, 24 Grat. [65 Va.] 624. It is said in those cases that the witness' statements elsewhere have nothing to do with the question." We find a like declaration in People v. Cassidy, 213 N. Y. 388, 107 N. E. 713, 715, Ann. Cas. 1916C, 1009, as follows: "The weight of authority is against the claim of the people that Walter by giving testimony before Justice Scudder waived his constitutional right to decline to give testimony on the trial of Willett that could be used against him in a criminal case. Emery v. State, 101 Wis. 627, 78 N. W. 145; Overend v. San Francisco Sup. Ct., 131 Cal. 280, 63 P. 372; State v. Burrell, 27 Mont. 282, 70 P. 982; Temple v. Com., 75 Va. 892; Cullen v. Com., 24 Grat. ([65] Va.) 624; Matter of Mark, 146 Mich. 714, 110 N. W. 61; Samuel v. People, 164 Ill. 379, 45 N. E. 728; Georgia R. & [B.] R. Co. v. Lybrend, 99 Ga. 421, 27 S. E. 794; Miskimmins v. Shaver, 8 Wyo. 392, 58 P. 411, 49 L. R. A. 831; Boston Marine Ins. Co. v. Slocovitch, 14 N. Y. St. Rep. 718; Cullinan v. Quinn, 95 App. Div. 492, 88 N. Y. S. 963; Com. v. Phoenix Hotel Co., 157 Ky. 180, 162 S. W. 823; State v. Lloyd, 152 Wis. 24, 139 N. W. 514, Ann. Cas. 1914C, 415; Ex parte Wilson, 39 Tex. Cr. R. 630, 47 S. W. 996." These authorities amply establish the rule prevailing in this jurisdiction, and, as we think, in accordance with sound reason.

[2] We therefore turn to the claim that the witness had waived his privilege by reason of his employment as agent of the Julian Petroleum Corporation. A more definite and accurate statement of the proposition advanced is, that one who is employed in a fiduciary capacity has no privilege to assert in so far as his testimony relates to transactions occurring in the course of his employment. In other words, if this argument be sound, an agent accused of embezzlement is not accorded the same protection against giving testimony to be used to convict him as is one charged with murder. If this be true it is a strange anomaly in the law. Nor has our attention been called to any authority which directly supports the argument. We have been cited to Johnson v. U. S., 228 U. S. 457, 33 S. Ct. 572, 57 L. Ed. 919, 47 L. R. A. (N. S.) 263, and In re Fuller, 262 U. S. 91, 43 S. Ct. 496, 67 L. Ed. 881, but those authorities simply determine that where the title to one's books and records has passed to his trustee in bankruptcy that the bankrupt has "no constitutional right to prevent" their "use for any legitimate purpose." Furthermore, it cannot possibly be urged that Eggers v. Fox, 177 Ill. 185, 52 N. E. 269, is in point. That case simply decides that where a witness does not assert his privilege it is error for the court to refuse to permit him to testify. No one, of course, can seriously contend that an agent is not under the necessity of accounting to his principal, as is declared in the two English cases relied upon by counsel, Green v. Weaver, 1 Simons Rep. 404, and Robinson v. Kitchin, 25 Law Journal, Equity, New Series, 441 (1855), but it can scarcely be argued that because therein it was held incumbent upon the brokers to relate their transactions even though incidentally they became subject to statutory penalties, not by reason of the things and matters it was sought to discover, but as the result of assuming to act as brokers at all, that those authorities should have the effect of persuading us to limit the natural extent of a constitutional provision adopted for the very purpose of putting an end to the practice of extorting confessions and admissions which once prevailed in the absence of such a guaranty. We are not at all inclined to whittle away at these safeguards of American liberty until they become nothing but shallow pretenses, but rather we would, wherever proper and possible, give them renewed vigor and renewed vitality. Not only from the standpoint of reason but also from precedent in our own jurisdiction do we feel constrained to declare that an agent does not, by becoming such, waive his constitutional right not to give testimony tending to incriminate him. In People v. Millsap, 85 Cal. App. 733, 260 P. 378, 380, the defendant was charged with perjury in having verified an answer to a complaint. The court said: "The allegations which we have summarized from the complaint clearly show that the appellant received money of the plaintiff in said civil action in a large amount; that at the time he received it he was acting in a fiduciary capacity for her; that instead of investing and

keeping it for her, which he should have done in the due and lawful execution of his trust, he fraudulently appropriated it to his own use and refused on demand to return it. This is sufficient to make out a case of embezzlement, under sections 503 and 506 of the Penal Code. 10 Cal. Jur. 265; People v. Shearer, 143 Cal. 66, 76 P. 813; People v. Gordon, 133 Cal. 328, 65 P. 746, 85 Am. St. Rep. 174; People v. Steffner, 67 Cal. App. 23, 227 P. 699. Although neither the date at which this misappropriation occurred nor the dates on which plaintiff demanded the return of her money are alleged, yet a prosecution for the embezzlement was not barred by the statute, at least as to the sum of $8,500, for that amount was received by appellant within three years before he verified the answer, and, of course, could not have been embezzled before it was received. An admission of the truth of these allegations would therefore have subjected appellant to a criminal prosecution for embezzlement, and he was not required by section 446 of the Code of Civil Procedure to verify his answer."

[3] Turning now to the finding of the court that the petitioner's claim of privilege was not asserted in good faith, but, for the purpose of shielding certain of the defendants, let us consider to what extent the court is authorized to decide the questions the witness must answer. It must be obvious, as is said in Overend v. Superior Court, supra, that the witness "is not required to disclose all the facts, as this would defeat the object for which he claims protection." It is equally apparent that the witness cannot arbitrarily refuse to testify without the existence in fact of a real danger; and that some discretion must rest in the court whereby it may prevent the mantle of protection from being turned into a cloak for fraud and trickery. What is the test by which the court and the witness are to be guided in the adjustment of apparently conflicting rights? Chief Justice Marshall, in the case of U. S. v. Burr (In re Willie), 25 Fed. Cas. page 38, No. 14,692e, said:

"When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable extent, and according to the true intention of the rule and of the exception to that rule, by observing that course which it is conceived courts have generally observed. It is this:

"When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. *If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims.* It follows necessarily then, from this statement of things, that if the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, *it must rest with himself, who alone can tell what it would be, to answer the question or not.* If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact. If the declaration be untrue, it is in conscience and in law as much a perjury as if he had declared any other untruth upon his oath; as it is one of those cases in which the rule of law must be abandoned, or the oath of the witness be received.

"The counsel for the United States have also laid down this rule according to their understanding of it; but they appear to the court to have made it as much too narrow as the counsel for the witness have made it too broad. According to their statement a witness can never refuse to answer any question unless that answer, unconnected with other testimony, would be sufficient to convict him of a crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to *furnish any one of them against himself.* It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description." (Italics ours.)

That this concise yet comprehensive statement of the celebrated chief justice remains the law to-day is evident from the fact that almost every case throughout the United States, down to and including Mason v. United States, 244 U. S. 362, 37 S. Ct. 621, 61 L. Ed. 1198, has quoted it with approval.

Another leading pronouncement is one by Lord Chief Justice Cockburn in Regina v. Boyes, 1 Best & S. 311, adopted in the case of Brown v. Walker, 161 U. S. 591, 16 S. Ct. 644, 648, 40 L. Ed. 819, as follows:

" 'To entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer,' although, 'if the fact of the witness being in danger be once made to appear, *great latitude should be allowed to him in judging for himself of the effect of any particular question.*'

" 'Further than this,' said the Chief Justice, 'we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things; not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law, and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding inter alios, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice." (Italics ours.)

In Ex parte Butt, 78 Ark. 262, 93 S. W. 992, 995, the court quotes from State v. Thaden, 43 Minn. 255, 45 N. W. 447, relative to the rule laid down by Chief Justice Cockburn as follows: "To this we would add that, when such reasonable apprehension of danger appears, then, inasmuch as the witness alone knows the nature of the answer he would give, he alone must decide whether it would criminate him. This, we think, is substantially what Chief Justice Marshall meant by his statement of the rule in the Burr trial." Another phrasing of the rule is contained in Wilson v. Ohio Farmers' Ins. Co., 164 Ind. 462, 73 N. E. 892, 893, in these words: "If a witness places his refusal to answer on this ground, his claim of privilege must be respected, *unless it be clear from his whole examination that he is mistaken in the supposition* that his answer would tend in any degree to criminate him, or else that his refusal is purely contumacious. * * * An admission, for instance, that he had converted moneys which came into his hands as agent of appellant during the time in question would furnish an important item of evidence under an indictment assigning perjury upon the testimony that he gave upon his trial for embezzlement. * * *" (Italics ours.) To the same general effect reference may be had to Foot v. Buchanan (C. C.) 113 F. 156; People v. Zazove, 311 Ill. 198, 142 N. E. 543; Ex parte Senior, 37 Fla. 1, 19 So. 652, 32 L. R. A. 133; Floyd v. State, 7 Tex. 215; Poole v. Perritt, 1 Speers (S. C.) 128; Chamberlain v. Willson, 12 Vt. 491, 36 Am. Dec. 356; Ex parte Irvine (C. C.) 74 F. 955; Word v. Sykes, 61 Miss. 649; Kirschner v. State, 9 Wis. 140; U. S. v. Heike (C. C.) 175 F. 852; State v. Edwards, 2 Nott. & McC. (S. C.) 17, 10 Am. Dec. 557; In re Moser, 138 Mich. 302, 101 N. W. 588, 5 Ann. Cas. 31.

We should not close this résumé of precedent law without two or three excerpts from cases bearing particularly upon the question of the good faith of the witness. From People v. Forbes, 143 N. Y. 219, 38 N. E. 303, 306, we select this language:

"The witness who knows what the court does not know, and what he cannot disclose without accusing himself, must in such cases judge for himself as to the effect of his answer; and if, to his mind, it may constitute a link in the chain of testimony, sufficient to convict him when other facts are shown, or to put him in jeopardy, or subject him to the hazard of a criminal charge, indictment, or trial, he may remain silent. While the guilty may use the privilege as a shield, it may be the main protection of the innocent; since it is quite conceivable that a person may be placed in such circumstances, connected with the commission of a criminal offense, that, if required to disclose other facts within his knowledge, he might, though innocent, be looked upon as the guilty party. Adams v. Lloyd, 3 Hurl. & N. 363.

"But it is urged that the relator made use of the privilege, not in good faith, for his own protection from any peril, actual or apprehended, but as a pretext for shielding his friends or associates, and that the facts and circumstances before the learned judge presiding at the oyer and terminer were of such a nature as to warrant him in so deciding as a matter of fact, and that such finding is not reviewable here. The weight of authority seems to be in favor of the rule that the witness may be compelled to answer when he contumaciously refuses, or when it is perfectly clear and plain that he is mistaken, and that the answer cannot possibly injure him, or tend in any degree to subject him to the peril of prosecution. But the courts have recognized the impossibility in most cases of anticipating the effect of the

answer. Where it is not so perfectly evident and manifest that the answer called for cannot incriminate as to preclude all reasonable doubt or fair argument, the privilege must be recognized and protected."

In Sovereign Camp Woodmen of World v. Bailey (Tex. Civ. App.) 163 S. W. 683, 684, we find the following:

"When a witness desires to be relieved from answering a question, he must swear that he believes that his answer would incriminate him. He cannot sit silently by and refuse to answer without giving a reason for his silence. Rosendale v. McNulty, 23 R. I. 465, 50 A. 850; Ex parte Stice, 70 Cal. 51, 11 P. 459; Scott v. Miller, 5 Jur. N. S. 858, cited in note to the Ohio case herein cited. The privilege cannot be put forward for the purpose of concealing facts in the interest of some third person. People v. Foundry Co., 201 Ill. 236, 66 N. E. 349; Re Moser, 138 Mich. 302, 101 N. W. 589, 5 Ann. Cas. 31; Lewisohn v. O'Brien, 176 N. Y. 253, 68 N. E. 353.

"In this case, if it should not appear that the evidence asked of the Holzheusers as to the killing of L. H. Bailey would subject them to any danger from a criminal prosecution, but that the rule intended for the protection of accused persons is being used to protect the interests of the minor child, they should be compelled to answer. They should be compelled to swear unequivocally that their testimony would incriminate them, and then the court should be satisfied that there is reasonable ground to apprehend danger to the witnesses from their being compelled to answer."

And in Re Stewart, 121 Wash. 429, 209 P. 849, 852, quoting from what the court designates the modern rule as found in 28 R. C. L. 428, it is said: "There are several English authorities which hold that a witness is the sole judge of whether answering a certain question asked would tend to incriminate him. There are also American authorities which seem to lean to the same view. However, the great weight of authority is to the contrary, and it is now settled, both in England and in this country, that it is the province of the court to determine in the first instance under all the circumstances of the case whether any direct answer to a proposed question has a tendency to criminate a witness, and, of course, it is the duty of the court, while it protects the witness in the due exercise of his privilege, to take care that he does not, under the pretense of defending himself, screen others from justice, or withhold evidence which he might safely give. Otherwise it would be in the power of every witness to deprive parties of the benefit of his testimony, by a merely colorable pretense that his answers to questions would have a tendency to implicate him in some crime or misdemeanor, or would expose him to a penalty or forfeiture, *when it is clear that the questions have no such tendency.* The court must be able to discern from the character of the question and the other facts adduced in the case some tangible and substantial probability that the answer of the witness might help to convict him of a crime. Sometimes it may be difficult to discern the dividing line, but in all such cases, the doubt should be solved in favor of the witness. Certainly, where the witness, on oath, declares his belief that the answer to the question would criminate or tend to criminate him, the court cannot compel him to answer, unless it is perfectly clear, from a careful consideration of all the circumstances of the case, that the witness is mistaken, or is acting in bad faith, and that the answer cannot possibly have any such tendency. For the purpose of this discussion a question that criminates, or tends to criminate, a witness may be defined as one the answer to which will show, or tend to show, him guilty of a crime for which he is yet liable to be punished." (Italics ours.)

[4, 5] It cannot be doubted, from the authorities from which we have quoted and which we have cited, that the court is first charged with the responsibility of determining whether there is a real danger. Obviously, it can as a matter of law say in a proper case that the statute of limitations has run against the offense. Where complete immunity is provided by law, it can so determine. Where the facts disclose beyond reasonable doubt that the acts which the witness fears to disclose do not in law constitute an offense, it can so declare. In all of the cases cited, however, it is to be observed that the statement is that it is the province of the court to say "whether any direct answer to a proposed question has a tendency to criminate" the witness which is but another way of saying that the court must determine that no direct answer which the witness may make can tend to criminate him. When the petitioner here was asked whether the answers did not relate "a true statement of fact in response to the" questions asked, if he had answered "No," he would have given evidence, which beyond all peradventure of doubt would have tended to convict him of perjury. It would have been a direct answer. How could the trial judge possibly find that no direct answer could tend to criminate him? This is an example of what Chief Justice Marshall had in mind when he said:

"If the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not." And likewise

it cannot be gainsaid that if the witness here had answered the interrogatories asking whether he gave the answers claimed to have been given by him in the deposition he would, if he was in fact liable to prosecution for perjury, have forged one of the links in the chain of evidence necessary to convict him. The view we entertain makes it unnecessary to discuss the question whether answers to the interrogatories would also have had a tendency to criminate the witness of the crime of embezzlement in connection with the affairs of the Julian Petroleum Corporation. It is but just to say that there was some evidence introduced indicating a desire on the part of the witness to protect certain defendants in the action. He testified, however, that that was not the reason he refused to testify. Additionally, it should be noted that wherever the fraud of the witness is assigned as a reason why the witness may be compelled to break his silence it is connected with a statement to the effect "that the answer cannot possibly have the tendency" to criminate him. In other words, where the answer does have the tendency to criminate, it can make no difference what other purpose his silence serves. This is the substance of the decision in People v. Forbes, supra.

Petitioner is discharged.

We concur: WORKS, P. J.; CRAIG, J.

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105 Cal. App. 236

In re JACOBSEN.

Civ. 7227.

District Court of Appeal, Second District, Division 2, California.

April 14, 1930.

Attorney and client ⟹ 40 — Disbarment — Admission to bar — False affidavit.

False statement in attorney's affidavit for admission to bar that no disbarment proceedings had been filed against him warranted revocation of license.

The evidence disclosed that the respondent had been disbarred by the court of common pleas of Cuyahoga county, Ohio, and that judgment had been reversed by the Court of Appeals in that state, and that, in addition, other charges had been preferred against respondent before the Cleveland Bar Association. Respondent's affidavit for admission to the bar stated that no such proceedings had been filed against him "before any bar association, court, or other body." The respondent claimed that he had told one of his sponsors before his application for admission the full details of the complaint which resulted in the judgment of disbarment, and was advised that it was unnecessary to mention that fact.

Petition by the State Bar of California and the Los Angeles Bar Association for revocation of an order admitting Victor L. Jacobsen to practice law.

Order set aside, and respondent's license revoked.

Charles L. Nichols, of Los Angeles, for petitioner State Bar of California.

Joe Crider, Jr., of Los Angeles, for petitioner Los Angeles Bar Ass'n.

Thatcher J. Kemp, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

Victor L. Jacobsen was admitted to practice before all of the courts of this state by an order made on June 14, 1926. This is a petition for the revocation of that order. The affidavit of Jacobsen supporting his application for admission contained the following language: "That so far as affiant is aware, no charges of unprofessional conduct or proceedings for disbarment have been filed against affiant before any bar association, court or other body." It is now made to appear, however, that this statement was false; that prior to the application the applicant had been disbarred by the court of common pleas of Cuyahoga county, state of Ohio, and that the judgment had been reversed by the Court of Appeals of the Eighth District of that state; that, in addition thereto, other charges had been preferred against him before the Cleveland Bar Association; and that he had appeared before the grievance committee of that body to answer to the charges.

We see no merit in the uncorroborated claim of respondent that he told one of his sponsors before his application for admission here the full details of the complaint, which resulted first in a judgment of disbarment, later reversed by the Court of Appeals, and was by him advised that it was unnecessary to mention the fact. The language of the affidavit is clear, explicit, and comprehensive. Candor and honesty dictated that the facts be set forth. These virtues in the members of the profession have ranked as indispensable for several centuries, and are essential to him who would fulfill his primary duty, that of aiding in the administration of justice. Not only are they time-honored, but their possession is a universal requirement in all enlightened countries. It is impossible, therefore, for a lawyer to shield himself from the consequences of untruthful and false statements

by placing the burden upon another's shoulders. The same response must be made to his claim that he does not remember receiving notice of the hearing upon the other charges before the grievance committee of the Cleveland Bar Association. It is evident that he appeared there and attempted to defend himself. His statement that he thought the charges related to a man named Laudato, who was known to him not to be a lawyer, is too flimsy to merit any consideration, except that it does indicate the insincerity with which he has dealt and apparently hopes to continue to deal with this and other tribunals of justice. We have no hesitancy in applying the words of this court in Re Lasley, 61 Cal. App. 59, 214 P. 284, 285, as follows: "Regardless of whether the charges against him were well or ill founded, it was his duty to report them to this court and to the board of bar examiners, and to set forth in his affidavit a truthful statement of all facts in order that his previous record might be carefully delved into by those charged with that responsibility"—to the facts here.

The order admitting Victor L. Jacobsen to practice law is set aside, and his license revoked.

I concur:

CRAIG, Acting P. J.

Owing to the absence of Presiding Justice WORKS, he does not participate in this decision.

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105 Cal. App. 258

LESTER et ux. v. SUPERIOR COURT, TULARE COUNTY, et al.

Civ. 308.

District Court of Appeal, Fourth District, California.

April 15, 1930.

1. Exceptions, bill of ⚷48 — Notice — Presentation for settlement.

Party moving to settle bill of exceptions *held* not required to give notice thereof, where both bill of exceptions and amendments were filed with clerk within ten days allowed by statute (Code Civ. Proc. § 650).

Petition for writ of mandamus by H. D. Lester and wife against the Superior Court, Tulare County, and another to compel respondents to settle a bill of exceptions.

Writ granted.

C. W. Braswell, of Long Beach, for petitioners.

Power, McFadzean & Crowe, of Visalia, and James R. McBride, of Lindsay, for respondents.

BARNARD, Acting P. J.

This is a petition for a writ of mandamus to compel the respondents to settle a bill of exceptions.

The petitioners were defendants in a certain action pending in said superior court. They appealed from an order made and entered in said action striking out their answer and counterclaim and refusing permission to file an amended answer and counterclaim. The said defendants prepared a bill of exceptions and served the same on the attorney for the plaintiffs by mail on December 6, 1929, and filed the same with the clerk of said court on December 9, 1929. On December 11, 1929, the plaintiffs served upon the attorney for defendants certain proposed amendments to said bill of exceptions, and filed the same with the clerk of said court on December 12, 1929. On December 23, 1929, the attorney for defendants served upon the attorney for plaintiffs a notice that the proposed bill of exceptions, with the amendments thereto, would be presented to the judge for settlement on January 6, 1930, at 10 o'clock a. m. When the matter came up for hearing, the plaintiffs objected to the settlement of such proposed bill of exceptions on the ground that the same was not presented to the judge of said court for settlement until after the expiration of the time fixed by law for said presentation. This objection was sustained, and the settlement of the bill of exceptions was refused. Thereupon this proceeding was instituted.

The respondents rely upon the cases of Witter v. Andrews, 122 Cal. 1, 54 P. 276, and Moultrie v. Tarpio, 147 Cal. 376, 81 P. 1112. In the first of these cases there is involved the question of notice, where the bill in question was presented directly to the judge. In the other case the proposed bill of exceptions was neither presented to the judge nor to the clerk within the time allowed. Where, however, the bill of exceptions and the amendments are delivered to the clerk of the court for the judge, no notice on the part of the moving party is required. Mellor v. Crouch, 76 Cal. 594, 18 P. 685; Curtin v. Ingle, 155 Cal. 53, 99 P. 480. Section 650 of the Code of Civil Procedure provides that the adverse party may propose amendments to a bill of exceptions within ten days after the service of such bill upon him. It then provides: "The proposed bill and amendments must, within ten days thereafter be presented by the party seeking the settlement of the bill, to the judge who tried or heard the case, up-

on five days' notice to the adverse party, or be delivered to the clerk of the court for the judge." The section then provides that, when they are received by the clerk, he must deliver them to the judge, who must then designate the time at which he will settle the same, and the clerk must immediately notify both parties of such time of settlement. In commenting upon the provisions of this section and also similar provisions of section 659 of the same Code, as they then existed, the court in Mellor v. Crouch, supra, said as follows:

"The obvious purpose of these provisions is that the parties may have notice of the time when the statement will be settled. When the statement and amendments are presented directly to the judge there is no provision for any notice of the time of settlement to be thereafter given by either the judge or clerk; and in such case, therefore, the five days' notice mentioned in section 659 must be given by the party himself. But when the papers are delivered to the clerk for the judge, the purpose of the Code is effected through the requirement that then the judge must designate a time for the settlement, and the clerk must give notice of it. The provision about the five days' notice in section 659 qualifies, we think, only the preceding clause of the sentence, and is not applicable to the case when the statement and amendments are delivered to the clerk for the judge."

Both the bill of exceptions and the amendments were filed with the clerk within the ten days allowed. Having been so filed within the time provided in the statute, it was the duty of the clerk to deliver the same to the judge, of the judge to fix the time for settling the same, and then of the clerk to notify the parties. No notice of the time of settlement was required to be given by the defendants under such circumstances. The notice given by the attorney for defendants that the matter would be presented to the judge on January 6, 1930, was unnecessary. While the trial court was under no obligation to settle the bill of exceptions at that time, it was its duty to fix a time for the settlement of the same. It follows that the order refusing to settle said bill of exceptions upon the ground that the same, and the amendments thereto, were not presented for settlement until after the time fixed by law for said presentation had expired, was erroneously entered. It is the duty of the respondents to designate a time at which said bill of exceptions will be settled, and, after notice given to the parties by the clerk, to proceed to settle the same.

It is ordered that the writ issue as prayed for.

We concur: MARKS, J.; OWEN, Justice pro tem.

105 Cal. App. 213

MUNSON v. KIRBY et al.★

Civ. 5691.

District Court of Appeal, Second District, Division 2, California.

April 14, 1930.

Rehearing Denied May 14, 1930. Hearing Denied by Supreme Court June 12, 1930.

1. Brokers ⚷86(1) — Commission — Action — Evidence — Sufficiency.

Evidence *held* to support judgment for plaintiff suing to recover broker's commission for sale of land sold by defendants.

The testimony indicated that defendants' listings of the property must have been intended and understood by all parties to have been with plaintiff, that the original contract between seller and purchaser was initiated by plaintiff's employee, and that the purchaser was actually procured by him acting for plaintiff.

2. Appeal and error ⚷916(3), 931(1) — Objections in lower court — Pleadings — Proof — Sufficiency — Presumption.

Doubt respecting sufficiency of pleadings and proof should be resolved against appellant raising question for first time on appeal.

3. Appeal and error ⚷193(5), 209(2) — Objections in lower court — Pleadings — Proof — Sufficiency.

Alleged failure of broker suing for commissions to plead and prove license *held* not reversible error, where question was raised for first time on appeal (St. 1919, p. 1259, § 20).

Plaintiff apparently attempted to plead compliance with St. 1919, p. 1259, § 20, regulating real estate brokers and providing for licenses, and the action was tried on the theory that the allegations of the complaint were sufficient to comply with the statute.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by Margaret Munson, doing business under the firm name of Munson Land Company, against W. H. Kirby and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Parker, Moote & Longcroft, and Noren Eaton, all of Los Angeles, for appellants.

C. Ray Noll, of Los Angeles, for respondent.

NORTON, Justice pro tem.

This is a suit by plaintiff to recover a broker's commission for the sale of certain real property sold by defendants to the American

born children of one K. Muto, a native of Japan. In the superior court judgment was rendered in favor of plaintiff, and from that judgment this appeal is prosecuted.

Appellants make the point that the evidence was insufficient to support the judgment, in that there was no evidence that Thomas Munson, who conducted the negotiations upon which plaintiff bases her claim, was actually an agent of or in the employ of plaintiff at the time of these negotiations, nor that the listings of the property for sale made by appellants were made with plaintiff, nor any evidence that either Thomas Munson or plaintiff or any one acting for her actually procured the purchaser to whom appellants sold the property.

[1] The evidence in this case is to some extent conflicting, but, after a careful examination of the testimony, this court has no doubt but that there is ample evidence to sustain the findings of the trial judge in all the particulars complained of by appellants. The testimony and all the circumstances and evidence in the case indicate strongly that the two listings of the property executed by appellants must have been intended and understood by all parties to have been with plaintiff, and that Thomas Munson was acting for her and as her employee. There is likewise sufficient evidence to justify the trial judge in his conclusion that the original contract between seller and purchaser was initiated by plaintiff's employee, and that the purchaser was actually procured by him acting for plaintiff. Due, perhaps, to defective knowledge of the English language on the part of K. Muto, the testimony is not clear and definite as to the status of his relations during the negotiations with his cousin H. Muto, who to some extent appears to have represented him during the transaction. It is apparent, however, from the evidence that H. Muto was, during his association with the transaction, acting with the consent of and for K. Muto, who furnished the funds to purchase the property, and, in the opinion of this court, the conclusion of the trial judge that the plaintiff was the procuring and inducing cause of the sale is fully sustained by the evidence.

Appellant specifies certain rulings of the court in excluding and admitting evidence which are alleged to be error, but in the opinion of this court the contention of appellant in this regard is without merit.

[2, 3] A more serious ground for reversal urged by appellant is the claim that plaintiff failed to allege in her complaint and also failed to prove that she was a duly licensed real estate broker at the time the alleged cause of action arose, as required by section 20 of the Act of 1919 (St. 1919, p. 1259) creating a state real estate department and regulating real estate brokers and salesmen. Plaintiff in her complaint apparently attempted to plead compliance with this act, but her allegations in this regard are criticized by appellants as not being a statement of her status as a real estate broker at the time the cause of action arose. The complaint was verified and no denial of the allegations therein contained in this behalf was made in the answer. At the commencement of the trial plaintiff's attorney stated the licensing of plaintiff in practically the language of the complaint and asserted that it was admitted by the pleadings and further replied in the affirmative to the question of the trial judge as to whether plaintiff was licensed to sell real estate as provided by the statute. Immediately thereafter attorney for appellant moved to dismiss as to one defendant, on the ground that the pleadings set forth no cause of action against her, but made no mention of the alleged defect, which is complained of on this appeal. The point was not made at any subsequent phase of the trial, and, so far as disclosed by the record, is raised for the first time on appeal to this court.

We cannot escape from the conclusion that the action was tried on the theory that the allegations of the complaint were sufficient to comply with the statute and were admitted by the parties to the action. There is no question but that the attorney for plaintiff so believed, and that the trial judge was led to concur in this belief, apparently with the knowledge and acquiescence of defendants' counsel.

In the circumstances, any doubt as to the sufficiency of the pleadings and proof should be resolved against the appellant. Houston v. Williams, 53 Cal. App. 267, at page 272, 200 P. 55; Cushing v. Pires, 124 Cal. 663, 57 P. 572; Collection Service Corp. v. Conlin (Cal. App.) 277 P. 749.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

105 Cal. App. 199

CITY OF LOS ANGELES v. BOARD OF SUP'RS OF MONO COUNTY et al.

Civ. 4055.

District Court of Appeal, Third District, California.

April 12, 1930.

1. Appeal and error ⟹771 — Neglect to file opening brief — Inadvertence of clerk — Excusable.

Failure to file opening brief in time, due to inadvertence of clerk in legal division of city water department in not notifying attorneys for city of filing date, *held* excusable, warranting denial of motion to dismiss appeal.

Though appellant's showing for relief was not strong and it did not appear that it was very diligent in making application therefor, appellant being a municipality was required to rely entirely upon its officers and agents; the value of the property involved was large, and respondents had suffered no prejudice from the delay in filing the brief.

2. Appeal and error ⟹770(1) — Hearing on merits — Favored.

A hearing on merits of case is favored wherever possible.

Appeal from Superior Court, Mono County; Raglan Tuttle, Judge.

Suit by the City of Los Angeles against the Board of Supervisors of Mono County, and M. Y. S. Kirkwood and others, as members of and constituting the Board of Supervisors of Mono County, and Charles L. Hayes as the District Attorney of the County of Mono. From a judgment dismissing the application for writ of mandate to compel cancellation of all assessment certificates of sale for delinquent taxes and tax deeds of certain lands in Mono County, the City of Los Angeles appeals. On motion to dismiss the appeal, and on motion to be relieved from default.

Motion to dismiss denied, and motion for relief from default granted.

Erwin P. Werner, City Atty., of Los Angeles, W. Turney Fox, of Glendale, and W. B. Mathews, George T. Warren, and Kenneth K. Scott, all of Los Angeles, for appellant.

Charles L. Hayes and A. Boyer, Dist. Atty., both of Bridgeport, and Platt & Sanford, of Carson City, Nev., for respondents.

FINCH, P. J.

This is a motion to dismiss the appeal herein on the ground that the appellant has failed to file its opening brief in due time. The appellant has applied to be relieved from such default on the grounds of inadvertence and excusable neglect.

The appeal is from a judgment denying appellant's application for a writ of mandate to compel the cancellation, pursuant to the provisions of section 3804a of the Political Code, of all assessment certificates of sale for delinquent taxes and tax deeds of its lands in Mono county, on the ground that such land is exempt from taxation.

The transcript on appeal was filed in the Supreme Court June 20, 1929. Appellant's time to file its opening brief was extended by stipulation to January 1, 1930. On February 18, 1930, respondents filed notice of motion to dismiss the appeal on the ground stated. Thereafter the cause was transferred to this court, and on March 1 respondents filed notice that they would move for a dismissal of the appeal on March 24 on the ground stated in the first notice. Appellant's opening brief was delivered to the clerk of this court on March 20, and its application to be relieved from its default was filed on the same day.

[1] It appears from the affidavits filed in support of the appellant's application, among other alleged excuses, "that in the year 1929, there was an office system in force in the legal division of the department of water and power whereby attorneys in charge of court cases were notified as to dates of appearances, hearing on appeal, time briefs were due, etc., so that the attorneys would be advised in advance in sufficient time to make their appearances and file briefs"; that a clerk in the legal division of the department of water and power "was required to keep a record of all civil actions * * * and a calendar of appearances, hearing, appeals, brief due dates, etc."; that through oversight and inadvertence such clerk neglected to notify the attorneys for the appellant "that the time in which to file appellant's opening brief * * * would expire January 1, 1930"; that the attorneys for appellant "relied upon said system" and did not know until the notice to dismiss the appeal was served "that the time had elapsed within which to file appellant's opening brief." The affidavits further show that the proceeding involves the title to 11,720 acres of land of the value of $300,000.

[2] It must be conceded that appellant's showing for relief is not strong and that it was not very diligent in making application therefor. On the other hand, it may be said that the appellant, being a municipality, must rely entirely upon its officers and agents; that the value of the property involved is large; and that it is apparent that the respondents have suffered no prejudice

from the delay. "It is the policy of the law to favor, wherever possible, a hearing on the merits." Waybright v. Anderson, 200 Cal. 374, 377, 253 P. 148, 149. "Generally lawyers who are actively engaged in professional duties adopt a system or plan by which their manifold duties may be directed to their attention, and they become so accustomed to the functioning of the system that, when a break in the chain occurs, they should not be held to the same strict accountability as though the habit of reliance upon the system had not been formed." H. G. B. Alexander & Co. v. Martz, 90 Cal. App. 360, 361, 265 P. 881, 882. Reliance upon some such system is manifestly necessary in the legal department of a great city. The following additional cases illustrate the liberality exercised by the courts in relieving parties from their defaults where relief can be granted without injustice to other parties: Gorman v. California Transit Co., 199 Cal. 246, 248 P. 923; Haviland v. Southern California Edison Co., 172 Cal. 601, 158 P. 328; Mardesich v. City of Los Angeles (Cal. App.) 279 P. 810; Yolo W. & P. Co. v. Edmands, 45 Cal. App. 410, 187 P. 755; Borgmeyer v. Solomon, 39 Cal. App. 106, 178 P. 544; Pacific Power Co. v. State, 31 Cal. App. 719, 162 P. 641; Hagenkamp v. Equitable L. Assurance Soc., 29 Cal. App. 713, 156 P. 520.

The motion to dismiss the appeal is denied, and the motion for relief from default is granted.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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105 Cal. App. 94

HAYES v. CITY OF LONG BEACH et al. ★

COLLETT v. SAME.

Civ. 7042, 7059.

District Court of Appeal, Second District, Division 2, California.

April 4, 1930.

Hearing Denied by Supreme Court June 2, 1930.

1. Municipal corporations ⟹218(8, 9) — Civil service — Reduction — Good of public service — Employee — Hearing — Reasons — Appeal.

City employees laid off for good of service according to seniority *held* not entitled to reasons for discharge, hearing, or appeal.

Charter of City of Long Beach, § 106, provides that no employee in classified service shall be discharged or reduced in rank or compensation until presented with reason for discharge specifically stated in writing, and given opportunity to be heard. Section 107 provides that employee in classified service dismissed from department by city manager may appeal from decision of such officer to civil service board. Rule 14, § 2, of the rules and regulations of city authorizes reduction in force according to seniority for good of public service.

2. Mandamus ⟹107 — Municipality — Employees — Discharge — Good of service — Salary.

City employees, laid off for good of service, not having performed further service, *held* not entitled to mandamus to compel payment of salary (Code Civ. Proc. § 1085).

Appeals from Superior Court, Los Angeles County; Percy Hight, Judge pro tem.

Separate applications by F. M. Shrode, and by Daniel F. Collett, opposed by the City of Long Beach, a municipal corporation, and others, for writ of mandate to compel issuance of salary warrant, wherein J. Evelyn Hayes, as executrix, was substituted as petitioner for F. M. Shrode, deceased. From a judgment for defendants in the first action and from an order sustaining a demurrer to petition in second action and judgment rendered, petitioners appeal.

Affirmed.

Burr A. Brown, of Long Beach, for appellants.

Nowland M. Reid, City Atty., and Edmund J. Callaway, Deputy City Atty., both of Long Beach, for respondents.

CRAIG, Acting P. J.

Petitioners F. M. Shrode, since deceased, and Daniel F. Collett, claiming to be employees of the city of Long Beach, in Los Angeles county, each petitioned the superior court for a writ of mandamus requiring the approval, allowance, and issuance of his warrant for salary. A demurrer to the petition of Shrode was overruled, and after trial on the merits judgment was rendered in favor of the defendants. A like demurrer to the petition of Collett was sustained without leave to amend. Upon the demise of F. M. Shrode, the executrix of his estate was substituted for the purposes of these proceedings. The petitioners appeal from the adverse rulings above mentioned.

In all of the respects pertinent to a discussion of the pleadings each case presents the same questions. It is alleged that the petitioners were employed under and were subject to the provisions of rules and regulations adopted in accordance with the city charter, which were in force and effect at all of the times mentioned. The enabling provisions of the charter, and the material portions of such rules and regulations, are set forth in the

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

petition. The petitioners aver that while so employed they were notified in writing by the city manager that, effective within one day from the date of notice, they would be "laid off," "out of your order of seniority," "for the good of the service." Within three days thereafter, Shrode "made application for an appeal from the aforesaid order or notice." Previously to such notification, Collett, having been advised by an assistant to the city manager that his services would be terminated about one year later, and being informed by said official that such decision was final, made application for an appeal; but it is not alleged that he sought an appeal from the order laying him off. Each employee requested that he be presented with specific reasons or grounds for the action taken, and that he be afforded a hearing thereon. Neither a hearing nor an appeal was permitted in either instance. Thereafter petitioners presented themselves as ready, able, and willing to perform their former duties, but were not reinstated. Their warrants for compensation during the succeeding months were rejected, whereupon they petitioned the superior court for mandatory relief, as already stated.

It is contended by petitioners that "each and all of the aforesaid acts and conduct * * * were had without sufficient reasons being specifically stated in writing for such suspension, discharge and reduction in rank and/or compensation; that said plaintiff * * * was denied an opportunity to be heard on appeal, * * * was denied a trial and hearing before such civil service board under the rules and regulations of such board and the provisions of the city charter of said city." Various provisions of the city charter and of the rules and regulations of said municipality are pleaded, among which are the following:

Rule XIV: "Sec. 2. Whenever, for lack of work or lack of funds or other necessary cause, it becomes necessary in any department to reduce the force in any employment within the civil service, the employee last certified for employment in such classification, who has been accepted, shall be laid off first; providing that the good of the public service shall at all times be considered and the board shall have power to waive this provision. Where individual rights conflict with public rights it is understood that the former must give way."

Section 106 of the city charter: "No employee in the classified service shall be discharged or reduced in rank or compensation until he has been presented with reasons for such discharge or reduction in rank or compensation specifically stated in writing; and has been given an opportunity to be heard before the board in his own defense."

Section 107 of the city charter: "Any employee of any department in the city in the classified service who is suspended, reduced in rank, or dismissed from a department by the head of that department or the city manager may appeal from the decision of such officer to the civil service board. * * *"

[1, 2] There are further allegations of fact and of legislative enactment, but from the foregoing it is apparent that their recital could serve no purpose of the petitioners. It is obvious that their recital of the charter and rules by which respondents are governed do not specially enjoin the performance of an act, or entitle the petitioners to the use or enjoyment of a right from which they are precluded, when construed in the light of admitted circumstances and conditions. Code Civ. Proc. § 1085. It nowhere appears that they performed any service for which the demanded compensation is due them, nor is it denied that the municipal departments to which they are attached were invested with discretionary powers as recited in section 2 of rule XIV. It does not lie within the province of a judicial tribunal to say as a matter of law that such discretion was in this instance abused, nor is it attempted to be asserted that the authority conferred by said charter or rules was unjust or oppressive, or that it was discriminatory as to the petitioners. The only argument or citation of legal persuasion anywhere offered in their briefs relate solely to the procedure available to officers or employees, discharged, suspended, or reduced in rank or compensation, without cause or without an opportunity to be heard upon specified charges. In the instant case the petitioners were *laid off* for the good of the service, out of their order of seniority, and for aught that we may decide, as a necessary reduction of the force under circumstances wherein public rights prevailed as against individual preference. No provision of any rule or statute to which our attention is directed brings an employee who may have been laid off under the express authority of section 2, rule XIV, within the purview of sections 106 and 107 of the city charter. Collett requested that charges be filed, and that he have a hearing thereon, and demanded that he be afforded an appeal, before he was notified that his department would lay him off. He had neither been laid off nor discharged when he sought to invoke this jurisdiction of the municipal board or council. Shrode merely demanded the filing of specific charges, a hearing, and an appeal within three days after receipt of the order laying him off. The intent and purpose of these orders were properly expressed by the board in response to Collett's request by a communication which stated, "Your appeal is not properly before us, for the reason that you are still in the employ of the city." It results that no grounds for mandatory relief are presented by either petition.

The order sustaining the demurrer to the petition of Daniel F. Collett, and the judgment, are affirmed; and the judgment entered against J. Evelyn Hayes, as executrix of the estate of F. M. Shrode, deceased, is affirmed.

I concur: IRA F. THOMPSON, J.

Owing to the absence of Presiding Justice WORKS, he does not participate in this decision.

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105 Cal. App. 254

SPEERS v. SPEERS.

Civ. 31.

District Court of Appeal, Fourth District, California.

April 15, 1930.

1. Divorce ⚷184(6) — Cruelty — Trial court's decision — Conclusiveness.

In divorce action for extreme cruelty, trial court's judgment of party's susceptibility to cruelty will not be disturbed on appeal.

2. Divorce ⚷236 — Property settlement — Defense to alimony — Consideration.

Property settlement alleged as defense to claim for alimony *held* merely partial payment of existing indebtedness, wife receiving no consideration.

After the alleged property settlement, the parties lived together as husband and wife, and two children were born to them. It appeared, further, that the alleged settlement was a mere compromise whereby the husband sought to avoid being sued on account of a much larger indebtedness, owing to the wife.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action for divorce by Victoria A. Speers against Froman Speers. From a judgment for plaintiff, defendant appeals. Transferred from Supreme Court.

Affirmed.

John C. Miles, of Los Angeles, for appellant.

Charles F. Reiche, of Los Angeles, for respondent.

OWEN, Justice pro tem.

This action was originally appealed to the Supreme Court, and, by appropriate order, transferred by that court to this court for decision, and is an action instituted by the plaintiff against her husband for a divorce on the ground of extreme cruelty. The answer denied the material allegations of the complaint, and set up a property settlement as a defense to plaintiff's prayer for support for herself and two minor children.

The sufficiency of the proof adduced on the trial as to cruelty, and the wife's right to all, or any part, of the sum of $50 per month awarded by the court, are the only questions involved in this appeal.

[1] No appellate court may gauge or measure the degree of susceptibility of a party in a divorce proceeding to a course of cruel conduct on the part of the other spouse. That which may be infinitely cruel to a person of intelligence, delicacy of sentiment, and innate refinement may not be cruel to a person lacking in these estimable qualities. The trial judge, sounding his judgment on the conduct of the parties, their apparent manner of living, the degree of their refinement, and the scope of their intelligence is in a position to determine if a given course of conduct by one party will result in extreme cruelty to the other. A reading of the transcript herein shows that the defendant's conduct would be extreme cruelty to a woman of refinement and delicacy of feeling. The trial judge had the plaintiff before him. His judgment as to her susceptibility to extreme cruelty will not be disturbed. Barnes v. Barnes, 95 Cal. 171, 30 P. 298, 16 L. R. A. 660.

[2] The property settlement set up as a defense to the wife's claim for alimony is dated July 24, 1923. Subsequent to that date the parties lived and cohabited together as husband and wife, and the two children were born to them. No immediate separation was had, and the contract so entered into may not alter the legal relations of the parties. Civ. Code, § 159. Notwithstanding this fact, it appears from an examination of the so-called property settlement that it was nothing but a compromise, whereby the defendant paid his wife and mother-in-law the sum of $3,000 to avoid a suit for about $8,000 due them on promissory notes and other indebtedness. It was also in evidence that he threatened to go into bankruptcy if they did not execute the agreement. After thus settling his debt for about 40 cents on the dollar, and after bringing two children into the world as the husband of the plaintiff, he appeals from the judgment of the lower court awarding the mother and children $50 per month as support.

There was no property settlement between the parties. The defendant merely paid the plaintiff and her mother what he owed them, discounting the same 60 per cent. Settling a prior obligation with no consequent benefit to one of the parties cannot be held to be a property settlement. So far as the plaintiff was concerned, there was no consideration for the

agreement. Stroud v. Thomas, 139 Cal. 274, 72 P. 1008, 96 Am. St. Rep. 111.

The judgment is affirmed.

We concur: BARNARD, Acting P. J.; MARKS, J.

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105 Cal. App. 216

PACIFIC FINANCE CORPORATION v. McGOWAN.

McGOWAN v. PACIFIC FINANCE CORPORATION et al.

Civ. 5847.

District Court of Appeal, Second District, Division 2, California.

April 14, 1930.

1. Sales ⟹41 — Caveat emptor rule — Applicability — Seller's false statements.

Rule of caveat emptor is inapplicable where seller knowingly makes false statements, falsity of which is not known to purchaser.

2. Evidence ⟹434(11) — Parol evidence — False representations — Written contract.

Seller's false representations may be proven by parol evidence, notwithstanding that there was written sale contract, since writing may be impeached for fraud.

3. Sales ⟹38(2) — Rescission — False representations — Intent.

Where buyer relies on seller's false representations, deliberate intent to defraud is not requisite to rescission (Civ. Code, § 1572).

4. Sales ⟹38(4) — Rescission — False representations — Automobile — Model — Estoppel.

Buyer of used automobile *held* not estopped to claim rescission for false representations respecting model because space in contract for year model was left blank.

Appeal from Superior Court, Los Angeles County; Erwin W. Owen, Judge.

Actions by the Pacific Finance Corporation against Major D. McGowan, and by Major D. McGowan against the Pacific Finance Corporation and another, were consolidated. From judgment in favor of McGowan, Pacific Finance Corporation and another appeal.

Affirmed.

Andrew J. Copp, Jr., of Los Angeles, for appellants.

Goudge, Robinson & Hughes, F. Walton Brown, and Ben S. Beery, all of Los Angeles, for respondent.

CRAIG, Acting P. J.

The plaintiff and appellant Pacific Finance Corporation, having instituted an action in replevin against the respondent McGowan for possession of an automobile, the latter joined issue therein, and commenced an action for rescission of a contract of conditional sale under which he acquired the same, naming said corporation and appellant Western Motors Company as defendants. The cases were consolidated, and after trial judgment was rendered rescinding the contract, and awarding to the plaintiff in the second action all moneys alleged to have been paid by him thereunder. Both companies appealed.

Certain of the findings of fact are uncontroverted. It appears that on August 17, 1922, respondent, accompanied by his son, Dorrell McGowan, were shown a Mercer automobile at the sales rooms of Western Motors Company, which he agreed to purchase, and for which he paid on account the sum of $75 in cash, and gave a Buick car for which he was allowed a credit of $400. He signed an order designated "Customer's Deposit Receipt," which described the machine as "one used Mercer automobile, touring 4 Pass.," and recited the price as $1,000, from which were deducted the above credits, and "Leaving bal due and unpaid $525.00/xx Terms P. F. C. 12 mo." Thereafter, on the same date, the parties executed a contract which provided, in part, as follows:

"The seller agrees to sell and the purchaser hereby agrees to buy the following described personal property, to wit:

———	Mercer	4-Pass. Tour	2295
Serial No.	State License No.	New or Used	No. of Cyls.
———	397794	Used	4

for the sum of $1,137.52, gold coin of the United States of America of the present standard, payable as follows: $475 upon the signing of this contract, receipt of which is hereby acknowledged, and the balance of $662.52 as follows: (specifying twelve monthly payments of $55.21 each) together with such other sums as are hereinafter provided for, it being understood and agreed that the purchase price of the said personal property as above set forth includes interest on the deferred balance to the maturity of each payment thereof, time sale and other charges, if any.

"All deferred payments to bear interest from date of maturity at the rate of eight per cent. per annum, payable monthly, and if the interest is not so paid it shall be added to and become a part of the principal, and thereafter bear the same rate of interest."

On the same date the vendor Western Motors Company sold and transferred to appellant Pacific Finance Corporation all its right and interest in the contract, On September 17 an installment of $55.21 was paid, but none

was paid during the month of October. After the third installment became due, respondent tendered $110.42, which was declined except upon condition that he also pay about $80, as expenditures incurred in maintaining the replevin suit, which was then pending. Allegations of fraud and usury were on motion of the plaintiff stricken from the answer of respondent in that proceeding. In his complaint praying a rescission of the contract, it was alleged that the Mercer car was of an older model, and of less value, than it had been represented by the seller, and that whereas it had been stated and the plaintiff had agreed that he should pay about 12 per cent. interest upon deferred installments, the rate specified in the contract amounted to more than 20 per cent. per annum; that said representations were false and fraudulent, were made for the purpose of inducing the execution of the contract; that he relied upon and innocently accepted them as true, and would not otherwise have signed the instrument in controversy. Each of these allegations was denied by appellants, and it is here contended that there was no evidence before the trial court which justified the conclusion at which it arrived.

Although the evidence is conflicting, there is evidence tending to support the allegations as to the character of car which was exhibited and which respondent was informed he was getting, and as to that which he actually received. It is not denied that he was uninformed as to models, mechanism, or values of automobiles, and was unable to operate one; that he was accompanied by his son who did the driving; and that both made inquiries of the agents of appellant Western Motors Company. They both testified that after protracted watching of the advertisements in newspapers, they visited the company's establishment in response to a list displayed in various publications which included a "1917 Mercer, 4 Pass. with extra equipment, $1000," for which they asked; that they had previously been offered a Mercer car of 1916 model for $900; and that so stating they endeavored to obtain a reduction in appellant's price, without success. Respondent testified that he "then told them distinctly and repeatedly that we were giving them a hundred dollars more because their car was a 1917 car which we preferred to the 1916"; further, that "Mr. Rogers first and Mr. Nichols afterwards, told us it was a 1917 Mercer"; "I would not know anything about the car if he told me everything there was to tell about it. I am absolutely ignorant on the matter of automobiles"; and in answer to the question, "You observed, then, that the column headed 'Model—year' and the column headed 'Serial Number' (in the contract) were both left blank?" he replied: "I did not." The son also testified: "Mr. Nichols said in comparison of the two cars that naturally the 1917 would be better than the 1916. * * * I wanted to buy an axle from them, but it was a 1917 axle and it would not fit my model"; that a mechanic informed him "it was a 1915 and not a 1917, the first time I took the car in there," about four months after the purchase. Said mechanic testified: "I was to sell some parts for the car, and the part they asked for would not fit in that car. * * * That was a 1915 automobile by the Mercer factory"; and that the 1917 model was of greater value than that of 1915. The positive refutation or defective memory of appellants' witnesses of any conversation or even mention of the year model is remarkable. In the order slip and contract, respectively, prepared by this appellant for respondent's signature, it was merely described as "one used Mercer automobile," and as "——— Mercer 4-Pass. Tour 2295 Serial No. ———." Yet appellant Pacific Finance Corporation reported and registered the machine as "Year Model 1917," "Model 22-72 Year Model 17." From the foregoing it is obvious that the respondent was led to believe that the 1915 car was manufactured in 1917. The difference between the order and the final contract as to price of the machine was also attributed by the parties to causes the legitimacy of which is disputed. As heretofore quoted, it appears in the former as $1,000, and in the latter as $1,137.52. Reduced to its final analysis during the trial it appears that the amount contested was ultimately found to be about $30, which appellants contended consisted of necessary incidental charges, whereas the respondent insisted it amounted to an illegal interest exaction. It is nowhere asserted, however, that respondent was informed that this item would be included, and the court found that the seller had misrepresented to him in this respect.

[1, 2] Appellants attack the judgment upon the ground that there was an absence of actual fraud, and that respondent so relied upon the judgment of others as to have waived any latent defect. This latter argument is founded upon the fact that the car was demonstrated prior to its purchase, and that it operated properly. Complaint is not made, however, that it would not run, but the grounds alleged for rescission were that it was much older, and of much less value, than as stated by the seller, and that its cost was then even added to after the price had been agreed upon. The issue presented here arose in Ferguson v. Koch, 204 Cal. 342, 268 P. 342, 344, 58 A. L. R. 1176, and various points urged by appellants in the instant case are so aptly discussed and decided, that we need but quote therefrom:

"The general rule is well established that, where parties deal fairly or at arm's length, the rule of caveat emptor applies, but, where honest dealing is departed from by the vendor making false statements as of his own knowledge, the falsity of which is not known to the

purchaser, such purchaser has the undoubted right to rely implicitly upon such statements, and the principle has no application. In other words, the vendor must stand mute, or at least refrain from making statements calculated to deceive.

"* * * The evidence shows that the vendee was not familiar with the different types of motors in use in Reo cars, but had merely heard that those used in the speed wagon type of auto were very good machines. The mere circumstance, therefore, that the vendee made an independent investigation of the truck does not necessarily show that he relied on his own judgment rather than upon the representations of the other party, nor does it give rise to the presumption of law to that effect. A purchaser has a right to rely on the respresentations of his vendor as to facts not within his knowledge, and the vendor cannot escape responsibility by showing that the purchaser might have ascertained upon inquiry that the representations were untrue. Sullivan v. Helbing, 66 Cal. App. 478, 226 P. 803; Whiting v. Squeglia, 70 Cal. App. 108, 232 P. 986. The trial court having found that the false representations were made, and there being ample evidence in the record to support the conclusion, the judgment must stand unless it can be said that the evidence concerning the false misrepresentations was improperly received.

"This brings us to the question whether or not parol evidence is proper to prove false representations where there is a written contract of sale. The rule is, of course, well settled that, where the parties have reduced to writing what appears to be a complete and certain agreement, it will, in the absence of fraud, be conclusively presumed that the writing contains the whole of the agreement between the parties, and that it is a complete memorial of the same, and parol evidence of prior, contemporaneous or subsequent conversations or representations or statements will not be received for the purpose of adding to or varying the written instrument. * * * It is equally well settled, however, that a writing may be impeached for fraud, and a parol warranty really made may then be relied upon rather than the written one thus shown to be fraudulently imperfect or defective. * * * Appellant has cited us to certain earlier cases in our reports which he claims make a distinction between fraudulent representations going to induce the making of a contract and representations in the nature of warranties. There is no reason why any such distinctions should exist, and, in fact, none does exist."

[3] In the cited case it appeared that the purchaser had been assured that the motor of the automobile in question was of a type used in 1925 machines; that the machine was demonstrated, and apparently satisfactory, but that later discovery that the motor in the car was a 1917 model furnished ground for rescission of the contract in an action by the vendor thereon after default in the payment of installments. That actual intent to defraud is not requisite to rescission in such cases has repeatedly been decided. In Scott v. Delta Land Co., 57 Cal. App. 320, 207 P. 389, 392, it was said: "In a civil action the good faith of the party who procures the assent of another to the making of a contract by material misrepresentations is of no moment. 'Many courts lay down the rule that the misrepresentation * * * is considered to be constructively fraudulent because of its effect of imposing upon and deceiving the person to whom it is made.' 12 R. C. L. p. 343, par. 98. The rule of the criminal law requiring proof of a specific intent to defraud in false pretense cases does not apply to civil actions."

Other decisions applying these familiar rules in recent cases are: American Soda Fountain Co. v. Martin (Cal. App.) 279 P. 680; Pashley v. Wukejevich (Cal. App.) 285 P. 910. Grounds for civil relief are embraced within the provisions of section 1572 of the Civil Code; that is to say: "The suggestion, as a fact, of that which is not true, by one who does not believe it to be true," or "the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true."

It follows that whether the seller's agents disbelieved or were otherwise unwarranted in making the representations becomes immaterial, since deliberate intent to defraud is not indispensable to rescission. And, in view of considerable substantial evidence that the representations were made, we are not authorized to say that the trial court was not justified in concluding that material facts were suggested or positively asserted which, within the contemplation of said section, affected the validity of the transaction.

[4] It is urged that respondent is estopped to defend upon these grounds for the reason that the year model having been left blank he was put upon his inquiry, and that he did in fact learn of the defect in September, when the installment was paid for that month. However, he positively testified that he implicitly relied upon the seller in this respect after having made diligent inquiry, that the latter discouraged his reading the contract stating that he would forget the first part by the time he had read toward the last, and that he did not notice the omission. Respondent also swore positively that he did not learn that it was a 1915 model until December, or nearly four months after the sale, when informed of the pendency of the claim and delivery action, and within but a few days prior to serving notice of rescission. Here again the trial court may well have deemed the omission of significance and as indicating an

intentional attempt to obscure the facts rather than as a warning of necessity for inquiry. It was warranted in believing any substantial evidence tending to sustain the findings rendered. Meyer v. Meyer, 82 Cal. App. 313, 255 P. 767.

From what has been said it becomes unnecessary to discuss at length other points urged by the parties, and particularly respondent's challenge of the validity of the contract under the finding that excessive interest was being added to deferred payments. By complete rescission the judgment restores them as nearly as may be to their former status. St. 1919, p. lxxxiii, § 2; Haines v. Commercial Mortgage Co., 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A. L. R. 725.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; NORTON, Justice pro tem.

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105 Cal. App. 238

SAFERIAN v. BAER.

Civ. 280.

District Court of Appeal, Fourth District, California.

April 14, 1930.

1. Forcible entry and detainer ⚷4 — "Forcible entry" — Breaking locks.

Breaking of locks by landlord is sufficient to constitute "forcible entry."

[Ed. Note.—For other definitions of "Forcible Entry," see Words and Phrases.]

2. Landlord and tenant ⚷180(1) — Eviction from premises — Recovery of damages.

Tenant lawfully in possession of premises who is evicted from them may recover damages.

3. Landlord and tenant ⚷277(2) — Tenant's default — Statutory notice.

Under statute, tenant was entitled to three days' notice within which to comply with terms of lease, and landlord had no right to possession without such notice (Code Civ. Proc. § 1161).

4. Landlord and tenant ⚷180(3) — Action for eviction — Complaint.

Complaint alleging tenant was in possession of premises, that certain acts of landlord deprived him of rents, issues, and profits of premises, and praying for damages, disclosed action for damages for eviction.

5. Landlord and tenant ⚷180(3) — Action for eviction — Nonjoinder of plaintiffs.

In action for eviction, landlord could not raise question that there was nonjoinder of plaintiffs because original lessees were plaintiff and another, where evidence showed landlord knew the other lessee had gone away.

6. Landlord and tenant ⚷180(3) — Action for eviction — Pleadings — Evidence admissible.

In action for eviction, evidence that landlord threw away seeds and turned loose horses *held* inadmissible under pleadings.

The complaint alleged that landlord's acts deprived tenant of rents, issues, and profits of premises.

7. Landlord and tenant ⚷180(3) — Action for eviction — Damages — Amount — Evidence.

In action for damages for eviction from small farm, evidence sustained finding tenant was damaged in amount of $500.

8. Landlord and tenant ⚷180(6) — Action for eviction — Complaint — Findings.

In action for eviction, wherein court found plaintiff was in possession under certain lease, it was immaterial that complaint alleged he was in possession under another lease.

9. Landlord and tenant ⚷180(1) — Action for eviction — Demand for possession — Necessity.

No demand for possession of premises was necessary, where tenant sued for damages for eviction.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by George K. Saferian against A. L. Baer for damages for eviction. From a judgment for plaintiff, defendant appeals.

Affirmed.

Ernest Klette, of Fresno, for appellant.

Percy Church and K. Ohanian, both of Fresno, for respondent.

BARNARD, J.

This is an action by a tenant for damages for an eviction by his landlord.

The evidence shows that a written lease, covering a small farm, was entered into between the defendant, as lessor, and the plaintiff and one Costic Stomatiou, as lessees, for the term of three years commencing on April 15, 1924, and ending on April 15, 1927, at an annual rental of $300, payable $150 on April 15 and $150 on October 15 of each year. The lessees took possession of the property, and about two months later the said Costic Stomatiou became sick and left, whereupon the

plaintiff continued to live upon and farm the property. On October 15, 1926, the defendant entered into a new lease with the plaintiff, covering the same property; said lease being for a period of five years, commencing with April 15, 1927. This lease provided for the same annual rental as the first lease, and acknowledged receipt of $150 cash upon its execution and delivery. There was added to the second lease the following clause: "The second party owes to first party $50.00 additional, and agrees to pay in sixty days." There was evidence that this $50 was the balance of the rental on the lease first referred to. The $50 was not paid within sixty days, and on the 14th day of February, 1927, at 5 o'clock p. m., in the business district of Fresno, the defendant handed the plaintiff a written notice, to the effect that the plaintiff was in default under both of said leases, in that he had failed to keep the buildings and fences in good repair, and had failed to pay the $50 above mentioned. The notice further stated that the defendant "does hereby and now, avail himself of his option to terminate said lease, and to oust and eject any and all persons therefrom, and he does hereby and now, avail himself of said option to terminate said lease and does hereby and now, demand of you the immediate possession of said premises." No three-day notice or alternative demand that he comply with the terms of the lease or vacate the premises was contained in this notice. Upon returning to the premises, shortly after receiving the notice, the plaintiff found the defendant in possession thereof. The defendant had broken the lock on the gate and the lock on the door of the house, had removed plaintiff's personal property from the house, turned his horses loose, and thrown away a quantity of seed. Defendant informed plaintiff that he would no longer be allowed on the place. The plaintiff handed $50 to his lawyer for the purpose of paying the balance on the old rent and sent his lawyer to see the defendant. The defendant told the lawyer that he would have no more dealings with the plaintiff.

The complaint in this action sets forth that on or about the 12th of February, 1927, the plaintiff was in the peaceful and actual possession of the property in question; that said possession had been obtained by written lease from the defendant, dated October 15, 1926; that on or about February 12, 1927, while the plaintiff was so in possession of said premises, the defendant forcibly entered thereon and in a forcible manner ejected the plaintiff, breaking locks on the gates and on the doors of the residence; that the defendant has unlawfully withheld the possession of said premises from the plaintiff since that date, and the plaintiff alleges that he has been damaged in the sum of $10,000, and the prayer is for a judgment for that amount, for the unlawful entry and detainer of said premises. The answer, in addition to denying the matters set up in the complaint, alleges as a special defense that the plaintiff was in default in the payment of $50, above referred to, and that he had failed to keep the buildings, fences, and other improvements in a good state of repair, and there is included a cross-complaint for $1,000 for damages alleged to have been suffered in connection with said fences and buildings. The case was tried without a jury, and from a judgment for $500, in favor of the plaintiff, the defendant has appealed.

[1, 2] The appellant contends that the respondent has not proceeded under the forcible entry or unlawful detainer act, as outlined in section 1159 of the Code of Civil Procedure, and succeeding sections; that procedure under that act was the exclusive remedy of respondent; and that under the law an owner cannot be held liable for damages for dispossessing a tenant, except as incidental to proceedings on the part of the tenant for restitution of the premises. Appellant, in support of this contention, relies upon the cases of Canavan v. Gray, 64 Cal. 5, 27 P. 788; Burnham v. Stone, 101 Cal. 164, 35 P. 627, and Walker v. Chanslor, 153 Cal. 118, 94 P. 606, 17 L. R. A. (N. S.) 455, 126 Am. St. Rep. 61. These cases hold that where a person who is *wrongfully* in possession is dispossessed by the owner of the property, having the right of entry, and where no excessive force is used by the owner, the only remedy of such person so dispossessed, under these code provisions, is to seek restitution of the property, and in such a case the court has the right to allow damages. These cases, however, have no application to a situation where a tenant who is *rightfully* in possession, is forcibly evicted by the owner. The breaking of locks is sufficient to constitute a forcible entry. Rutledge v. Barger, 82 Cal. App. 356, 255 P. 537. Where a tenant who is lawfully in possession of the premises is evicted from them, he may recover damages. Klein v. Lewis, 41 Cal. App. 463, 182 P. 789. Even a constructive eviction is sufficient. Riechhold v. Sommarstrom Invest. Co., 83 Cal. App. 173, 256 P. 592. The circumstances in the instant case show not merely a constructive eviction, but an actual ouster. And the eviction was preceded by a forcible entry.

[3] For the purposes of this appeal it must be taken that the plaintiff was rightfully in possession. The defendant alleges that the buildings and fences had been allowed to depreciate, contrary to the terms of the lease, but the court found to the contrary. There was $50 of the rental provided for in the first lease unpaid, but the time for its payment had been once extended. It would seem that any right of forfeiture had been waived by appellant, at least until the giving of notice. In any event, under section 1161 of the Code of Civil Procedure, the respondent was enti-

tled to three days' notice, within which he had the right to comply with any terms of the lease in which he was in default. That respondent would have availed himself of such an opportunity, if such had been given, is indicated by the fact that when appellant served such notice as he did serve, the respondent promptly attempted to get the $50 to him. And without such notice the appellant had no right of entry for the purpose of taking possession.

[4] At the trial one of the attorneys for the plaintiff, who stated he had lately come into the case, made this statement: "This is a case brought under section 1159—forcible entry." Just what this attorney had in mind does not appear, but his statement does not control the nature of this action. The complaint does not ask for restitution of the premises. It alleges that the plaintiff was in the peaceful and actual possession of the premises; that certain acts of the landlord had deprived him of the rents, issues, and profits of the premises; alleges damages; and the prayer is for damages. We think the action is one for damages for eviction.

[5] Appellant contends that this action cannot be maintained, for the reason that the original lessees were respondent and another, and that there is a nonjoinder of plaintiffs. There was evidence that about two months after the first lease was executed, and after respondent had begun to work the place according to the lease, the other lessee became sick and went away, and that the respondent took over the obligation to take care of the place. The respondent was in actual possession of the property during the seasons of 1924, 1925, and 1926. It is not questioned that he paid all of the rent, except the last $50. Appellant renewed the lease for five years in the name of respondent alone. When appellant desired to take the place back, the notice he served referred to both leases, but was addressed to the respondent alone, and served upon him. In speaking of another man, who was going to help the respondent in paying his rent, the appellant testified: "He disappeared like the first man that rented from me in 1924. He disappeared and I have never seen him any more." We think sufficient knowledge on the part of appellant is shown, with his later dealings with respondent, to prevent appellant from successfully raising that point. A further consideration is that this action is one for damages suffered by the respondent personally, through losing the enjoyment of the profits of the place for the ensuing five years under his own lease.

[6, 7] Appellant also assigns as error the introduction of evidence as to the value of certain personal property destroyed by appellant, when he took possession of the premises in question. Respondent was allowed to testify that appellant threw away about fifty pounds of Turkish melon seeds, worth about $3 a pound, and ten pounds of other seeds worth about $1 a pound. Also, that he spent $34 in searching for and locating horses turned loose by the appellant. An eviction entitled a tenant to recover any damages he may have sustained. Hamer v. Ellis, 40 Cal. App. 57, 180 P. 30. Under the pleadings of the instant case, however, respondent was limited to such damages as he suffered by being deprived of the rents, issues, and profits of the premises in question. The evidence in question should not have been admitted. We think, however, that this does not require a reversal. The last lease itself provided that after three years the lessor had the right to cancel the lease upon the payment of $300 to the lessee. This is some evidence of the value of the use of the property for that portion of the time. Appellant had also received $100 in advance on this lease, above the balance of rental due him, and for which nothing had been received by the respondent when the eviction took place. There was other evidence that the rental value of the property in question varied from nothing to $25 an acre per year. There is ample evidence to sustain the finding of the court as to the amount of damage.

[8] Objection is made to the findings of the court on the ground that they are not supported by the complaint or by the evidence. The principal objection is that one of the findings is to the effect that the respondent was in possession under the lease of April 9, 1924, whereas the complaint stated that he was in possession under the lease of October 15, 1926. The material part of the allegation is that he was in the peaceful and actual possession of the property. The finding to that effect is amply supported.

[9] Again, the court found "that all of the allegations of defendant's answer and cross-complaint are not true." It is claimed that the allegation in the cross-complaint that respondent had failed to pay the last $50 of rental on the first lease was true. This was immaterial, since the plaintiff was entitled to recover, regardless of whether or not he had failed to pay the $50 in question. A similar contention that there is no evidence to support the finding that respondent made demand for possession of the premises is without merit for the reason that no demand was necessary where respondent elected to sue for damages for eviction, rather than pursue his remedy for restitution of the premises.

The complaint, the evidence, and the findings are sufficient to support a judgment for damages under the circumstances. It appears that appellant took the law into his own hands in place of pursuing his legal remedy. He was satisfied to renew the lease for five years after an experience of nearly three-

years with respondent; he extended the remainder of the last payment under the old lease; and then within four months, without further demand, and with no opportunity to respondent to make good in respect to any claimed default, he suddenly claimed a forfeiture, and by breaking locks, entered and took possession of the premises. The trial court was justified in believing the evidence that there was another and different reason why appellant desired possession of the place.

The judgment is affirmed.

We concur: MARKS, Acting P. J.; BEAUMONT, Justice pro tem.

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105 Cal. App. 232

FIVE-O DRILL CO. et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 7160.

District Court of Appeal, Second District, Division 2, California.

April 14, 1930.

New trial ⟹157 — Statutory notice — By mail — Required.

Granting motion for new trial, in absence of opposing party, where statutory notice of five days by mail had not been given, *held* error (Code Civ. Proc. §§ 1005, 1013).

Prohibition by the Five-O Drill Company and others against the Superior Court in and for Los Angeles County.

Writ granted.

Andrews & Gillham, of Los Angeles, for petitioners.

Burr A. Brown, of Long Beach, for respondent.

CRAIG, Acting P. J.

The petitioners herein, who are four of several defendants in a civil action pending in the Superior Court of Los Angeles County, were awarded judgment, and the plaintiffs duly served upon respective counsel for each of the defendants a notice of intention to move for a new trial. Thereafter, and on August 12, 1929, plaintiffs' counsel, whose offices were in the city of Long Beach, mailed to counsel for petitioners at their offices in the city of Los Angeles, in the same county, but not less than twenty-five miles distant, notice in writing that said motion would be heard on August 16, 1929, at 9 o'clock a. m. The motion was then submitted upon oral argument and a memorandum of points and authorities, in the absence of petitioners and their counsel, and on August 29, 1929, it was granted. During the following month petitioners moved to set aside the order granting a new trial, which was denied, whereupon the plaintiffs set the case for trial. These petitioning defendants pray a writ of prohibition restraining further proceedings as to them, alleging that the notice of hearing was insufficient and that the trial court is without jurisdiction to again try the issues as to themselves.

The question presented is governed by rule XIX, subdivision 4 (204 Cal., p. lxxvii), and sections 1005 and 1013 of the Code of Civil Procedure, which prior to the amendments of the codes and on the date of mailing provided as follows:

"* * * Upon the filing of the notice of intention to move for a new trial, the clerk forthwith shall call the same to the attention of the judge who presided at the trial of the action or proceeding, or the Presiding Judge, as the case may be, and such judge thereupon shall designate the time at which a hearing will be had on said proposed motion. *Five (5) days' notice by mail shall be given* thereof by the clerk to the respective parties. * * *"

"When a written notice of a motion is necessary, it must be given, if the court is held in the county in which at least one of the attorneys of the party notified has his office, *five days before the time appointed for the* hearing; otherwise, ten days. When the notice is served by mail, the number of days before the hearing must be *increased one day for every twenty-five miles of distance* between the place of deposit and the place of service. * * *"

"In case of service by mail, the notice or other paper must be deposited in the postoffice, in a sealed envelope. * * * The service is complete at the time of the deposit, but if, within a given number of days after such service, a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done *is extended one day for every twenty-five miles distance* between the place of deposit and the place of address; such extension, however, not to exceed thirty days in all."

It is to be observed that the five days' notice of hearing upon a motion for new trial *must* be given *before* the time appointed, as specified by section 1005 of the Code of Civil Procedure, and that said section and section 1013 of the same Code require an additional day for every twenty-five miles distance in such cases.

It is argued on behalf of the respondent that it is "self-evident" that the rule is directory only in providing that the clerk per-

form this function, and that it was adopted to conform with newly enacted amendments to the Codes soon becoming effective and containing a similar provision. Since the petitioners make no issue as to the mode of service, and in either event at least six days' notice by mail was upon the admitted facts indispensable, the point becomes immaterial. It is further insisted that since section 1005 of the Code of Civil Procedure also provides that in the event of greater distances the time may be increased "not to exceed in all thirty days; but in all cases the court, or a judge thereof, may prescribe a shorter time," the notice as given was sufficient. However, it is not even intimated that the court did shorten the time, and the plain mandates are obviously controlling.

Counsel for the respondent also contend that petitioners had notice of the hearing other than that which was mailed, for the reason that they had received a notice of intention to move for a new trial, and that on the date of the hearing, August 16, 1929, they were furnished a copy of respondent's points and authorities. But the provisions above quoted do not afford an arbitrary or alternative method, nor is our attention directed to any other provision of the law which sanctions a substitution therefor. It follows that the petitioners were not given the legal period of time within which to prepare and present any opposition which they might have had to the motion for a new trial.

The petition for a writ of prohibition is granted, as prayed.

I concur: IRA F. THOMPSON, J.

Owing to the absence of Presiding Justice WORKS, he does not participate in this decision.

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105 Cal. App. 257

ADAMS v. BATES.

Civ. 165.

District Court of Appeal, Fourth District. California.

April 15, 1930.

1. Appeal and error ⚷347(1) — Notice of appeal — Time.

Notice of appeal from judgment, entered November 7, filed on February 3 following, *held* ineffectual, absent motion for new trial (Code Civ. Proc. § 939).

2. Appeal and error ⚷348(1) — Judgment — Notice of entry — Appeal — Time.

Notice of entry of judgment need not be given to start running of time within which appeal from judgment may be taken.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by R. R. Adams, doing business as the Creditors' Adjustment Bureau, against Mathilde P. Bates, administratrix of the estate of Guy A. Bates, deceased. Judgment for defendant, and plaintiff appeals.

Appeal dismissed.

H. W. Shaw, of Los Angeles, for appellant.

Richardson & Scherrer, of Riverside, for respondent.

MARKS, J.

On the 7th day of November, 1929, the court below rendered judgment sustaining respondent's demurrer to appellant's third amended complaint, without leave to amend. On that day judgment was rendered and entered in favor of respondent. No notice of entry of judgment was given to appellant. On February 3, 1930, appellant filed his notice of appeal. Respondent has moved this court to dismiss the appeal upon the ground that this notice was not given within sixty days after the entry of judgment. No motion for new trial was made.

[1, 2] Section 939, Code of Civil Procedure, provides that an appeal must be taken by filing with the clerk of the court, in which the judgment or order appealed from is entered, a notice of appeal within sixty days from the entry of the judgment or order, if no motion for new trial is made. The time for filing the notice of appeal in this case expired on the 28th day of January, 1930, and therefore the notice of appeal given was ineffectual. The Code does not require a notice of entry of judgment to be given to start the running of the time within which an appeal from a judgment may be taken. Schainman v. Kierce, 199 Cal. 249, 248 P. 905; Cook v. Cook (Cal. Sup.) 282 P. 385.

It follows that the appeal must be dismissed, and it is so ordered.

We concur: BARNARD, Acting P. J.; OWEN, Justice pro tem.

105 Cal. App. 208

DOUGLAS v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 7010.

District Court of Appeal, Second District, Division 1, California.

April 14, 1930.

1. Master and servant ⟹405(2) — Workmen's Compensation Act — Domestic servant — Evidence.

Undisputed evidence disclosing injuries while returning from purchasing bread for mistress' table *held* to show employee was domestic servant, not entitled to compensation (Workmen's Compensation, Insurance, and Safety Act).

Employee contended that she was assistant manager of bungalow court, and that part of her compensation as such was her board and lodging; that bread which she was on her way to procure was to be used on table where she was to receive her board, and therefore part of compensation for services as assistant manager; and that she was therefore collecting compensation at time of her injury on public street.

Certiorari by Viola L. Douglas, employer, to review an order of the Industrial Accident Commission awarding compensation to Julia L. Krummel, employee, for injuries sustained.

Award annulled.

F. Britton McConnell, of Los Angeles, for petitioner.

Edward O. Allen, of San Francisco, for respondents.

YORK, J.

On petition for writ of review.

This is an application to annul an award in favor of one Julia L. Krummel against Viola L. Douglas, the commission finding, as a basis for its award, that at the time of the injury which Miss Krummel undoubtedly sustained, she was employed by the petitioner, Viola L. Douglas, as assistant manager of a bungalow court, and that both the employer and the employee were subject to the Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831, as amended).

This application to annul the award is based upon the contention of the said Viola L. Douglas that at the time of the injury which Miss Krummel sustained she was employed by petitioner as a domestic servant, or at least that the labor or work which she was performing at the time of her injury was that of a domestic servant only.

The undisputed evidence discloses the fact that at the time of her injury, which injury was occasioned by an automobile backing into her, the said Julia L. Krummel was proceeding back to the bungalow court after the purchase of some bread to be used on the table of the said Viola L. Douglas.

The commission justifies its award on the ground that the said Julia L. Krummel was the assistant manager of the bungalow court, and that part of her compensation as such assistant manager was her board and lodging; that the bread which she was on her way to procure was bread which was to be used on the table where she was to receive her board, and therefore was part of her compensation for her services as assistant manager of the bungalow court, and that she was therefore collecting her compensation at the time of her injury on the public street.

This is a rather too far-fetched theory that the bread was to be a part or portion of her compensation. She was, as is disclosed by the evidence, also on a personal errand for herself, but was primarily making the trip to purchase bread to be used on her mistress' table, which duty was a part of her household domestic service, and therefore necessarily excluded from the provisions of the Workmen's Compensation, Insurance, and Safety Act. She was not injured while performing some duty in showing empty bungalows to prospective tenants, or in the care of or supervision of the bungalows rented by her employer.

The evidence beyond dispute shows that the only service she was attempting to render for her employer, when she received her injury, was securing bread, and this is necessarily limited to that part or that portion of her employment as a domestic servant only. We do not believe that the fact that she secured a portion of her wages by reason of her board being furnished to her by her employer could possibly by any stretch of the law or the evidence herein justify the commission in finding that she was at the time of her injury performing any service for her employer other than that of a household domestic servant.

The award is therefore annulled.

We concur: CONREY, P. J.; HOUSER, J.

105 Cal. App. 246

JOHNSTON v. REINHARD et al.

Civ. 7333.

District Court of Appeal, First District, Division 1, California.

April 15, 1930.

1. Appeal and Error ⚷627(2) — Dismissal of appeal — Delay in filing transcript.

Appeal must be dismissed under statutes and rules where transcript was not filed until over eight months after filing notice of appeal, unless excusable neglect is sufficiently shown (Code Civ. Proc. §§ 473, 953a; Court of Appeals Rules 1, 5).

2. Appeal and error ⚷628(1) — Dismissal of appeal — Delay in filing transcript — Negotiations for settlement.

Negotiations for settlement after filing notice of appeal do not preclude dismissal for delay in filing transcript, in absence of effort to obtain extension of time (Code Civ. Proc. §§ 473, 953a; Court of Appeals Rules 1, 5).

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by R. E. Johnston against S. Reinhard and others. Judgment for plaintiff, and defendants appeal. On motion to dismiss the appeal.

Motion granted, and appeal dismissed.

A. J. Stebenne, of Redwood City, for appellants.

James T. O'Keefe, of Redwood City, for respondent.

TYLER, P. J.

[1] Motion to dismiss appeal upon the ground that appellant has failed to file his transcript within the time prescribed by law. The action was one brought on a promissory note, and it was filed on March 15, 1928. The case was tried without a jury on September 25, 1928, and was submitted. After its submission the parties entered into negotiations for a settlement, but nothing came of the matter. On April 19, 1929, the court rendered judgment in favor of plaintiff and against defendants in the sum of $500. Notice of appeal was filed May 3, 1929. No attempt was ever made to propose a bill of exceptions or to obtain the preparation of a transcript pursuant to the provisions of section 953a of the Code of Civil Procedure until January 24, 1930, when the transcript was filed herein. It thus appears that a period of more than eight months have elapsed since the notice of appeal was filed and two days after a notice of motion to dismiss the appeal was made. Rule I of the court requires that the transcript shall be filed within 40 days after the appeal is perfected; and if the appeal is taken on a bill of exceptions or in pursuance of section 953a of the Code of Civil Procedure, the time for filing the transcript shall begin to run from the date on which the bill of exceptions or transcript is approved and certified as required by law, or from the date the proceeding to obtain the transcript has been terminated in the court below by dismissal or otherwise. Rule V provides in effect that, if the transcript is not filed within the time prescribed by law and is not on file at the time notice of motion to dismiss the appeal is given, the appeal may be dismissed. It is apparent, therefore, that under the rules above mentioned respondent is entitled to have the appeal dismissed, unless it can be said that appellants have made a showing of excusable neglect, legally sufficient to meet the requirements of section 473 of the Code of Civil Procedure.

[2] In opposition to the motion to dismiss, a single affidavit has been filed which merely states that, subsequent to the filing of the notice of appeal, negotiations were carried on for a settlement. This statement is flatly contradicted by affidavits filed on behalf of respondents, wherein it is averred that such negotiations were had while the case was under submission in the trial court, but not after judgment rendered. Assuming, however, that the negotiations for a settlement were made after the notice of appeal was filed, as contended for, such fact does not serve legal grounds for the relief sought. Appellants made no effort to obtain a stipulation or order extending the time to file the transcript. The cases uniformly hold that such neglect precludes an applicant from resisting a motion to dismiss the appeal. Shain v. People's Lumber Co., 98 Cal. 122, 32 P. 878; McFadden v. Dietz, 115 Cal. 697, 47 P. 777; Weinmann v. Factor, 63 Cal. App. 592, 219 P. 461; Waugaman v. Richardson, 72 Cal. App. 10, 236 P. 207.

For the reason given the motion is granted, and the appeal is dismissed.

We concur: KNIGHT, J.; CASHIN, J.

105 Cal. App. 189

BOGARDUS v. O'DEA.

Civ. 6274.

District Court of Appeal, Second District, Division 2, California.

April 12, 1930.

1. Dismissal and nonsuit ⟹ 29 — Joint tortfeasors — Single action — Retraxit — Effect.

Where defendants were sued as joint tortfeasors, retraxit of cause of action in favor of one operated as release of all.

2. Appeal and error ⟹907(3) — Presumptions — Judgment roll — Evidence — Absence.

Where appeal is on judgment roll alone, all proceedings necessary to validity of judgment will be presumed regularly taken.

3. Attorney and client ⟹89 — Retraxit — Attorney — Authority.

Dismissal signed by attorney may operate as retraxit, power to give retraxit not being limited to plaintiff in person (Code Civ. Proc. § 283).

4. Stipulations ⟹8 — Attorney of record — Authority — Client.

While there is attorney of record, no stipulation regarding conduct or disposition of action should be entertained, unless signed or assented to by attorney.

5. Judgment ⟹460(4) — Vacation — Extrinsic fraud — Amended complaint — Sufficiency.

Amended complaint in action to set aside judgment setting up extrinsic fraud in procuring judgment *held* sufficient.

Amended complaint alleged, in substance, that plaintiff had never been served with summons and had no knowledge of commencement or pendency of action until bank account was levied upon; that by reason of defendant's action in procuring judgment by means of false and fraudulent representations and return as to service of process known to them to be false when made, and made with intent to obtain judgment by default, judgment sought to be set aside was obtained, and that, by reason of execution levy, plaintiff's credit had been impaired, his health injuriously affected, and his bank deposit seized.

6. Dismissal and nonsuit ⟹29 — Extrinsic fraud — Vacation — Several defendants — Dismissal against two — Effect.

Dismissal as to two defendants, though operating as retraxit of cause of action for damages against all, *held* not to effect cause of action for vacation of judgment obtained by remaining defendant.

Complaint improperly joined cause of action in equity to vacate judgment, and one for damages against three defendants as joint tort-feasors. Cause of action for damages was dismissed as to two defendants which operated as a retraxit of cause of action for damages in favor of all, because they were sued as joint tort-feasors.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Charles C. Bogardus against M. F. O'Dea. Judgment for defendant, and plaintiff appeals.

Reversed.

Norbert Savay, of Los Angeles, for appellant.

Bradner W. Lee, Jr., and Kenyon F. Lee, both of Los Angeles, for respondent.

BURNELL, Justice pro tem.

The appeal is taken upon the judgment roll, which discloses the record to be as follows: The original complaint named as defendants H. S. McLaughlin and H. Sidney McLaughlin in addition to O'Dea, who is the respondent here. It alleged that in June, 1924, O'Dea, through his attorney, H. S. McLaughlin, had filed a complaint seeking recovery of money claimed to be due on the rental of certain real property; that the return on the summons showed personal service thereof by H. Sidney McLaughlin, and that thereafter judgment by default was entered against the appellant on which a writ of execution was served over two years after the commencement of the action, by virtue of which appellant's money on deposit in a bank was seized and turned over to O'Dea and H. S. McLaughlin, and his safe deposit box attached; that appellant was never in fact served with summons and had no knowledge of the commencement or pendency of the action until October of 1926, when his bank account was levied on; "that if this plaintiff had any knowledge in due time of the issuance of said summons and complaint he would have defended said action or had he the knowledge that a default had been entered therein he would have moved to have said default set aside and vacated on the ground that the plaintiff had then, and now has a good, meritorious defense to said action, to-wit: That he paid the moneys claimed by said O'Dea in his said complaint, also on the ground that he never received said summons and complaint and never knew of their issuance until October 29, 1926, as aforesaid"; that by reason of the acts of the three defendants in thus procuring a judgment by means of a "false and fraudulent representation and return" as to service of process, known to them to be false when made and made with intent to obtain judgment by de-

fault, and by reason of the execution levy, the plaintiff's credit had been impaired, his health injuriously affected, and his bank deposit seized. The relief prayed for as against all three defendants was $3,156 compensatory and $3,000 punitive damages, and that the judgment in the former action be set aside and the action dismissed.

Demurrers having been sustained, appellant dismissed the action as to the two McLaughlins and filed an amended complaint in which O'Dea was named as sole defendant. The allegations and prayer of this amended complaint are substantially the same as in the original pleading, except that punitive damages are not sought.

The respondent demurred to the amended complaint upon the ground, among others, that several causes of action were improperly united and not separately stated, to wit, one in equity to vacate a judgment, and one for damages. He also moved for a judgment of dismissal upon the ground that the plaintiff had dismissed the action as against his codefendants "with prejudice," and that, as they had all been sued as joint tort-feasors, the release of the McLaughlins by dismissal of the action as to them operated as a release as against respondent also. The demurrer and motion coming on for hearing at the same time, the motion was granted, the demurrer was ordered off calendar, and there followed the judgment of dismissal, from which this appeal is taken.

[1, 2] The original complaint set up two distinct causes of action without attempting to state them separately. One of the causes of action so pleaded was for damages alleged to have been suffered by appellant as a result of the "false and fraudulent representation and return" as to service of summons upon him, made, as the complaint alleged, "with intent to deceive in order to obtain said default judgment." According to the allegations of the original complaint, all three of the defendants joined in the commission of the tort-giving rise to this cause of action, and hence a retraxit of the cause of action in favor of any of them operated as a release of all of them. As said in Chetwood v. California National Bank, 113 Cal. 414, 45 P. 704, 707:

"While plaintiff may sue one or all of joint tort feasors, and while he may maintain separate actions against them, and cause separate judgments to be entered in such actions, he can have but one satisfaction. Once paid for the injury he has suffered, by any one of the joint tort feasors, his right to proceed further against the others is at an end. Where several joint tort feasors have been sued in a single action, a retraxit of the cause of action in favor of one of them operates to release them all. The reason is quite obvious. *By his withdrawal, plaintiff announces that he has received satisfaction for the injury complained of*, and it would be unjust that he should be allowed double payment for the single wrong. It matters not either whether the payment made was in a large or in a small amount. If it be accepted in satisfaction of the cause of action against the one, it is in law, a satisfaction of the claim against them all." (Italics ours.) In Flynn v. Manson, 19 Cal. App. 400, 126 P. 181, the action was against several defendants for the recovery of damages for tort. The plaintiff dismissed as to one of the defendants, the dismissal however, containing a provision that it was not the intention of the plaintiff to release the other defendants from liability. The remaining defendants moved for dismissal of the action as to them, upon the same ground as that urged in the instant case. Affirming the judgment of dismissal which followed the order granting this motion, the court held that the release, notwithstanding the saving clause, was a discharge, not only as to the defendant as to whom the dismissal was filed, but as to his codefendants. To the same effect are the decisions in Tompkins v. Clay Street R. R. Co., 66 Cal. 163, 4 P. 1165, and Urton v. Price, 57 Cal. 272. We are not unmindful of the decisions in Drinkhouse v. Van Ness, 202 Cal. 359, 260 P. 869, 877, in which it was held that a dismissal as to one of the defendants did not amount to a retraxit. But in that case there was testimony to the effect that the defendant released had paid nothing for the release, that the plaintiff had no claim on him, and that the dismissal was executed for the purpose of relieving him of costs in the suit. The court said: "The question whether Chase was a joint tort-feasor with Van Ness had not been determined. On the evidence subsequently admitted it would appear that he was not." This appeal being on the judgment roll alone, and no evidence being before us, we cannot assume that the plaintiff received nothing from the defendants, as to whom he dismissed, by way of settlement of his claim for damages. We have no means of ascertaining what, if any, evidence on this subject was presented to the court below on the hearing of the motion for dismissal as to O'Dea, and all intendments will be made in support of the judgment on an appeal of this nature, and all proceedings necessary to its validity will be presumed to have been regularly taken. Caruthers v. Hensley, 90 Cal. 559, 27 P. 411.

[3, 4] Appellant further urges that the dismissal signed by his attorneys cannot operate as a retraxit, because a retraxit cannot be given by an attorney, but only by the plaintiff in person. This was the rule at common law, but is not the rule in California, where, under the statutory provisions relating to attorneys at law (section 283, Code Civ. Proc.), "this authority must be considered to be conferred upon the attorney of record

in a cause." Merritt v. Campbell, 47 Cal. 542; Westbay v. Gray, 116 Cal. 660, 48 P. 800. Under our practice the client himself has, in fact, no authority to enter a dismissal since: "While there is an attorney of record, no stipulation as to the conduct or disposal of the action should be entertained by the Court unless the same is signed or assented to by such attorney." Commissioners v. Young, 29 Cal. 147, 87 Am. Dec. 164.

[5, 6] As to the cause of action sounding in tort, the motion to dismiss was properly granted, but, as we have said, *two* causes of action are stated in the amended complaint. The facts alleged therein are sufficient, irrespective of any question as to damages by reason of wrongful conduct, to state a cause of action against the respondent for the vacation of a judgment obtained by him against the appellant by the employment of extrinsic fraud. Dunlap v. Steere, 92 Cal. 344, 28 P. 563, 16 L. R. A. 361, 27 Am. St. Rep. 143; Parsons v. Weis, 144 Cal. 410, 77 P. 1007; Belle v. Thompson, 147 Cal. 689, 82 P. 327. This cause of action was in equity. The judgment obtained was in favor of respondent alone, and no one else was a necessary party defendant to a cause of action to obtain the equitable relief of a decree setting it aside and vacating it. Manifestly the dismissal as to the two defendants from whom, as well as from respondent, appellant sought to recover damages for the injuries which he claimed resulted from the wrongful acts of all of them as joint tort-feasors did not and could not affect the cause of action for vacation of the judgment as against the one defendant in whose favor it had been entered. Had the pleading been properly drawn, with each of these causes of actiton separately stated, the plaintiff could, of course, have dismissed as to either one without jeopardizing the other just as he might have dismissed as to one action and proceeded with the other had he filed two separate actions, one to set aside the judgment on the ground that it had been obtained by the employment of extrinsic fraud, and the other for the recovery of damages. The fact that the two causes of action were improperly united in one complaint and were not separately stated does not alter the situation.

Instead of ordering the demurrer off calendar the court below should have sustained it with leave to amend, thus enabling appellant to separate his equitable cause of action from that sounding in tort, and, upon dismissal as to the latter, to proceed to trial upon the former. The dismissal as to the equitable cause of action was clearly erroneous.

Judgment reversed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

CHABAN v. PITTLER.★

Civ. 6498.

District Court of Appeal, First District, Division 2, California.

April 14, 1930.

Rehearing Denied May 9, 1930. Hearing Denied by Supreme Court June 12, 1930.

1. Appeal and error ⚷907(3) — Appeal — Judgment roll — Findings — Conflicting — Review.

In appeal based on judgment roll, judgment would not be disturbed where it did not affirmatively appear there was conflict in findings.

2. Appeal and error ⚷694(1) — Appeal — Judgment roll — Scope of review — Evidence.

In appeal based on judgment roll, court cannot consider evidence.

3. Trial ⚷395(1) — Judgment — Findings — Sufficiency.

Findings as broad and specific as averments of complaint *held* sufficient to support judgment.

4. Appeal and error ⚷931(1) — Appeal — Judgment roll — Presumption — Additional findings.

In appeal based on judgment roll, it is presumed that if additional findings had been made they would be adverse to appellant.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Suit by J. Chaban against L. Pittler. From judgment for plaintiff, defendant appeals.

Affirmed.

John H. Crabbe, of San Francisco, for appellant.

Charles J. McDonnell, of San Francisco, for respondent.

NOURSE, P. J.

Plaintiff sued in two common counts for labor and materials furnished in the interior renovation of an apartment house. The cause was tried without a jury and resulted in a judgment for plaintiff in the sum of $1,357.75. Defendant appeals on the judgment roll alone.

The first count was on an express contract for the sum of $2,500, of which $1,250 had been paid. The second count was for the reasonable value of labor and materials alleged to be $357.75. The defense was based on allegations that the original contract had not been performed according to specifications, and that the labor and materials covered by

★Rehearing denied. Hearing denied by Supreme Court.

the second count were not furnished and were of no value. The defendant also filed a cross-complaint for damages in the sum of $2,000 for inefficient work and defective materials.

The trial court found the allegations of the complaint to be true, generally, save that plaintiff did not strictly perform the contracts and that the reasonable cost to defendant of performing would be $250, which sum she was awarded as damages. The allegations of the answer and cross-complaint were found untrue, except as to the matter of damages above noted.

[1, 2] On this appeal the appellant argues that the findings are conflicting, and that they are merely conclusions of law containing nothing in the nature of ultimate facts. The argument that the findings are conflicting is predicated on the form of the answer setting up a special written contract and guaranty covering the performance of the services. In finding that the allegations of the answer were all untrue "save and except that * * * it is true that plaintiff did not strictly perform and complete *said contracts*," it would seem that the trial court found that the written contract was executed as alleged in the answer, because that is the only contract upon which the allegations of the answer are based. If this was the intention of the court, there would appear to be some conflict in the findings, but, from the state of the record, we are unable to say whether this is prejudicial to appellant. We are, of course precluded from any consideration of the evidence in this appeal based on the judgment roll. If the answer had set up the terms and conditions of the written guaranty so that the inconsistency between the allegations of the complaint and answer would be apparent, appellant's case would be simple. However, so far as can be determined from the pleadings, the amount sued for may be well within the terms of the written guaranty. In relation to the appellant's claim that respondent failed to comply with the terms of the guaranty as to the character of labor and materials furnished, the findings are adverse to appellant, and we cannot say that they are not supported by substantial evidence.

[3, 4] Upon the second point we are also stopped by the method employed by appellant in presenting her appeal. The findings were as broad and specific as the averments of the complaint, and this is all that is necessary to support the judgment. Dam v. Zink, 112 Cal. 91, 93, 44 P. 331. If the court failed to find on any issue raised by the answer, it would be necessary to have the evidence before we could say there was error. In the absence of such showing, we must presume that if a finding were made it would be adverse to appellant. Fairbanks v. Macready, 92 Cal. App. 156, 160, 267 P. 716, 268 P. 947; Turgeon v. Barney, 70 Cal. App. 432, 435, 233 P. 394; 24 Cal. Jur. 947; 2 Cal. Jur. 525.

Judgment affirmed.

We concur: STURTEVANT, J.; BURROUGHS, Justice pro tem.

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105 Cal. App. 224

MORGAN v. LOS ANGELES ROCK & GRAVEL CORPORATION.★

Civ. 6275.

District Court of Appeal, Second District, Division 2, California.

April 14, 1930.

Rehearing Denied May 14, 1930. Hearing Denied by Supreme Court June 12, 1930.

1. Appeal and error ⟹790(1) — Denying new trial — Appealing from judgment — Dismissal.

Appeal from order denying new trial was dismissed, alleged error in order being open to consideration on simultaneous appeal from judgment.

2. Automobiles ⟹245(10) — Passenger alighting from street car — Injury by truck — Negligence — Jury question.

On conflicting evidence, whether plaintiff alighting from street car into safety zone was negligently injured by truck *held* for jury.

The truck driver testified that at speed of ten miles an hour he could stop truck within fifteen or eighteen feet; and, although going only four or five miles an hour, he first saw plaintiff about fifteen feet distant. It was conceded that truck proceded through intersection after striking plaintiff, but it was not clear whether traffic signals were set against plaintiff as she started to walk from safety zone to sidewalk, following path or area reserved for pedestrians.

3. Automobiles ⟹160(1) — Pedestrians — Vehicles — Equal rights.

Pedestrians and vehicles have equal rights in public streets.

4. Automobiles ⟹220(5) — Pedestrian's violating ordinance — Recovery.

That plaintiff after descending from street car started towards curb in violation of traffic ordinance would not alone preclude recovery for negligent injury by truck.

5. Automobiles ⟹164(1) — Driver's duty — Anticipating pedestrians — Attendant circumstances.

Truck driver's duty was to anticipate probable presence of pedestrians, especially

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes
★Rehearing denied. Hearing denied by Supreme Court.

at street car stops, and consider attendant circumstances as truck's weight and brakes.

6. Automobiles ⚷246(32) — Instruction — Contributory negligence.

Instruction that plaintiff, injured by truck after alighting from street car, could not recover if contributorily negligent *held* proper.

7. Negligence ⚷136(26) — Contributory negligence — Matter of law.

To find contributory negligence as matter of law, evidence must not be conflicting and must support only one reasonable inference.

8. Automobiles ⚷246(32) — Instructions — Traffic signals — Negligence.

Instructions that if plaintiff struck by truck after descending from street car, started toward curb against traffic signals she was negligent as matter of law *held* properly refused.

The instructions purported to be based upon a traffic ordinance forbidding pedestrians to cross roadway other than with released traffic, but ordinance did not specify duties of pedestrians who might find themselves within safety zone upon change of traffic signals.

9. Automobiles ⚷246(30) — Instruction — Pedestrian's degree of care.

Instruction that pedestrian need exercise less care than motorist, who must use every reasonable precaution to insure safety, *held* proper.

The jury were instructed that pedestrians have equal rights with vehicles in public streets, but degree of care required of driver of motor vehicle is much greater than that of pedestrian; that driver is required to use every reasonable precaution to insure safety to himself and to pedestrians; that if plaintiff used ordinary care for her own safety, defendant company, whose truck injured plaintiff when she attempted to cross street from safety zone where she had descended from street car, was legally at fault.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Margie Morgan against the Los Angeles Rock & Gravel Corporation. From a judgment for plaintiff and an order denying its motion for a new trial, defendant appeals.

Appeal from order dismissed, and judgment affirmed.

Joe Crider, Jr., and J. S. Garnett, both of Los Angeles, for appellant.

Harry B. Ellison and E. E. Bennett, both of Los Angeles, for respondent.

CRAIG, Acting P. J.

[1] The respondent was awarded a verdict and judgment for personal injuries inflicted upon her by a truck of the Los Angeles Rock & Gravel Corporation; a motion for new trial was presented, which was denied, and the defendant appealed from both the judgment and the order denying said motion. The asserted error in the order denying a new trial will be considered upon the appeal from the judgment, and the appeal therefrom is therefore dismissed. Heine Piano Co. v. Bloomer, 183 Cal. 398, 191 P. 900.

It appears that the plaintiff was struck by defendant's machine as she alighted from a westbound street car at the northeast corner of Pasadena avenue and San Fernando road, or Avenue 20, in the city of Los Angeles; she alleged that the truck was following the car at an excessive rate of speed, without proper control, and in violation of a city ordinance; that as she attempted to walk toward the curb the driver of the truck proceeded through the intersection, throwing her to the pavement. Issue was joined, and the defendant affirmatively alleged that the accident was unavoidable, and also that the accident resulted proximately from the plaintiff's contributory negligence in venturing into the pathway of the approaching truck. It is conceded that she alighted from the car into a space reserved for boarding and departing passengers, known as a "safety zone," about fifteen feet from the northerly curb and sidewalk, between which points a space is also marked for pedestrians to follow across that portion of the main thoroughfare; that the defendant's truck, loaded with gravel, and weighing about 32,000 pounds, ran into this last-mentioned space or area after the street car had left, the traffic signals had changed, and respondent had started to cross from the safety zone to the curb. Respondent testified that she had noticed the truck about fifteen feet away, traveling in the same direction as her car, but that she expected it to stop; that as she stepped into the main roadway the signal changed, whereupon she returned to the safety zone, and did not again proceed until the signal indicated that her way would be clear. The motortruck continued westerly after the signals had started traffic in a northerly direction, and ran upon the respondent, causing her injuries. It is also admitted that the accident occurred at about noon, and that the day was clear.

Appellant devotes a major portion of its briefs to evidence and argument as to the operation of signals, the legal duties and privileges of pedestrians and drivers of vehicles, and principally relying upon the provisions

of the ordinance, insists that respondent was herself so negligent as to preclude her right of recovery. Sections 5 and 12 of said provisions recite in part: "When such bell is sounded no traffic shall enter an intersection until a green or 'Go' signal is shown." "At intersections where traffic is directed by a police officer or by a traffic signal, it shall be unlawful for any pedestrian to cross the roadway other than with released traffic." To quote appellant's theory: "At the time Miss Morgan was proceeding in a northerly direction across the northerly half of Pasadena avenue traffic in all directions was 'blocked.' The signals were 'against her.' In a nutshell, it is our contention that if Miss Morgan had obeyed the ordinance she would not have left the safety zone and started for the north curb until the ringing of the second bell, at which time the traffic signals at the southeast corner and at the northwest corner would have displayed the word 'Go,' and while said last-mentioned traffic signals displayed the word 'Go' the traffic signal located at the northeast corner, and which controlled the movement of defendant's truck in a westerly direction, would have displayed the word 'Stop.'"

We are cited to no authority holding that the mere violation of traffic regulations, even if conclusively shown by the evidence, is sufficient to bar recovery by a pedestrian who, during the exercise of ordinary care, may have been injured by an automobile which entered an intersection when "traffic in all directions was blocked." In fact, appellant cites no authorities whatever except to distinguish varying conditions and circumstances wherein no different rules of conduct or of procedure in such cases are recognized or followed.

[2-5] The ordinance is not definite or clear as to the right or duty of a pedestrian, unavoidably left by a street car near the center of the street, upon the changing of signals. However, it is obvious that respondent did not "enter an intersection" of the highways, as the term is commonly accepted and understood, and we are not to be understood to say as a matter of law in the face of her denials that in any event she attempted to cross in the pedestrians' area in violation of the provisions relied upon by appellant. She testified that she was watching the signals, and believed that she was crossing "with released traffic," and in anticipation that the truck would be so controlled as to let her pass. Appellant's driver testified that with properly adjusted and operating brakes he could stop his truck within a space of fifteen to eighteen feet when driving at a rate of ten miles per hour; and while it appears that he was at the time in question going but four or five miles an hour, he first saw respondent at a distance of about fifteen feet. Diagrams in the record, marked by witnesses at the trial, indicate that he continued through the street intersection after striking respondent. He also tested his brakes in the morning, but was aware that oil could and that it might leak into them. From this and an abundance of like evidence it is apparent that while grave doubt may have arisen in the minds of the jury as to whether respondent had violated the law or was negligent, they were not unwarranted in concluding that the allegations of her complaint were amply sustained. However, if her momentary haste did contribute to her injuries, pedestrians and vehicles have equal rights in public streets, and a violation of the ordinance would not alone be sufficient to bar recovery. Robinson v. Clemons, 46 Cal. App. 661, 190 P. 203; Giorgetti v. Wollaston, 83 Cal. App. 358, 257 P. 109, 111; Saltzen v. Associated Oil Co., 198 Cal. 157, 244 P. 338. It was incumbent upon the driver to foresee the probable presence of pedestrians upon the street, especially where street cars receive and discharge their passengers, and to bear in mind the weight of his load, the condition of his brakes, and other attendant circumstances. The rules in such cases were announced in Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066, 1068, as follows:

"The negligent act or omission of a plaintiff which will exculpate a defendant from responding to the plaintiff in damages resulting from the plaintiff's negligent act or omission must be a contributing, proximate cause of the damages. Flynn v. San Francisco & S. J. R. R. Co., 40 Cal. 14, 19, 6 Am. Rep. 695; Basler v. Sacramento Gas & Electric Co., 158 Cal. 514, 519, Ann. Cas. 1912A, 642, 111 P. 530. 'The formula is, not that any degree of negligence on the part of the plaintiff which directly concurs in producing the injury * * * will constitute a defense; but if the negligence of the plaintiff, which amounts to the absence of ordinary care, shall contribute * * * proximately to the injury, the plaintiff shall not recover.' Robinson v. Western Pacific R. R. Co., 48 Cal. 409, 422, 423; Strong v. Sacramento & Placerville R. R. Co., 61 Cal. 326, 328. * * *

"The right of drivers of automobiles to use public highways is not superior to that of the humblest pedestrian, and in the exercise of a common right to the use of the public highways, all persons using the same must exert constant care and caution for the conservation of their correlative rights, commensurate with the special hazard which is peculiar to and nowadays ever present in the use of public highways. Accordingly, the driver of an automobile 'has no right to assume that the road is clear, but under all circumstances and at all times he must be vigilant and must anticipate and expect the presence of others. * * * The fact that he did not know that any one was on the highway is no excuse for conduct which would have amounted to reck-

lessness if he had known that another vehicle or person was on the highway.' Meyers v. Bradford, 54 Cal. App. 157, 159, 201 P. 471. Even though the operator of an automobile may be rigidly within the law, 'he still remains bound to anticipate that he may meet persons at any point of the street, and he must, in order to avoid a charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another person using proper care and caution, and if the situation requires he must slow up and stop.' Reaugh v. Cudahy Packing Co., 189 Cal. 335, 340, 208 P. 125, 127."

[6] In the instant case the jury were instructed fully in these well-established principles, and that they must find "that the evidence failed to show, by a preponderance thereof, that the plaintiff was guilty of negligence contributing proximately thereto, else they could not legally award her damages but must render a verdict for the defendant." This is in accord with the rules announced by the Supreme Court in Giorgetti v. Wollaston, supra, in the following language: "The failure of any person to perform a duty imposed upon him by law raises a presumption of negligence, and if such negligence proximately contributes to his injury, he cannot recover. McKune v. Santa Clara, etc., Co., 110 Cal. 486, 42 P. 980; Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675; Shimoda v. Bundy, 24 Cal. App. 675, 142 P. 109. This presumption, however, is not conclusive, but may be overcome by evidence that the failure was excusable or justifiable under the circumstances and not inconsistent with the exercise of due care."

[7] As we have seen, it may seriously have been questioned as to whether the plaintiff in this case disobeyed a signal or was not excusable for her movements under all of the circumstances. The evidence in this regard was at least conflicting, and, any question as to the dereliction of either party, was one for the jury to determine. This being true, an appellate tribunal is not authorized or inclined to disturb their conclusions as expressed by their verdict. It cannot be said as a matter of law that acts or omissions of the plaintiff proximately contributed to the accident unless the court is impelled to say that the evidence is not in conflict upon the facts, and that reasonable men can draw but one inference therefrom which points unerringly to the plaintiff's negligence. Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125. That such a case is not here presented is too obvious to justify further discussion.

[8] The trial court refused requested instructions to the effect that if they should find that the plaintiff stepped from the street car to the safety zone with intentions of crossing the street, it was her duty to await a signal releasing traffic, and that, if she started before the signal so indicated, she was guilty of negligence as a matter of law. As already observed, the ordinance does not specify the duties of pedestrians who may find themselves within a safety zone upon a changing of signals, and, under other facts and circumstances appearing, the question as to respondent's exercise of care was not one of law, but one of fact.

[9] It is next complained that the trial court erred in instructing the jury that pedestrians have equal rights with vehicles in public streets, but that the degree of care required of the driver of a motor vehicle is far greater than that of the pedestrian; that the driver is required to use every reasonable precaution to insure safety to himself and to pedestrians; that if they should find that the plaintiff at the time used ordinary care for her own safety, the defendant was legally at fault in causing her injury. This instruction stated again the rules announced, in language used, by our Supreme Court. Raymond v. Hill, 168 Cal. 473, 143 P. 743. Appellant criticises it because authorities in which it was upheld are distinguishable in many respects as to positions of parties, local conditions, and other points of fact, but since the fundamental principles announced consist of recognized rules applicable generally, the cases are not so distinguishable. As said in Weihe v. Rathjen Mercantile Co., 34 Cal. App. 302, 167 P. 287, following Raymond v. Hill, supra: "When the instructions are read together and construed as a whole, they are consistent with each other and not confusing, and appear to fairly cover the point discussed. It cannot be said, therefore, that the jury was misled." In the instruction in question, it may be that a better word might have been selected than "insure." However, we think it was meant in the sense of "assure" and must have been so understood by the jury.

Minor objections are raised as to rulings upon the evidence, etc., which we think are covered by what has been said, and it is not necessary to consume the time required by their consideration in detail.

The judgment is affirmed.

I concur: IRA F. THOMPSON, J.

Owing to the absence of Presiding Justice WORKS, he does not participate in this decision.

209 Cal. 318

MENSING v. CROTER.

S. F. 13714.

Supreme Court of California.

April 17, 1930.

Bastards ⟹59 — Prior illicit relationship — Excluding proof.

In action for support of illegitimate child, excluding proof of plaintiff's illicit relationship with another more than one year prior to period within which plaintiff's child must have been begotten *held* not error.

To make such proof admissible, it was incumbent upon defendant to sufficiently show that during period when child was begotten, and when plaintiff and other party were together, there existed both the desire and opportunity on the part of each for the resumption of their past illicit relationship, and defendant failed to make a sufficient showing in that regard.

PRESTON, J., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by Edith Frida Mensing, for and on behalf of her minor son, David Mensing Croter, against Jacob Croter. From an adverse judgment, defendant appeals.

Affirmed.

Superseding former opinion in 280 P. 1026.

Raymond Benjamin, of San Francisco, and Myron Harris and Leo A. Sullivan, both of Oakland, for appellant.

Thornton Wilson, of Oakland, for respondent.

RICHARDS, J.

This appeal is from a judgment in favor of the plaintiff and respondent rendered and entered after a jury had returned a verdict against the defendant in an action commenced by the plaintiff to compel the defendant to support her illegitimate son, of whom she alleged, and according to the judgment established, the defendant was the father. During the trial of the cause it was sufficiently shown that the child of the plaintiff had been born in the due course of gestation in the month of June, 1924. The plaintiff testified, and the jury apparently accepted her statement, that the act or acts of illicit intercourse between herself and the defendant occurred in Los Angeles during the last week of September, 1923, and that as a result thereof the child had been conceived. The defendant did not very seriously or successfully controvert the plaintiff's evidence as to his intercourse with her at said time, but rested his defense chiefly upon the ground that the plaintiff had been similarly intimate with other men at or sufficiently near the time of her intercourse with him as to render it possible for the jury to draw the inference that another than the defendant was the father of the child. In the course of this attempted proof, the defendant offered evidence to the effect that during the latter part of September, 1923, and while the plaintiff was in the city of Los Angeles, there was also living in that city a man named Raiche, whom the plaintiff had previously known in the city of Sacramento, and whom she met upon several occasions during the period of her stay in Los Angeles, and with whom she was apparently upon friendly terms. Having made this showing, the defendant offered proof that during the month of April, 1922, and while she was living in Sacramento, the plaintiff was the mistress of Raiche and lived for a time during that year in that illicit relationship with him. The basis upon which the defendant made the latter proffer of evidence was, not that such former illicit intercourse, admittedly beyond the possible period of gestation, was directly admissible for the purpose of showing another paternity of the child, but that such evidence was admissible for the purpose of showing that the former relationship between the plaintiff and Raiche during 1922, coupled with the fact that the plaintiff and Raiche remained friendly up to and including the month of September, 1923, and were shown to have met each other in the city of Los Angeles and to have been in company there upon two or more occasions during the very period when the plaintiff was maintaining illicit sexual relationship with the defendant, would be sufficient to entitle the jury to draw the inference that the past intercourse between herself and Raiche had been there resumed, and that the latter and not the

defendant was the father of the child. The trial court, however, took the position that the defendant had not so far succeeded in showing such opportunity for the plaintiff and Raiche to resume their past illicit relation while in Los Angeles at said time as would suffice to open the door for the admission of such evidence, and the trial court, consistently and repeatedly refused to permit the defendant to introduce the same. It is this refusal of the trial court which the defendant assigns as prejudicial error upon this appeal.

After a careful examination of the entire record, we are of the opinion that the trial court was correct in its refusal to permit the defendant to make proof of the plaintiff's illicit relationship and intercourse with Raiche as of a time at least one year prior to the period within which the plaintiff's child must have been begotten. That such evidence would not be directly admissible in such an action as this was fully established by this court in Estate of Gird, 157 Cal. 534, 108 P. 499, 137 Am. St. Rep. 131, wherein it was held that evidence of illicit relation on the part of the mother of an illegitimate child with men other than the defendant, whom she alleges to be its father, must be directed to a time at or about the time when, in the ordinary course of nature, the child must have been begotten. The authorities cited in said decision, as well as those to which our attention has been directed upon this appeal, are in practical accord to the foregoing effect. It was therefore incumbent upon the defendant in this action to sufficiently show that during the period in the month of September, 1923, when the plaintiff and Raiche were at the same time in the city of Los Angeles, there existed both the desire and opportunity on the part of each for the resumption of their past illicit relationship. We are constrained to hold that the defendant failed to make anything like a sufficient showing in the foregoing regard, for while it is true that the plaintiff and Raiche met upon two or more occasions while they were together in said city, there is no evidence whatever that at any such time of meeting an opportunity existed for sexual intercourse between them, the uncontradicted evidence in the case being that upon each occasion of such meeting or meetings between the plaintiff and Raiche they were never alone together, but were upon each occasion in the company of others and in such circumstances as would render it practically impossible for such intercourse to have occurred, even if the resumption of their former relationship had been desired by either. Raiche was not called as a witness in the case, and from the testimony of the plaintiff, under a most rigid cross-examination, it appeared that she had so far transferred her affections and desires toward the defendant herein as to have no wish to renew a past illicit connection with Raiche. This being the state of the record, we are constrained to hold that the trial court was correct in its refusal to permit the defendant to introduce the proposed evidence as to whatever prior illicit relationship might have been shown to exist between the plaintiff and Raiche as of a period long prior to the possible term of gestation.

This being the only question involved in the present appeal, it follows that the judgment of the trial court should be, and the same is hereby, affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; SHENK, J.

PRESTON, J.

I dissent. The opinion by Justice Sturtevant of the District Court of Appeal (280 P. 1026) sets forth my views on this case in better form than I could, and I adopt it as the basis of my dissent.

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209 Cal. 336

PEOPLE v. LEHEW.

Cr. 3287.

Supreme Court of California.

April 18, 1930.

1. Criminal law ⚷519(3) — Confession — While under arrest — Voluntary character.

That confession was made to officer while accused was under arrest does not necessarily render confession inadmissible.

2. Criminal law ⚷519(9) — Confession — Answer to questions.

Mere fact confession is made in answer to questions will not authorize its rejection.

3. Criminal law ⚷1141(2) — Appeal — Admitting confession — Review.

Reviewing court cannot say trial court erred in admitting confession, unless error appears as matter of law from record presented.

4. Criminal law ⚷736(2) — Confession — Voluntary character — Determination — Discretion.

Whether confession is free and voluntary is preliminary question addressed to trial court who has considerable discretion in determining it.

5. Criminal law ⚷531(3) — Confession — Admission.

In murder prosecution, court did not abuse discretion in admitting confession,

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

where there was ample evidence warranting conclusion it was voluntarily made when defendant was in full possession of faculties.

6. Criminal law ⚷525 — Confessions — Hysterical condition — Not affecting admissibility.

Evidence showing defendant was in hysterical condition at time of confession would not affect admissibility, but could be considered by jury in determining weight to be given to it.

7. Criminal law ⚷829(11) — Appeal and error — Refusing instruction — Covered by another instruction.

Refusing instruction relating to disregarding confession, if defendant could not appreciate what he said, *held* not error, because covered by instruction given.

> The requested instruction read in part that, if jury found from evidence that defendant's mind was by reason of his mental weakness, if any, at time of making statements, in such condition that he did not know and could not appreciate what he said, jury should disregard such statements in their entirety so far as they tended to incriminate him, and the instruction given stated in part that, unless jury believed that confession was freely and voluntarily made by defendant with full knowledge of its meaning and effect, jury should disregard confession entirely.

In Bank.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Thomas Lehew was convicted of murder in the first degree, and he appeals.

Affirmed.

James A. Myers, Hildebrand & Myers, and Granville T. Burke, all of Oakland, for appellant.

U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and Lilburn I. Gibson, of Ukiah, for the People.

WASTE, C. J.

The defendant, Thomas Lehew, was charged by information filed by the district attorney of the county of Mendocino with the murder of Teresa Johnson. The deceased, a schoolgirl about seven years of age, living with her parents near Mendocino City, was last seen alive on May 23, 1929, when she left another little girl at the forks of the road leading to their respective homes when on their way from school. She did not reach home, and a search for her resulted in the discovery, first, of her lunch pail, sweater, cap, and school books, and, subsequently, of her dead body. She had been choked to death and sexually abused. Suspicion was almost immediately directed to the defendant, who was arrested and made a purported confession. On arraignment, he entered pleas of not guilty and not guilty by reason of insanity. The plea of not guilty by reason of insanity was subsequently withdrawn.

The jury returned a verdict of murder in the first degree, without recommendation. A motion for a new trial was made and denied, and the defendant was sentenced to pay the extreme penalty. From the judgment of conviction and sentence he has appealed.

The evidence points unmistakably to the appellant as the murderer of Teresa Johnson. We find it unnecessary, however, to detail the unpleasant facts and circumstances surrounding the commission of this most heinous offense, for the appellant raises no issue as to the sufficiency of the evidence to support a conviction. In his closing brief he states that he "has never urged that a new trial should be granted because of the failure of the evidence to support the verdict," and that he "has devoted no portion of his brief to a claim that the verdict cannot be sustained, on appeal, because of the insufficiency of the evidence."

In support of a reversal of the judgment the appellant urges that the trial court erred when it admitted his "alleged" confession in evidence. The confession was made in the office of the district attorney of Mendocino county on Tuesday, June 4, 1929, twelve days after the homicide, and in the presence of the district attorney, the official phonographic reporter of the county, and a deputy sheriff. In response to certain interrogatories propounded by the district attorney, appellant admitted his connection with the crime. During the course of the trial, and after having satisfactorily established the corpus delicti, and having introduced certain other evidence tending to connect the appellant with the murder of Teresa Johnson, the prosecution called to the witness stand the reporter who had reported in shorthand the conversation between the district attorney and the appellant, wherein the latter had admitted his guilt. In response to certain preliminary questions, this witness testified that he had reported the entire conversation in shorthand, and had subsequently transcribed his notes, and that no threats, promises, or inducements had been held out to the appellant by any one present. Counsel for the appellant then agreed, subject to an objection to the introduction in evidence of the confession, that the witness might read into the record his transcribed notes of the proceedings in the district attorney's office. The objection to the introduction of the confession was based upon the twofold ground that it had been obtained by means of threats and duress, and at a time when the appel-

lant did not know or realize what he was doing. The appellant was thereupon granted permission by the trial court to "offer any testimony * * * on the question of whether or not the proposed conversation or confession * * * was freely and voluntarily given." Taking the stand solely for the purpose of narrating the conditions and circumstances under which he had confessed his guilt, the appellant testified that he thought the sheriff and his deputies had drugged his food while in the county jail; that while so incarcerated he felt "dizzy and everything blurred"; that his heart pounded, his head ached, and his condition grew progressively worse up until the time the confession was made; that he was unable to remember anything that happened between Sunday night, June 2d, and Wednesday, June 5th, but that he distinctly recalled the happenings of Wednesday, June 5th; that he did not recollect talking with the district attorney on Tuesday, June 4th, and confessing his guilt; that between the time of his arrest and Sunday night, June 2d, a number of threats had been made by the sheriff, and that he did not sleep for two weeks while in the county jail. On cross-examination he stated that he had never seen any one put anything in his food or drink, but knew it to be the fact because he could taste it and smell it; that while he was constantly aware that his food and coffee were being drugged and had a peculiar effect on him, he never refused the nourishment offered him; that his mind was a complete blank between Sunday night, June 2d, and Wednesday, June 5th, and that he did not therefore recall confessing his guilt to the district attorney on June 4th or signing the purported statement introduced in evidence.

Dr. Sidney K. Smith, a specialist in nervous and mental diseases, called by the defense, testified that he had examined the appellant and found no evidence of insanity or feeble-mindedness; that there was nothing abnormal about appellant, except that he was not of high-grade intellect; that he placed no credence in the appellant's belief that he had been doped or drugged while in the county jail; that a person, and particularly one of low-grade mentality, under emotional stress and strain, might reach a state of hysteria and not know what he was doing. Cross-examined, he stated that at the time he examined the appellant he found no signs of hysteria; that it would not be strange or peculiar for a man who had murdered and sexually abused a seven year old child to suffer from headaches and heart pounding; that in his opinion the appellant did not know of the confession and statement above referred to, and that he based his conclusion upon the appellant's childish recital of the affair and his apparent inability to recollect what had transpired between Sunday, June 2d, and Wednesday, June 5th.

In rebuttal of this evidence the prosecution called Dr. Donald R. Smith, superintendent of the state hospital, who testified that the appellant was brought to the state hospital on June 15th, and that he then had occasion to examine him; that it would be impossible for a person, under the circumstances set forth in a lengthy hypothetical question, to forget that he had made or signed a statement; that he found no evidence of a previous condition of hysteria in the appellant. On cross-examination the witness stated that in most cases it is possible to detect symptoms of hysteria in an hysterical individual, and that he found none in the appellant.

Dr. Charles E. Sisson, assistant superintendent of the state hospital, testified that he had examined the appellant between June 16th and 23d; that he found no evidence of hysteria; that the appellant had admitted to him that he remembered everything that occurred between Sunday, June 2d, and Wednesday, June 5th, but that he did not recall making a confession; that appellant's forgetfulness was "very unusual"; that on Sunday morning, June 16th, the appellant said, "Well, I guess I have talked too much already."

The sheriff and his several deputies in charge of the jail denied the making of any threats, promises, or inducements, and also denied that any drug or dope had been placed in the appellant's food, drink, or smoking material.

With this evidence before it, the trial court overruled the appellant's objection, and permitted the prosecution to introduce in evidence the confession made by the appellant in the office of the district attorney on the afternoon of June 4, 1929. In admitting this piece of evidence, the court took occasion to admonish the jury that it was for them ultimately to determine whether it was freely and voluntarily made. The appellant attacks the trial court's ruling admitting the confession in evidence upon the ground that "he was not possessed of sufficient mental capacity to make a voluntary confession," and that "he was suffering from hysteria, of such a nature as to deprive him of any understanding as to the nature of the act he was doing."

[1-4] Whether a confession is free and voluntary is a preliminary question addressed to the trial court and a considerable measure of discretion must be allowed that court in determining it. People v. Connelly, 195 Cal. 584, 598, 234 P. 374; People v. Castello, 194 Cal. 595, 599, 229 P. 855; People v. Siemsen, 153 Cal. 387, 394, 95 P. 863, 866; People v. Wilson, 79 Cal. App. 709, 713, 250 P. 879. In People v. Siemsen, supra, it is declared that the "admissibility of such evidence so largely depends upon the special circumstances

connected with the confession that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed in the first instance to the [trial] judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forborne to mark with absolute precision the limits of admission and exclusion." The mere fact that the confession was made to a police or other officer of the law while the accused was under arrest does not necessarily render the confession involuntary and inadmissible. So, also, the mere fact that a confession is made in answer to questions will not authorize its rejection, though the fact of its having been so obtained may be an important element in determining whether the answers were voluntary. People v. Hoge, 25 Cal. App. 456, 458, 143 P. 1072; People v. Quan Gim Gow, 23 Cal. App. 507, 512, 138 P. 918. A reviewing court cannot say that the trial court committed error in admitting a confession of guilt, unless such error appears as a matter of law from the record presented. The trial court is clothed with considerable discretion in determining whether or not the confession was free and voluntary, and, where the evidence is conflicting on the subject, it must be assumed that the testimony concerning a defendant's admissions was properly admitted. People v. Castello, supra, at page 600 of 194 Cal., 229 P. 855; People v. Shaffer, 81 Cal. App. 752, 756, 757, 254 P. 666; People v. Tugwell, 28 Cal. App. 348, 152 P. 740.

[5, 6] We are not prepared to say that the court below abused its discretion when it admitted the appellant's confession in evidence. There is ample evidence in the record, some of which is outlined above, warranting the conclusion that it was not induced by threats, promises, or inducements, but was freely and voluntarily made at a time when the appellant was in full possession of his faculties. Moreover, any evidence tending to establish that appellant was in an hysterical condition, and, perhaps, not in full possession of his faculties at the time he confessed his guilt, would not affect the admissibility in evidence of the confession itself, but would be evidence to be considered by the jury in determining the weight or effect to be given to it. People v. Miller, 135 Cal. 69, 71, 72, 67 P. 12; People v. Cokahnour, 120 Cal. 253, 254, 52 P. 505; People v. Elder, 55 Cal. App. 644, 648, 204 P. 29. As indicated above, the jury was admonished and instructed that it was for them to ultimately determine whether the confession was freely and voluntarily made.

[7] It is next contended that the court below erred in refusing to give the following requested instruction: "You are instructed that in weighing and considering any evidence that may have been submitted to you of statements purported to have been made by the defendant, adverse to his interest, you have a right and it is your duty to consider the condition of the mind of the defendant at the time of making of such alleged statements. And in this connection, I charge you that if you find from the evidence in this case that the defendant's mind was by reason of his mental weakness, if any, at the time of the making of any such statements, was in such condition that he did not know and could not appreciate what he said, it then becomes your duty, under your oaths, to disregard such statements in their entirety so far as they may tend to incriminate him." Without passing upon the propriety of an instruction so worded, we are of opinion that it was not error to refuse the same, because the following instruction, given by the court, sufficiently covered the subject:

"You are further instructed * * * that before you can consider any confession of the defendant as evidence against him, if you find that defendant has made a confession, you must believe that such confession was freely and voluntarily made and was not the result of inducement, coercion, intimidation, threats, promises or duress exercised by any officer of the law, or any other person over the defendant. Unless you believe that such confession was freely and voluntarily made by the defendant *with full knowledge of its meaning and effect*, then you must disregard such confession entirely from your consideration. (Italics added.)

"I further instruct you that in considering the testimony in this case, you should view with caution all evidence, if any, of the oral admissions of the defendant made out of court."

The italicized portion of the foregoing instruction very definitely informed the jury that they were to disregard the confession unless they were satisfied and believed that it was made by the appellant "with full knowledge of its meaning and effect."

Appellant's contentions being without merit, it is unnecessary to determine whether the asserted errors resulted, as urged, in a miscarriage of justice within the meaning of article 6, section 4½, of the Constitution.

The judgment is affirmed.

We concur: CURTIS, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.

NG YEE YIN v. LEE et al.

S. F. 13140.

Supreme Court of California.

April 23, 1930.

1. Partnership ⟹328(3) — Advancement by partner — Debt to partnership — Sufficiency of evidence.

Evidence showed that partner advancing money for construction of buildings advanced money for use of partnership, so that partner could offset payment on advancement against amount due him from partnership.

2. Partnership ⟹328(3) — Receipt by partner — Accounting — Sufficiency of evidence.

Evidence *held* insufficient to show that partner received money for partnership which he had not accounted for.

3. Appeal and error ⟹1011(1) — Review — Conflicting evidence.

Conclusion of trial court on contradictory evidence is binding on reviewing court.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Ng Yee Yin against M. H. Lee, also known as Lee Heung, also known as Man Hing Lee, also known as Lee Sung Pung, also known as S. P. Lee, and another. Judgment for defendant, and plaintiff appeals.

Affirmed.

Robert E. Hatch, of San Francisco, for appellant.

W. A. Richardson and Devoto & Richardson, all of San Francisco, for respondents.

CURTIS, J.

This is an action for an accounting of a Chinese partnership brought by the plaintiff, Ng Yee Yin, against the defendants, M. H. Lee and Chew Chung Kew. The action is in reality only against M. H. Lee, as he was the only defendant served, and he will hereafter be referred to as the defendant. The partnership involved herein was known as the Man Hing Lee Company, and was composed of the plaintiff, the defendant, and the said Chew Chung Kew. The trial was had and judgment rendered in favor of the defendant, and the plaintiff appealed.

On this appeal the controversy has narrowed down to two items involved in the account. These items are for $6,800 and $5,100, respectively.

[1] It is claimed by the plaintiff that the defendant received the sum of $6,800 from the Maxwell Irrigated Farms Company and unlawfully applied all of said sum in payment of a debt due from said company to the defendant. At the time the Maxwell Irrigated Farms Company made said payment to the defendant, said company was also indebted to the partnership of Man Hing Lee Company in a large sum of money approximating $40,000. The plaintiff contends that when said sum of $6,800 was paid, the defendant, being the managing partner of said partnership, should have applied said sum pro rata between the copartnership and himself in proportion to the respective amounts due from said company to the partnership and to the defendant. The partnership in which the parties hereto were members had previously entered into an agreement and lease with the Maxwell Irrigated Farms Company, in which it was agreed that the partnership should construct certain buildings upon the leased premises for the use and benefit of certain laborers employed by the partnership in working the lands covered by said lease. It was further agreed that the Maxwell Irrigated Farms Company should repay to the partnership all sums of money expended by the partnership in the construction of said buildings. When the time arrived for the construction of said buildings, the Man Hing Lee Company was without funds to construct the same. The defendant from his own funds advanced to the partnership over $8,000 for the purpose of constructing said buildings. Thereafter the Maxwell Irrigated Farms Company paid to defendant the sum of $6,800 for the partnership which the defendant applied on the indebtedness due him from the partnership by reason of the expenditures made by him in constructing said buildings. The only criticism which the plaintiff makes regarding this transaction is based upon the assertion that the buildings in question were to be erected by the Maxwell Irrigated Farms Company and not by the partnership, and therefore, when the defendant advanced the money for their construction, he advanced it to the Maxwell Irrigated Farms Company and not to the partnership. But the claim that the Maxwell Irrigated Farms Company was to erect said buildings has no foundation in fact, as the written lease in evidence plainly and conclusively shows to the contrary. As the buildings were to be constructed and paid for in the first instance by the partnership, when, therefore, the defendant advanced the money for their construction, he advanced it for the use of the partnership and not for the Maxwell Irrigated Farms Company. The company, accordingly, was not indebted to the defendant for the money thus advanced. On the other hand, as we have seen, the partnership was indebted to the defendant for the money advanced by him. This indebtedness was still outstanding

when the company paid to the defendant for the partnership said sum of $6,800. This being so, the defendant had the right to offset said payment as against the amount due him from the partnership in so far as the same would satisfy his debt.

We have treated this transaction as if the sum of $6,800 had actually been paid in cash. The evidence, however, shows that no money really changed hands, but that the transaction involved a series of credits between the parties. This fact does not change the legal relations of the parties, nor affect our conclusion that the whole of the $6,800 item was correctly credited to the account in favor of the defendant.

[2, 3] The claim regarding the item of $5,100 rests upon equally untenable grounds. The defendant and his copartners in the Man Hing Lee Company were also members of another partnership by the name of the Sam Hop Wo Company. They owned by far the largest interest in said last-named company, the other partners being a number of small shareholders consisting of laborers and persons of small means. The Sam Hop Wo Company became financially embarrassed, and it was decided to close out its business and terminate its existence. In order to do so it was necessary to pay up the indebtedness of this company. The small shareholders were unable to meet their share of this indebtedness, and it was agreed by the partners of the Man Hing Lee Company that the defendant should attempt to collect the amount and settle the bills, but that in case it was impossible for him to do so, the Man Hing Lee Company would advance the money. In accordance with the written agreement to this effect, the defendant paid out of the funds of the Man Hing Lee Company $5,102 in behalf of the small shareholders. It was the understanding that an assessment would be levied upon the small shareholders to repay this amount, and a notice was accordingly sent out to them. Plaintiff claims that at least a part of these assessments was paid, although there is no contention that any substantial, or, for that matter, that any definite or specific amount had been paid to defendant to reimburse the Man Hing Lee Company in this matter. The only evidence in the case regarding these payments is found in the testimony given by the defendant. He was asked by plaintiff's attorney regarding this matter and stated that if these assessments had been paid the Man Hing Lee Company would have received its money back, but that most of them had not been paid. Plaintiff relies upon this evidence as proof that some of these assessments had been paid. Although from this testimony of the defendant it might possibly be inferred that the defendant had received money from the payment of assessments which he had not accounted for, this evidence is not clear and satisfactory and falls short of being sufficient to justify a reversal of the judgment by this court. Moreover, just preceding this testimony, the defendant had been asked practically the same question as that just referred to; that is: "If all of the parties paid up their assessments you would have gotten back $5,102?" To this question he answered: "No, the partners never paid." It will thus be seen that the very testimony of the witness relied upon by the plaintiff, assuming that the testimony of the defendant to the effect that most of the partners didn't pay is equivalent to testimony that some of the partners did pay, is contradictory within itself. In this state of the record, the judgment of the trial court is binding upon us.

We are satisfied that the conclusion of the trial court that the two items above referred to were correctly accounted for by the defendant finds ample support in the evidence.

The judgment is therefore affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; RICHARDS, J.

PRESTON, J., deeming himself disqualified, does not participate in the foregoing opinion.

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209 Cal. 334

PAPPADATOS v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 13903.

Supreme Court of California.

April 18, 1930.

1. New Trial ⚷155 — Determining motion — Time.

Statutory provision motion for new trial "shall" be determined not later than ten days before expiration of time for passing thereon is directory (Code Civ. Proc. § 661).

2. New trial ⚷155 — Granting motion — Time.

Where notice of entry of judgment was served January 25, court, granting new trial March 26, acted within jurisdictional limits (Code Civ. Proc. §§ 660, 661).

Code Civ. Proc. § 660, provides that time, within which court has power to pass upon motions for new trial, expires sixty days after service on the moving party of written notice of entry of judgment.

In Bank.

Petition by Theodore Pappadatos for an alternative writ of prohibition against the

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⚷ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Superior Court in and for the City and County of San Francisco, and Hon. C. J. Goodell, Presiding Judge thereof, to restrain further steps in connection with an order granting a new trial.

Petition denied.

Charles A. Christin, Knight, Boland & Christin, and Whalen, Harzfeld & O'Brien, all of San Francisco, for petitioner.

PER CURIAM.

The petition for alternative writ of prohibition is denied.

In a certain action brought by petitioner for injunctive relief, a final decree was rendered in his favor and duly entered on January 25, 1930, on which day also notice of entry of judgment was served upon defendants therein. On March 26, 1930, after due proceedings, defendants' motion for new trial was argued before a judge other than the trial judge, was submitted, and an order entered granting a new trial. Petitioner thereupon moved to set aside said order upon the ground that it was in excess of the jurisdiction of the court because the proceedings were in violation of jurisdictional provisions of section 661, Code of Civil Procedure, to the effect that motion for new trial "shall be heard and determined," except in case of his inability, by the trial judge and "shall be submitted" not later than ten days before the expiration of the time within which the court has power to pass upon it. Such time, under section 660 of said code, expires sixty days after service on the moving party of written notice of entry of judgment; therefore, petitioner claims, the motion for new trial here was submitted about seven days too late. The court, however, denied petitioner's motion to set aside the order granting a new trial and the cause, after due proceedings, was reset for trial April 17, 1930. Petitioner thereupon filed his petition herein praying that this court issue an alternative writ of prohibition to restrain the taking of any further steps in connection with said order granting a new trial for the reasons aforesaid.

[1, 2] In denying it, we recognize that, as a general rule, where specified in the Code with respect to motions for new trial, time is usually jurisdictional, but, in our opinion, the provisions here in question are directory, intended only to direct a wise procedure for the disposition of such motions. The word "shall" as employed therein has, in the interpretation of statutes, often been held merely directory (Board of Education v. Board of Trustees, 96 Cal. 42, 30 P. 838; Board of Education v. Board of Trustees, 129 Cal. 599, 62 P. 173; In re Chadbourne, 15 Cal. App. 363, 369, 114 P. 1012; People v. High School District, 62 Cal. App. 67, 73, 216 P. 959). For noncompliance with said provisions no penalty is prescribed and the clause therein as to time does not purport to curtail but confirms the sixty-day period specified in section 660. Inasmuch, therefore, as section 661 contains no penalty for the omission of this procedure and the motion was submitted and passed upon within said sixty-day period provided by law, we hold that the court below acted within its jurisdictional limits. In further support of such ruling, attention is directed to the reasoning employed and doctrine announced in City of Los Angeles v. Hannon, 79 Cal. App. 669, 251 P. 247, and cases therein cited, construing as directory only section 632 of the Code of Civil Procedure relating to the time within which decisions of trial courts should be made on questions of fact submitted to them.

SMELLIE et al. v. SOUTHERN PAC. CO. et al.★

Sac. 4057.

Supreme Court of California.
April 1, 1930.

Rehearing Granted April 28, 1930.

1. Evidence ⚷53 — Presumption — Outweighing positive testimony.

A presumption is evidence and may outweigh positive evidence adduced against it.

2. Automobiles ⚷242(1) — Railroads ⚷346(5) — Presumption — Exercise of ordinary care — Evidence.

Statutory presumption that automobile guest exercised ordinary care constituted evidence in action for death at railroad crossing (Code Civ. Proc. § 1963, subd. 4).

3. Witnesses ⚷276 — Statute — Construction — Examination of adverse party.

Statute permitting party to examine adverse party should receive construction which would accomplish purpose thereof (Code Civ. Proc. § 2055).

Code Civ. Proc. § 2055 provides a party to the record may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses. The party calling such adverse witness shall not be bound by his testimony, and such testimony may be rebutted.

★Rehearing granted. 299 P. 529.

4. Evidence ⟹591 — Testimony — Binding on party calling witness.

Ordinarily, party calling witness is bound by testimony of such witness.

5. Evidence ⟹591 — Testimony — Adverse party — Weight.

Testimony of adverse party called as witness is not when weighed against presumption evidence of party calling witness (Code Civ. Proc. § 2055).

6. Evidence ⟹591 — Testimony — Adverse party — Weight.

Testimony of adverse party called as witness does not dispel presumption contrary thereto in favor of party calling adverse witness (Code Civ. Proc. § 2055).

7. Trial ⟹140(2) — Testimony — Adverse party — Weight — Question for jury.

Weight of testimony of adverse party called as witness is for jury and not for court on motion for nonsuit or directed verdict (Code Civ. Proc. § 2055).

8. Evidence ⟹591 — Adverse party — Testimony — Consideration by jury.

Jury may disregard testimony of adverse party called as witness, as against presumption (Code Civ. Proc. § 2055).

9. Evidence ⟹591 — Testimony of automobile driver — Presumption that guest used due care.

Testimony of automobile driver, called as witness by adverse party in action for death at railroad crossing, that deceased guest made statement, "It's all clear; let's go," *held* not sufficient to dispel presumption guest exercised ordinary care (Code Civ. Proc. §§ 2055, 1963, subd. 4).

10. Automobiles ⟹245(87) — Railroads ⟹350(21) — Injuries to automobile guest — Exercise of due care — Question for jury.

Testimony of automobile driver, called as witness by adverse party in action against driver and railroad for death at crossing, that deceased guest made statement, "It's all clear; let's go," created conflict with presumption that guest took ordinary care, making question for jury (Code Civ. Proc. §§ 2055, 1963, subd. 4).

11. Negligence ⟹93(1) — Negligence of driver — Imputation to guest.

Negligence of automobile driver in driving in front of approaching train could not be imputed to deceased guest.

The evidence disclosed that the automobile driver was in sole control of the automobile, and that guest was in no degree responsible for the automobile being driven in front of the approaching train.

12. Automobiles ⟹245(87) — Railroads ⟹350(21) — Automobile guest — Railroad crossing accident — Contributory negligence — Question for jury.

Contributory negligence of deceased automobile guest struck at railroad crossing *held* for jury in action against automobile driver and railroad.

The evidence disclosed that automobile was stopped at crossing to permit freight train to pass on side track, and that after freight train had passed the driver drove automobile over side track and was struck by approaching train on main line.

13. Death ⟹11 — Action for wrongful death — Widow and children — Statute.

Widow's and children's right to maintain action for death of husband and father is statutory (Code Civ. Proc. § 377).

14. Death ⟹9 — Liability for death of guest — Limiting statute — Effect — "Gross negligence."

Statute limiting liability of automobile driver and owner for wrongful death of guest, except for "gross negligence," *held* not to destroy right under wrongful death statute; "gross negligence" being defined as want of slight diligence. (California Vehicle Act, § 141¾, as added by St. 1929, p. 1580).

California Vehicle Act, § 141¾, as added by St. 1929, p. 1580, relieves automobile owner or driver of liability for death of guest, except in case of death resulting from intoxication, willful misconduct, or gross negligence of the owner or driver.

[Ed. Note.—For other definitions of "Gross Negligence," see Words and Phrases.]

15. Automobiles ⟹244(20) — Death of guest — Gross negligence of driver — Evidence — Sufficiency.

In action for death of automobile guest in railroad crossing accident, evidence *held* to make prima facie case of gross negligence against driver (California Vehicle Act, § 141¾, as added by St. 1929, p. 1580).

16. Constitutional law ⟹186 — Retroactive laws — Power of Legislature.

Legislature has power to pass retroactive laws which do not impair obligations of contracts or disturb vested rights.

17. Constitutional law ⟹23 — Statutes ⟹263 — Retroactive construction — Express declaration — Necessary implication.

No statute or constitutional provision will be construed as to give it retroactive effect, to divest vested rights, or affect pending litigation, unless such intent is expressly declared or necessarily implied.

18. Automobiles ⟹6 — Statute limiting driver's and owner's liability — Guest's death — Retroactive effect.

Statute limiting liability of automobile driver and owner for death of guest *held* not applicable to actions arising before enactment (California Vehicle Act, § 141¾, as added by St. 1929, p. 1580).

RICHARDS, J., dissenting.

In Bank.

Appeal from Superior Court, Madera County; S. L. Strother, Judge.

Action by Lillie D. Smellie and others against the Southern Pacific Company and another. Judgment for defendants, and plaintiffs appeal.

Reversed.

Superseding opinion in 276 P. 338.

Conley, Conley & Conley, W. M. Conley, Philip Conley, and Matthew Conley, all of Fresno, for appellants.

J. Maxwell Peyser, of San Francisco, and Carter & Peterson and Philip M. Carey, both of Oakland, J. E. Rodgers, A. F. Bray, and Mortimer B. Veale, all of Martinez, and Robert E. Hatch, of San Francisco, amici curiæ.

L. L. Cory, of Fresno, Devlin & Devlin & Diepenbrock, of Sacramento, and W. H. Stammer, of Fresno, for respondent Southern Pac. Co.

Cooley & Gallagher and Cooley, Crowley & Gallagher, all of San Francisco, Gallaher & Jertberg, of Fresno, and H. I. Maxim, of Madera, for respondent Ireland.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), amici curiæ.

CURTIS, J.

The general facts in this case were correctly stated in our former opinion (276 P. 338, 339) rendered in this court. This statement of facts is as follows:

"This appeal is taken from a judgment for defendants upon a directed verdict returned by the jury in an action brought by the widow and four minor sons of Robert S. Smellie, deceased, to recover damages for the death of said decedent, who was killed when the automobile truck in which he was riding as the guest of defendant L. Ireland, the driver and owner thereof, was struck by a train of defendant Southern Pacific Company. The court held at the conclusion of plaintiffs' case that the evidence established as a matter of law contributory negligence on the part of said decedent, and directed a verdict to be returned in favor of defendants. The correctness of this ruling is here challenged.

"The accident occurred at about 5 o'clock p. m. on June 25, 1926, in the city of Madera. The truck in which decedent was riding * * * was of the Reo manufacture, and was used by Ireland in a general trucking business conducted by him. Ireland was called by plaintiffs as their witness under the provisions of section 2055, Code of Civil Procedure. He testified that he turned off the state highway, on which he had been traveling in a northerly direction, into Ninth street. The situs of the accident seems to have been in an outlying district of the city of Madera. He proceeded easterly on Ninth street to a point between 20 and 25 feet from the westerly rail of a side track of defendant Southern Pacific Company which intersects Ninth street, and there brought his car to a stop to permit a freight train to pass. No signal of any kind was maintained at the intersection. The freight train was moving south at a speed of 5 or 6 miles an hour, and 6 or 8 cars remained to pass the intersection when Ireland brought his truck to a stop. East of the side track and parallel thereto was the main line track of the Southern Pacific Company. The distance between the center line of the side track and the center line of the main track was 13 feet. Both Ireland and decedent had resided in Madera for many years, and Ireland testified as to his familiarity with the crossing. Doubtless the decedent was also generally familiar with existing conditions. The moment the caboose, which was the rear car of the freight train, cleared the crossing, Ireland started his truck and crossed the side track, and, in an attempt to cross the main track, the auto-truck was struck by the Fresno Flyer, north bound, which was traveling on the main track at a rate of speed estimated to be about 55 miles an hour. The accident happened so quickly that not more than an interval of a second intervened between the time Ireland saw the train and the time his truck was hit by it. He looked before starting, but the outgoing freight train blocked a view of the main track, and consequently his view to the south was obstructed, and he did not see the approaching passenger train. He listened, but did not hear the passenger train because of the noise made by the passing freight train. The distance which the passenger train traveled before it could be brought to a stop furnishes some evidence as to the speed at which it was moving. Upon cross-examination by counsel for the codefendant Southern Pacific Company, Ireland testified that both he and Smellie looked before Ireland started the truck, and Smellie, who was seated by his side, said, 'It's all clear; let's go.' The testimony of Ireland was not contradicted by that of any other witness. Respondents did not offer any evidence in their own behalf, but, upon

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the conclusion of plaintiffs' case, made motions for nonsuits and directed verdicts, and the court granted the motions for directed verdicts, upon which the judgment appealed from was entered."

In granting defendants' motion for a directed verdict, the trial judge expressly stated that he discarded entirely the testimony of the defendant Ireland, that deceased had said to him just before the truck was started on its fatal trip across the railroad tracks, "It's all clear, let's go." He based his order for a directed verdict upon the facts and circumstances shown by the evidence to have existed at and immediately prior to the collision, leaving entirely out of consideration the statement of Ireland that the deceased had said, "It's all clear, let's go." The trial judge disregarded this testimony of Ireland, for the reason, as stated by him, that the jury in the case, if the cause should be submitted to them for decision, had the right, if they disbelieved the testimony of Ireland, to reject the whole of it. Notwithstanding the fact that the trial court disregarded the statement of Ireland as to what the deceased said just prior to the collision, the respondents have insisted during all the stages of this appeal that the statement attributed to the deceased by the defendant Ireland was not only properly before the court, but that it of itself furnished sufficient legal grounds to justify the order of the trial court directing a verdict in favor of the respondents. In so doing, however, respondents have not abandoned the ground upon which the trial court granted said motion, and they still insist that the order granting a directed verdict should be affirmed, irrespective of any question of this testimony of the defendant Ireland.

In our former opinion, which was first rendered in department ([Cal. Sup.] 269 P. 657), and thereafter and on rehearing adopted by the court in bank ([Cal. Sup.] 276 P. 338), the judgment was affirmed upon the ground that the evidence before the court, inclusive of that given by the defendant Ireland as to the last words of the deceased, showed, as a matter of law, that said deceased was guilty of contributory negligence. The rendition of this opinion brought forth, not only a petition for a rehearing from the appellants and an answer thereto by the respondents, but numerous amici curiæ have been granted permission, and have taken advantage of such leave, to file briefs in support of the respective contentions of the parties hereto.

The legal battle thus waged by these various participants has centered around Ireland's testimony as to the decedent's last words, "It's all clear, let's go," and the force and effect to be given to this testimony. The appellants, and those amici curiæ arrayed on the side of the appellants, contend that the testimony of Ireland in this regard only produced a conflict in the evidence upon the question of whether the deceased was guilty of contributory negligence, and therefore it was the duty of the court to disregard this conflict and submit the case to the decision of the jury. The basis of this argument by the appellants, and those allied with them, is that the plaintiffs at the trial in the lower court were entitled to avail themselves of the presumption that the deceased took ordinary care of his own concerns (section 1963, subd. 4, Code Civ. Proc.), and that the testimony of Ireland as to the statement made by the deceased only produced a conflict in the evidence, which conflict, upon a motion for a directed verdict, the court was in duty bound to disregard and submit the issue thus tendered to the consideration of the jury.

On the contrary, the respondents, and those amici curiæ supporting the cause of the respondents, contend that the presumption relied upon by appellants, being merely a disputable presumption, was entirely overcome and dispelled by the testimony of Ireland, and therefore that the undisputed evidence before the trial court showed that the deceased was guilty of contributory negligence, in that he advised Ireland that the way was clear and that they should proceed to cross the railroad tracks. Accordingly, the respondents and those amici curiæ insist that the order of the trial court in directing a verdict upon this state of the evidence was proper, and that the judgment based thereon should be affirmed.

[1] The question is, therefore, directly raised and presented as to whether this presumption, that the deceased exercised due care for his safety, has been overcome and dispelled as a matter of law by the testimony of Ireland. That a presumption is evidence and may in certain cases outweigh positive evidence adduced against it has long been the settled law of this state. People v. Milner, 122 Cal. 171, 54 P. 833; Sarraille v. Calmon, 142 Cal. 651, 76 P. 497; People v. Siemsen, 153 Cal. 387, 95 P. 863; Pabst v. Shearer, 172 Cal. 239, 156 P. 466; Thompson v. Davis, 172 Cal. 491, 157 P. 595; Gilmour v. North Pasadena Land, etc., Co., 178 Cal. 6, 171 P. 1066; Olsen v. Standard Oil Co., 188 Cal. 20, 204 P. 393; Mar Shee v. Maryland Assurance Corporation, 190 Cal. 1, 210 P. 269; Pacific Portland Cement Co. v. Reinecke, 30 Cal. App. 501, 158 P. 1041; Grantham v. Ordway, 40 Cal. App. 758, 182 P. 73, 76.

A few quotations from the foregoing authorities will, we think, remove all doubt from this question. In People v. Milner, supra, at page 179 of 122 Cal., 54 P. 833, 837, the court said: "Against a proved fact, or a

fact admitted, a disputable presumption has no weight; but, where it is undertaken to prove the fact against the presumption, it still remains with the jury to say whether or not the fact has been proven, and, if they are not satisfied with the proof offered in its support, they are at liberty to accept the evidence of the presumption." In Sarraille v. Calmon, supra, at page 655 of 142 Cal., 76 P. 497, 498, the court said: "The presumption of nonpayment arising from possession of uncanceled notes, admittedly executed by defendant, was evidence that they were not paid, and produced a conflict with the evidence of defendant's witnesses." In People v. Siemsen, supra, at page 390 of 153 Cal., 95 P. 863, 865, we find the following language: "But the court, in determining whether or not to accept Mr. Greeley's testimony, had a right to consider the presumptions raised by law. One of these is that 'official duty has been regularly performed'; another that 'a writing is truly dated.' * * * These presumptions, while disputable, are in themselves evidence (citing authorities) and will support a finding made in accordance with them, even though there be evidence to the contrary." In Pabst v. Shearer, supra, at page 242 of 172 Cal., 156 P. 466, 467, this court stated the rule as follows: "It must be remembered that a presumption declared by statute, although disputable, is itself evidence, and that it is for the trial court to say whether the evidence offered to overthrow the presumption has sufficient weight to effect that purpose." In Thompson v. Davis, supra, at page 493 of 172 Cal., 157 P. 595, 596, this court again said: "Under the express provision of section 164 of the Civil Code, as that section has read since the year 1897, such deed to the wife raised the presumption that the title was thereby vested in her as her separate property. This presumption is, to be sure, not conclusive. 'It may be overcome by evidence sufficient to satisfy the court that the property in question, although conveyed to the wife, was in fact community property.' (Citing authority.) But the presumption, 'although disputable, is itself evidence, and * * * it is for the trial court to say whether the evidence offered to overthrow the presumption has sufficient weight to effect that purpose.'" In Olsen v. Standard Oil Co., supra, at page 24 of 188 Cal., 204 P. 393, 395, this court sustained an instruction in the following words: "'The presumption is that every man obeys the law and the presumption in this case is that the plaintiff was traveling at a lawful rate of speed and on the proper side of the highway at all times. This presumption is in itself a species of evidence and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence." In Pacific Portland Cement Co. v. Reinecke, supra, at page 504 of 30 Cal. App., 158 P. 1041, 1043, we find the following language: "The presumptive evidence of the time of the making of the indorsement and guaranty and the consideration therefor may be resorted to in aid of the findings even though it be assumed, as counsel for the defendant contends, that it stands alone and was opposed by direct evidence to the contrary. The general rule that as against a proved fact, or a fact admitted, a disputable presumption has no weight, is subject to the exception that where, as in the present case, an endeavor is made to establish a fact contrary to the presumption, the fact in dispute still remains to be determined upon a consideration of all of the evidence including the presumption." In Mar Shee v. Maryland Assurance Corporation, supra, at page 7 of 190 Cal., 210 P. 269, 272, this court has again said: "There seems to be some confusion in the decisions of this state with respect to the extent to which under various circumstances presumptions of law are to be regarded as evidence of facts. The Code expressly declares them to be evidence (Code Civ. Proc. §§ 1957, 1963), and admonishes the trial judge to instruct the jury on all proper occasions 'that they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a * * * presumption.' Code Civ. Proc. § 2061, subd. 2. Among the decisions of this court recognizing and applying the foregoing rule may be mentioned the following: Sarraille v. Calmon, 142 Cal. 651, 76 P. 497; Adams v. Hopkins, 144 Cal. 19, 77 P. 712; Moore v. Gould, 151 Cal. 723, 91 P. 616; People v. Siemsen, 153 Cal. 387, 390, 95 P. 863; Freese v. Hibernia Sav., etc., Soc., 139 Cal. 392, 73 P. 172; Gilmour v. North Pasadena Land, etc., Co., 178 Cal. 6, 171 P. 1066."

[2] The presumption, therefore, that the deceased exercised ordinary care for his safety was evidence in the present action in favor of the plaintiffs. Did the testimony of defendant Ireland, which was contradictory to this presumption merely produce a conflict in the evidence, or did it entirely overcome and dispel it?

In the case of Mar Shee v. Maryland Assurance Corporation, supra, this court held that, where a fact is proved against a party relying on the presumption "by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case." From the rule thus enunciated in this last-cited case, it would appear that a fact which will dispel a presumption as a matter of law can only be proven by the

admission or testimony of the party relying on the presumption, or by his witnesses.

In the present action, as already stated, Ireland, although examined by the plaintiff, was called under section 2055 of the Code of Civil Procedure. This section reads as follows: "A party to the record of any civil action or proceeding or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent or managing agent of any corporation which is a party to the record, may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses. The party calling such adverse witness shall not be bound by his testimony, and the testimony given by such witness may be rebutted by the party calling him for such examination by other evidence. Such witness when so called, may be examined by his own counsel, but only as to the matters testified to on such examination."

It will be noted that this section provides in the first place that a party to the record "may be examined by the adverse party as if under cross-examination." Furthermore, "the party calling such adverse witness shall not be bound by his testimony, and the testimony given by such witness may be rebutted by the party calling him for such examination by other evidence."

[3, 4] This section of the Code was enacted in 1917. Prior to its enactment, a party might call an adverse party as a witness if he desired to do so, but he was obliged to call him as his own witness, and he was bound by his testimony in the same manner and to the same extent as he was by other witnesses called by him. This rule often worked a hardship on litigants, and often prevented the true facts of the case from being brought out in the evidence. It was to temper the rigor of this rule that section 2055 of the Code of Civil Procedure was enacted. It is a statute remedial in character, and as such should receive a construction by the courts which will carry into effect and accomplish the intent and purpose of the Legislature in enacting it. This intent was, as we read the section, to enable a party to an action to call an adverse party as a witness for the purpose of eliciting such facts as said witness may testify to which are favorable to the party calling him, without being bound by any adverse testimony which said witness may give. Only by such construction can the full remedial purposes of said legislation be effected. Not only so, but we think the express terms of said section clearly and plainly indicate that such was the purpose of the Legislature in the enactment of said section. As before noted, the adverse party, when called as a witness, is examined by the party calling him "as if under cross-examination" and the party calling him "shall not be bound by his testimony." It is difficult to conceive of language more direct and explicit. It can have but one meaning, in our opinion, and that is the meaning which we have above given to it. Such a witness does not stand in the same relation to the party calling him as does a witness who is called under ordinary conditions. He is more in the nature of a witness of the adverse party. A party is expressly forbidden to cross-examine his own witness, but when he calls an adverse party as a witness he is expressly given the right to examine him under the rules of cross-examination. A party calling a witness under the ordinary rules of procedure is bound by the testimony of such witness, but by the express provisions of section 2055, Code of Civil Procedure, the very opposite rule prevails. Such a witness has none of the characteristics of a witness called by a party under the ordinary rules of procedure, but many of the characteristics of a witness called by the adverse party.

This construction of section 2055, Code of Civil Procedure, is not new in this state. In Cioli v. Kenourgios, 59 Cal. App. 690, 697, 211 P. 838, 841, the present question was before the court, and it was held: "The fact that plaintiff called the alleged conspirators to the witness stand did not compel approval by him of their testimony. He could use their appearance on the stand, their words, their acts—in fact anything they could furnish in his favor, and reject the rest. The salutary provision of section 2055 of the Code of Civil Procedure * * * was designed to prevent as far as possible parties to an action from perpetrating fraud and dishonesty. It strips them of former barriers used for shielding falsehood."

In the case of Grantham v. Ordway, supra, the plaintiff called as a witness one of the defendants, Ordway, under said section 2055. The action was one to recover damages for injuries sustained in an automobile accident, and was brought against said Ordway and the Pacific Acreage Company. The automobile was owned by the company, but was driven by its codefendant Ordway at the time of the accident. Ordway testified that he was on business of his own at the time of the accident, and that he was in no way acting for the company or transacting business for the company at the time. The trial court granted a nonsuit, and on appeal the judgment was reversed. A petition to have the case heard by the Supreme Court was denied. This case is on all fours with the present action. It was written by Chief Justice Waste, then presiding justice of said District Court of Appeal and was concurred in by Justice Richards, then on said court, and Justice Nourse, acting temporarily as a justice of said court. As to the construction to be placed on section 2055, Code of Civil Procedure, the court said: "Furthermore, plain-

tiff is not bound by Ordway's testimony. 'A party to the record of any civil action * * * may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses. The party calling such adverse witness shall not be bound by his testimony, and the testimony given by such witness may be rebutted by the party calling him for such examination by other evidence.' "

That case is of further importance by reason of its ruling upon the question of whether the testimony of Ordway destroyed the presumption that the automobile was being used for the benefit of the Pacific Acreage Company by reason of its ownership thereof at the time of the accident. Upon this phase of that case the court said: "The automobile being admitted to belong to the defendant Pacific Acreage Company, a presumption arose that it was used for its benefit and on its own account. That presumption was not destroyed as matter of law by the testimony of defendant Ordway. 'Even though his explanation of the use of the car would absolve him, if credited, the question of whether it should be credited was one of fact for the jury.' (Citing authorities.)" On this same subject the court in that case also said: "Whenever, under a given state of facts a presumption arises, such presumption is itself evidence. Courts and jurors are not bound to decide in conformity with the declaration of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a presumption, or other evidence, satisfying their minds. Code Civ. Proc. § 2061, subd. 2. A presumption, even if disputable, will raise a conflict which is sufficient to support a finding made in accordance therewith, even though there be evidence to the contrary. Whether a presumption has been controverted is a question of fact. (Citing authorities.)"

The effect of evidence given by an adverse party under section 2055 was commented on by this court in the recent case of Marchetti v. Southern Pacific Co., 204 Cal. 679, 269 P. 529, 532. In that case we said: "While the two trainmen, who were called for cross-examination under section 2055 of the Code of Civil Procedure, testified that they gave the required signals, both by ringing the bell and sounding the whistle, the plaintiffs, especially upon a motion for a nonsuit, would not be concluded by their evidence; it being the duty of the court upon a motion for a nonsuit to accept the evidence most favorable to the plaintiffs."

As opposed to the foregoing rule and the authorities cited in support thereof, the respondents rely principally upon the case of Figari v. Olcese, 184 Cal. 775, 195 P. 425, 428, 15 A. L. R. 192, but we find nothing in that case contrary to the views hereinbefore expressed, or to the authorities last cited. In that case the court held, upon the trial of an action in which the evidence had been produced by the calling of an adverse witness under section 2055 of the Code of Civil Procedure, that the evidence of such witness might be given its proper weight in the final determination of the issues of the case. As bearing out our construction of said section, this court in that case held: "In other words, such testimony is to be treated as though given on cross-examination."

Neither do we think that in any of the following cases, cited by respondent, is there anything to be found which is contrary to the construction we have placed upon section 2055 of the Code of Civil Procedure: Brown v. Chevrolet Motor Co., 39 Cal. App. 738, 179 P. 697; Preo v. Roed (Cal. App.) 278 P. 92; Andrews v. Waldo (Cal. Sup.) 272 P. 1052; Heiter v. Hirschfeld (Cal. Sup.) 271 P. 1051; Koster v. Southern Pacific Co. (Cal. Sup.) 279 P. 788. In Brown v. Chevrolet Motor Co., supra, and in Koster v. Southern Pacific Ry. Co., supra, no reference is made to section 2055. While in the other cases witnesses were called under said section, no question was presented nor discussed in the opinion of any of these cases as to the force and effect of such evidence against a disputable presumption.

[5-7] Our conclusion, therefore, is that the testimony of a witness called under section 2055 of the Code of Civil Procedure is not, when weighing it against a presumption, to be considered, nor is it really, evidence of the party calling such witness, and that the evidence thus produced does not dispel a presumption contrary thereto, but in favor of the party calling such adverse witness. This testimony is, of course, evidence in the case and may be considered in determining the issues of the case upon the trial or final hearing by the court, or, if the case is before a jury, by the jury. When the action is before a jury, however, the duty of weighing this evidence is with the jury and not with the court upon a motion for a nonsuit or directed verdict.

[8] Besides, the testimony of Ireland has certain elements of weakness which render it of doubtful probative value, and which, we think, presents additional reasons why it should not, as a matter of law, be held to be conclusive of the fact to which it relates. In the first place it is the testimony of an adverse party, and a jury may disregard the testimony of such a witness as against a presumption if the latter satisfies them. Adams v. Hopkins, 144 Cal. 19, 77 P. 712; Everett v. Standard Accident Insurance Co., 45 Cal. App. 332, 187 P. 996; Keating v. Morrissey, 6 Cal. App. 163, 91 P. 677.

Then again the testimony of Ireland related to a declaration of another person. Evidence of the declarations or oral admissions

of a party are always received with caution. Code Civ. Proc., § 2061, subd. 4. The reason for this rule is that: "In most cases it is impossible, however honest the witness may be, for him to give the exact words in which the declaration or admission was made. Sometimes even the transposition of the words of a party may give a meaning entirely different from that which was intended to be conveyed. The slightest mistake or failure of recollection may totally alter the effect of the declaration or admission." 10 Cal. Jur., p. 1081; Davis v. Davis, 26 Cal. 23, 44, 85 Am. Dec. 157.

A third inherent weakness to be found in the testimony of Ireland is that it purports to give the statements or declarations of a deceased person. Regarding testimony of this character, this court said: "The evidence is of oral admissions against interest by a man whose lips are sealed in death. What then does the law say of such evidence (assuming now its admissibility)? The Code of Civil Procedure declares (2061, subd. 4) that the evidence of oral admissions of a party ought to be received with caution by the jury. In Mattingly v. Pennie, 105 Cal. 514, 39 P. 200, 45 Am. St. Rep. 87, this court in bank said, 'no weaker kind of testimony could be produced.' Again in bank (Austin v. Wilcoxson, 149 Cal. 24, 84 P. 417) this court has said: 'It is not stating it too strongly to say that evidence so given under such circumstances must appear to any court to be in its nature the weakest and most unsatisfactory.'" Estate of Emerson, 175 Cal. 724, 727, 167 P. 149, 151. We might go on and cite many other authorities, but the above are sufficient for our present purpose. To invoke a rule which would deprive a party of the right to have a jury pass upon the weight of evidence of this character would be contrary to an unbroken line of decisions of this court, and its effect would be in many instances to deprive a party to an action of the right, guaranteed to him by the law of this state, to a trial by jury.

[9, 10] We are, therefore, of the opinion that the testimony of Ireland, as against the presumption that the deceased took ordinary care of his own concerns, was not sufficient as a matter of law to dispel said presumption, but, on the other hand, merely tended to create a conflict with said presumption, which it was the right of the appellants to have passed upon by the jury in its final deliberations, and not by the court on a motion for a directed verdict.

The respondent, the Southern Pacific Company, contends that, as between it and the appellants, the testimony of Ireland must be regarded as evidence of the appellants, and, therefore, under the rule enunciated in Mar Shee v. Maryland Assurance Corporation, supra, it entirely overcame and dispelled the presumption of due care on the part of the deceased. Said respondent cites no authority to support this contention, and we think to assent to it would be to place an unauthorized limitation upon the remedial provisions of section 2055 of the Code of Civil Procedure.

However, both the respondents contend that, aside from the testimony of Ireland, the evidence conclusively shows that the deceased was guilty of contributory negligence in not avoiding the danger which was apparent to him from the presence of the railroad track.

[11, 12] We have already set forth a general statement of facts in the first part of this opinion. There are minor details not included in the foregoing general statement, but we do not think that it will be necessary to set the evidence out more fully than has already been done. From the facts as they are contained in the record, it appears that the defendant Ireland was in sole control of the truck in which he and the deceased were riding just prior to and at the time of the collision; that the deceased was merely a guest of Ireland; and that the deceased was in no degree responsible for Ireland's driving his truck in front of the approaching train. Under such circumstances the negligence of Ireland cannot be imputed to the deceased. Carpenter v. Atchison, etc., Ry. Co., 51 Cal. App. 60, 195 P. 1073; Ilardi v. Central California T. Co., 36 Cal. App. 488, 172 P. 763; Nichols v. Pacific Electric Ry. Co., 178 Cal. 630, 174 P. 319; Bresee v. Los Angeles Traction Co., 149 Cal. 131, 85 P. 152, 5 L. R. A. (N. S.) 1059; Tousley v. Pacific Electric Ry. Co., 166 Cal. 457, 137 P. 31; Marchetti v. Southern Pacific Co., 204 Cal. 679, 269 P. 529. It follows, therefore, that there must have been some act performed by the deceased, or a failure to do some act required of him, which proximately contributed to his death, before he could be held to be guilty of contributory negligence. The evidence is silent as to any overt act on the part of the deceased, aside from the statement of Ireland already quoted, which, in the least degree, can be said to show that the deceased was guilty of negligence. As to his failure to take the precautions which a person of ordinary prudence would take in the position in which he was placed in order to avoid the danger incident to the crossing of the railroad track under the circumstances shown, we think the evidence is far from satisfactory. There is no evidence that he did not look and listen for the train; in fact, the evidence is to the contrary. Ireland, after the freight train had passed, according to his own statement as shown in evidence, "pulled right in behind the caboose" and started across the tracks. The distance between the center lines of the two tracks was only thirteen feet. Ireland after starting the last time did not stop until he was on the main track when he was hit by the north-bound train. It must all have happened in a very few seconds of time. Of course, as respondents suggest, the deceased

might have stepped from the car before Ireland started it up the last time. But there is no evidence that he then knew, or had any reason to believe, that Ireland intended to cross the tracks without looking for the approaching train. If he were ever aware of Ireland's intention to cross the main track in front of the train, it must have been only an instant before Ireland actually drove upon the main track. It was evidently then too late for him to leave the machine or to otherwise avoid the danger. Under these circumstances, we seriously doubt whether the action of the deceased just preceding the collision amounted as a matter of law to contributory negligence on his part. In the recent case of Shields v. King (Cal. Sup.) 277 P. 1043, 1044, we quoted with approval the following rule enunciated in prior decisions of this court: "The duty of a passenger to remonstrate against excessive speed or to withdraw from the vehicle, a reasonable opportunity therefor being afforded, is not absolute, the question whether by failing to do either he is wanting in ordinary care being dependent upon the circumstances of the particular case."

"Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury. * * * In all other cases the question of contributory negligence is a question of fact for the jury." Flores v. Fitzgerald, 204 Cal. 374, 268 P. 369, 370; Borland v. Key System Transit Co. (Cal. Sup.) 270 P. 194.

The respondents, in support of their contention that the deceased was guilty of contributory negligence, cite the two cases of Heitman v. Pacific Electric Ry. Co., 10 Cal. App. 397, 102 P. 15, and Barnett v. Atchison, etc., Ry. Co. (Cal. App.) 278 P. 443. In the first of these two cases, the deceased and one Caseboom were associated in the transfer business. They were riding together in a wagon drawn by a pair of mules with Caseboom driving. They drove upon the railroad tracks of the defendant, and a collision occurred between the car of the defendant and the wagon in which Caseboom and the deceased were riding. It was conceded in that case "that the negligence of the driver of the mules is to be imputed to and regarded as the act of the deceased." In view of this admission, the only question passed upon by the court in that case was whether or not the driver was guilty of negligence. That case, therefore, can have no bearing upon the question before us, which concerns entirely the negligence of one who was riding as a guest.

In the case of Barnett v. Atchison, etc., Ry. Co., supra, five men were in an automobile, one of whom was driving said machine. They were all held to be guilty of contributory negligence. In that case, however, the automobile was being backed upon the railroad track by the driver at a speed of about five miles per hour. All of the men were perfectly familiar with the conditions surrounding the crossing and knew of the frequency of trains on the track. The bell of the engine was ringing continuously. Six or seven hundred feet from the crossing the engineer had blown the station whistle, and, when the automobile was approximately fifteen feet from the track, the engineer sounded four sharp warning whistles. While they were thus approaching the crossing, the driver was looking to the left and to the rear of his machine. The three men in the rear seat of the machine had their heads down and were examining some minnows in a sack on the floor of the machine. None of them either looked or listened for an approaching train before their machine was driven onto the railroad track, or took any other precaution whatever to observe the danger into which they were being driven. Parks, who was not a party to said action, and who was on the front seat with the driver, observed the train and called to his companions to jump. He jumped free of the machine and was not injured. The three men in the rear seat and the driver were seriously injured and three of them died as a result of their injuries. No mention of the rule applicable to guests is to be found in that entire case. The four men injured were treated as if they were equally guilty of negligence. The uncontradicted evidence shows that none of these made any attempt whatever to ascertain the presence of the train upon the track or to escape from the danger into which they were heedlessly running. Furthermore, we think the evidence in that case shows that all five of these men were interested in a common venture, and that the driver of the machine was simply acting as the representative of the others.

Neither of these cases, in our opinion, are applicable to the facts in the present action. The facts before us do not, we think, point unerringly to the negligence of the deceased. On the other hand, they show that, as far as the deceased was concerned, he did nothing to bring upon himself the injury which resulted in his death. It is problematical whether he could have taken any action, after he realized he was in danger, which would have enabled him to escape from injury. Under these circumstances, we think it was for the jury to say as a matter of fact, and not for the court to hold as a matter of law, whether the deceased was guilty of contributory negligence.

On behalf of the respondent Ireland, it is further argued that by the recent amendment of the California Vehicle Act, whereby a new section known as section 141¾ was added to said act, appellants' cause of action against

Ireland, if any ever existed, has abated. Section 141¾ of the California Vehicle Act (St. 1929, p. 1580) was enacted at the recent meeting of the Legislature and became effective August 14, 1929. It reads in part as follows:

"Any person who as a guest accepts a ride in any vehicle, moving upon any of the public highways of the State of California, and while so riding as such guest receives or sustains an injury, shall have no right of recovery against the owner or driver or person responsible for the operation of such vehicle. In the event that such person while so riding as such guest is killed, or dies as a result of injury sustained while so riding as such guest, then neither the estate nor the legal representatives or heirs of such guest shall have any right of recovery against the driver or owner of said vehicle by reason of the death of the said guest. * * *

"Nothing in this section contained shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for injury to or death of such guest proximately resulting from the intoxication, wilful misconduct, or gross negligence of such owner, driver or person responsible for the operation of such vehicle; provided, that in any action for death or for injury or damage to person or property by or on behalf of a guest or the estate, heirs or legal representatives of such guest, the burden shall be upon plaintiff to establish that such intoxication, wilful misconduct or gross negligence was the proximate cause of such death or injury or damage.

"For the purpose of this section the term 'guest' is hereby defined as being a person who accepts a ride in any vehicle without giving compensation therefor."

[13-15] The present action was instituted, and the appeal from the judgment therein was perfected long prior to the enactment of said section 141¾. Appellants' right to maintain this action is statutory and arises by virtue of the provisions of section 377 of the Code of Civil Procedure. No such right of action existed under the common law. 8 Cal. Jur. pp. 948 to 951; Clark v. Goodwin, 170 Cal. 527, 150 P. 357, L. R. A. 1916A, 1142; Dickinson v. Southern Pacific Co., 172 Cal. 727, 730, 158 P. 183; McLaughlin v. United Railroads, 169 Cal. 494, 147 P. 149, L. R. A. 1915E, 1205, Ann. Cas. 1916D, 337. Section 377 gives to the heirs or personal representative of a person killed by the wrongful act of another a right of action for damages against the person causing his death. The right of action given under said section of the Code is based upon the want of ordinary care on the part of the person wrongfully causing the death of the person killed. By section 141¾ of the California Vehicle Act, above quoted, when the person killed by the wrongful act of another is riding at the time as a guest of the party causing his death, the latter is liable in damages only in case of his own intoxication, willful misconduct, or gross negligence. This section of the act must, therefore, be held to be a limitation upon the right to sue for the death of one killed by the wrongful act of another given by section 377 of the Code of Civil Procedure. It does not, however, deprive the heirs or legal representatives of the right to sue for the death of the person wrongfully killed while riding as a guest of another, but only requires proof of a greater degree of negligence, that is, gross negligence, or willful misconduct, or intoxication. Gross negligence has been defined to be "the want of slight diligence." Redington v. Pacific P. T. C. Co., 107 Cal. 317, 40 P. 432, 48 Am. St. Rep. 132; Walther v. Southern Pacific Co., 159 Cal. 769, 775, 116 P. 51, 37 L. R. A. (N. S.) 769. Undoubtedly the appellants in this action made out at least a prima facie case of gross negligence against the respondent Ireland. If the deceased were not guilty of contributory negligence as a matter of law, then the appellants have made out a case for the jury even under section 141¾ of the California Vehicle Act. It is true the appellants did not plead gross negligence as against the respondent Ireland, but in the event of another trial the appellants should be permitted to so amend their complaint as to bring themselves within the terms of said section 141¾. Especially should this privilege be accorded them in view of the state of evidence before us which makes out a prima facie case of gross negligence against the respondent Ireland.

[16-18] Appellants insist, however, that the provisions of section 141¾ of the California Vehicle Act are not retroactive, and that they have no application to pending actions, or to any cause of action which arose prior to the going into effect of said section. We find the general rule upon this section stated as follows: "While the legislature has power to pass retroactive laws which do not impair the obligations of contracts or disturb vested rights, yet it is established, not only as a doctrine of the common law, but as a principle of general jurisprudence, that no statute or constitutional provision shall be so construed as to give it a retroactive effect, to divest individuals of rights vested previous to its passage, or to affect pending litigation, unless such intent is expressly declared, or necessarily implied in the language of the provision to be construed." 5 Cal. Jur., p. 750. The rule thus enunciated finds support in the following decisions from the courts of this state: Montecito County Water District v. Doulton, 193 Cal. 398, 224 P. 747; East Bay Municipal Utility District v. Garrison, 191 Cal. 680, 218 P. 43; Estate of Frees, 187 Cal. 150, 201 P. 112; Vanderbilt v. All Persons, 163 Cal. 507, 126 P. 158; Willcox v. Edwards, 162 Cal. 455, 123 P. 276, Ann. Cas.

1913C, 1392; Bascomb v. Davis, 56 Cal. 152; State Commission in Lunacy v. Welch, 20 Cal. App. 624, 129 P. 974; James v. Oakland Traction Co., 10 Cal. App. 785, 103 P. 1082. "It is a canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intention." In re Matter of Clyde E. Cate (Cal. Sup.) 279 P. 131, 133.

We find nothing in section 141¾ of the California Vehicle Act from which we can draw the slightest indication that its provisions should operate retroactively. In fact, the entire phraseology of the section indicates an intention to apply said section to actions which might arise after its enactment and effective date.

Respondent Ireland relies upon the case of Moss v. Smith, 171 Cal. 777, 155 P. 90, and People v. Bank of San Luis Obispo, 159 Cal. 65, 112 P. 866, 37 L. R. A. (N. S.) 934, Ann. Cas. 1912B, 1148, in support of his contention that, by virtue of the change in the law, applicable to appellants' right of action, the same has abated. The action of Moss v. Smith, supra, was brought against the directors of a corporation to recover under section 309 of the Civil Code, which makes participating directors liable for debts of the corporation created in excess of its subscribed capital stock. A demurrer to the complaint was sustained on the ground that, after the creation of said excessive indebtedness, section 309 of the Civil Code was amended in so far as it contained inhibitions against the creation by public utility corporations of indebtedness in excess of their authorized or subscribed capital stock, and providing that the provisions of said section should have no application to public utility corporations. The corporation of which the defendants were directors, and as such they were alleged to have created said excessive indebtedness, was a railroad corporation, and was therefore a public utility corporation. It was held that section 309 of the Civil Code "is highly punitive so far as the directors are concerned," and that the amendment of the Code section, making it inapplicable to public utility corporations, destroyed the right of action against the directors, as the repealing statute contained no saving clause. In People v. Bank of San Luis Obispo, supra, according to the syllabus, it was held that, "where a judgment rendered under the Banking Act of 1903, declaring a defendant bank insolvent and ordering it into involuntary liquidation, had been affirmed on direct appeal therefrom and thus become final, the subsequent repeal of such statute by the Banking Act of 1909, pending an appeal from an order refusing a new trial of the action in which the judgment was rendered, without supersedeas or stay-bond, does not have the effect to destroy the judgment, nor necessitate the dismissal of the action in which it was rendered." These cases we think can be readily differentiated from the present case. Moss v. Smith, supra, was an action to recover a penalty and was punitive in character. The present action is one to recover compensatory damages only. A much stricter construction is always given to statutes which have for their purpose the infliction of a penalty, than to those which merely give a right of action for injuries actually sustained. In People v. Bank of San Luis Obispo, supra, it was held that the repealing statute did not apply to the judgment involved therein. In each of these cases there is to be found language which by itself would tend to support respondent's contention, but such language was not necessary to the decision in which it was rendered, and therefore cannot be held to possess any great authoritative value.

In the recent case of Krause v. Rarity (Cal. App.) 285 P. 879, the effect of the enactment of section 141¾ of the California Vehicle Act upon pending litigation was directly in issue, and it was there held that said statute was not retroactive and, therefore, had no bearing upon actions that were pending at the effective date of said section. We are in accord with the conclusion reached by the court in that cause.

For the reasons stated herein the judgment is reversed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.

I dissent: RICHARDS, J.

SEAWELL, J. (concurring).

I concur in the judgment upon the sole ground that there is evidence in the record to the effect that the driver of the automobile stopped, looked, and listened before he attempted to cross the railroad track under such existing circumstances that his going forward thereafter cannot be said to constitute contributory negligence as a matter of law.

PRESTON, J. (concurring).

I concur in the conclusion reached in this case. I concur also in the reasoning advanced to show that the testimony of defendant Ireland was not of that clear, positive, and unimpeachable character that as a matter of law dispelled the presumption that the deceased took ordinary care of his own concerns. Section 1963, subd. 4, Code Civ. Proc.

But I am unable to concur in so much of the opinion as restricts the source from which the testimony must arise which would dispel the presumption. In my view of the law it makes no difference whether the testimony arises from plaintiff's own case or from an examination of the defendant under section 2055 of

the Code of Civil Procedure or from defendant's own showing. The question, and the sole question, is: Does the evidence meet the test as to strength and reliability sufficiently to overcome the presumption in question? The holding in the foregoing opinion seems to be that the evidence must arise either from admissions or the testimony of the parties relying upon the presumption. I see no reason for any such restriction of the rule.

For example, suppose the cause of action in favor of plaintiff depended upon the ineligible alienage of the defendant, and that he was compelled to and did rely solely upon the statutory presumption arising from the fact that defendant was a member of an ineligible race of people; yet if defendant upon examination under said section 2055, or as a part of his own case, showed to the court that he was born in the United States, or that he enlisted in the military forces of the country, thereby obtaining citizenship, and there was nothing to throw suspicion upon the authenticity of his birth certificate or his certificate of citizenship, could it be said that the presumption in favor of plaintiff had not been overcome? My view is that in such a case the presumption in favor of plaintiff would be entirely dispelled.

In fact, the case of Clendenning v. Parker, 69 Cal. App. 685, 231 P. 765, furnishes a concrete illustration of the position I am contending for. It appears that there Michael Haley and wife lived together as such in the city of Seattle from November 22, 1915, the date of their marriage, until the latter part of September, 1916, when Mrs. Haley went to Los Angeles. On the 9th day of October, 1916, and only a few days after she left Seattle, a marriage ceremony was performed between herself and the defendant Parker. The records of the courts of the county in which the city of Seattle was situated were examined and showed that no proceeding for a divorce or annulment of her marriage with Michael Haley had ever been instituted in said court. She had not lived in California sufficiently long to have acquired the right to institute an action for divorce. It was held, therefore, that the presumption of the legality of the marriage of Mrs. Haley with defendant Parker had been completely rebutted and overcome by the evidence that no decree of divorce had ever been granted as between Mrs. Haley and her husband Michael Haley. In that case the evidence was so clear and convincing that it amounted to practically a demonstration that the pretended marriage with defendant Parker was void, and it was therefore sufficient to dispel as a matter of law the presumption that such marriage was legal.

The above case, and perhaps other cases also, give clear proof of the wisdom of the rule which I here advocate.

PERRY v. McLAUGHLIN et al.★

Civ. 3787.

District Court of Appeal, Third District, California.

April 4, 1930.

Rehearing Denied May 3, 1930. Hearing Granted by Supreme Court June 2, 1930.

1. Automobiles ⚷181(1) — Liability to injured guest — Limiting statute — Retroactive effect.

Statute limiting liability of automobile driver and owner for injuries to guest *held* not retroactive and not applicable to cause of action arising before its adoption (California Vehicle Act, § 141¾, as added by St. 1929, p. 1580).

California Vehicle Act, § 141¾, as added by St. 1929, p. 1580, relieves automobile driver and owner of liability for injuries to guest, except in case of injuries arising from intoxication, willful misconduct, or gross negligence of driver or owner.

2. Appeal and error ⚷204(1) — Competency of evidence — Questioning for first time on appeal.

Competency of evidence admitted without objection in trial court could not be questioned for first time on appeal.

3. Negligence ⚷108(1) — Pleading.

Negligence may be pleaded in general terms.

4. Negligence ⚷108(2) — Complaint — Allegations of negligence — Sufficiency.

Complaint is sufficient if it alleges specific acts which constitute negligence complained of.

5. Automobiles ⚷238(5) — Injuries to automobile guest — Complaint — Sufficiency.

Automobile guest's complaint against driver and owner for injuries sustained when guest was thrown from seat to floor of automobile *held* to state cause of action.

The complaint stated that driver was operating automobile as agent of owner, and that the road over which the automobile was being driven was rough, rugged, bumpy, and jagged, that driver knew condition of road, that the automobile was operated in negligent and careless manner, in that driver operated automobile at excessive speed, and that guest riding in back seat was thrown to floor of automobile injuring her back.

6. Negligence ⚷136(10) — Conflicting evidence — Question for jury.

Negligence is for jury, where evidence is such that inferences may be drawn for or against existence thereof.

★Rehearing denied. Hearing granted. 297 P. 554.

7. Automobiles ⚷245(24) — Injuries to guest — Negligence of driver — Question for jury.

Negligence of automobile driver *held* for jury, where guest had been thrown from back seat to floor of automobile and injured.

The evidence produced by the automobile guest was to the effect that the road at point where accident occurred was rough and full of potholes and ruts, that the culvert where guest was thrown from her seat was in bad shape, and at time of accident automobile was traveling at the rate of thirty or thirty-five miles per hour, and that the driver had been over road on several occasions and knew condition thereof.

8. Trial ⚷235(1) — Instructions — Evidence — Ambiguity.

Instruction that jury could not indulge in speculation, guess, or conjecture as to whether automobile driver's negligence caused injuries to guest, but in such event jury must find for defendants, *held* properly refused as ambiguous.

9. Automobiles ⚷246(20) — Instruction — Negligence of driver — Injury to guest.

Instruction that, in determining whether automobile driver used due care, as regards injury to guest, and drove automobile at reasonable speed, jury should consider all circumstances influencing conduct of ordinarily prudent driver, *held* proper.

The instruction was objected to because it omitted all reference to element of knowledge on part of driver as to condition of road, and failed to confine consideration of jury to condition of road as it was known to driver at time of accident.

10. Damages ⚷213 — Instruction — Recovery for aggravation of disease.

Instruction existence of disease would not prevent recovery by automobile guest from driver and owner, but recovery could be had for aggravation of disease, *held* proper.

The evidence disclosed that the guest's injured vertebra had been weakened by disease before accident, but that the accident broke down the diseased vertebra and necessitated an operation, resulting in permanently stiffened back.

11. Damages ⚷159(3) — Plea of general damages — Evidence as to earning capacity — Admissibility.

Under plea of general damages, evidence as to wages and earning capacity prior to personal injuries *held* admissible.

12. Evidence ⚷151(4) — Injuries to guest — Fast driving — Statement showing motive — Admissibility.

Testimony of automobile driver that her daughter at church was on her mind *held* admissible in guest's action for injuries as showing motive for fast driving.

13. Automobiles ⚷243(3) — Evidence — Condition of road — Injury to guest — Admissibility.

Admitting evidence that road for quarter of mile in approaching place of accident was rough *held* admissible, in guest's action for injuries.

14. Evidence ⚷474(8) — Guest — Competency as witness — Speed of automobile.

Automobile guest suing for injuries *held* competent to testify as to speed of automobile.

15. Automobiles ⚷244(30) — Wife using husband's automobile — Presumption of agency.

Proof that wife operated automobile with husband's consent created prima facie case authorizing inference that wife was using automobile as husband's agent.

16. Automobiles ⚷244(30) — Wife driving automobile — Agent of husband — Evidence — Sufficiency.

Evidence that at time of accident wife was acting as husband's agent in driving automobile *held* sufficient to sustain judgment against husband, in guest's action for injuries.

The evidence disclosed that the husband had driven automobile to country club and turned automobile over to wife and requested her to call for him later in the day, and that, as wife was returning from country club, automobile guest was thrown from seat to floor of automobile and injured.

17. Damages ⚷132(3) — Personal injuries — Excessive award.

$12,500 for breaking down of diseased vertebra of woman, forty years of age, before injuries receiving $16 to 18 per week, *held* not excessive.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Mary Perry against Porter McLaughlin and another. From a judgment for plaintiff, and from an order denying motion for judgment notwithstanding verdict, defendants appeal.

Affirmed.

Irving D. Gibson, of Sacramento, for appellants.

Butler, Van Dyke, Desmond & Harris, of Sacramento, for respondent.

PER CURIAM.

The original submission of this cause was set aside and a further hearing had in order that the effect of section 141¾ of the California Vehicle Act of 1929 (St. 1929, p. 1580) might be considered in relation to the issues presented upon this appeal.

[1] That the above section has no retroactive effect and does not apply to causes of action arising before its adoption appears to be definitely settled by the following cases: Betty Krause et al. v. Rarity & A., T. & S. F. Ry. Co. (Cal. App.) 285 P. 879, and Lillie D. Smellie et al. v. Southern Pacific Co., a corporation, et al. (Cal. Sup.) 287 P. 343, opinion filed April 1, 1930, in which the same questions were involved, and in which the holding in the Krause Case is expressly approved. As all the other points involved in this appeal are thoroughly and completely covered by an opinion prepared by Hon. F. M. Jamison, sitting as the justice pro tem, and which meets our concurrence, we hereby adopt the same as the opinion of the court:

"This is an appeal from a judgment in favor of respondent, upon a verdict of a jury in an action for damages for injuries alleged to have been sustained by respondent while riding as a guest of appellants in an automobile owned by appellant Porter McLaughlin, and operated by appellant, Pauline McLaughlin, at the time of the accident that caused the injuries. Also, an appeal from the orders of the court denying motions of appellants for a new trial, and for judgment notwithstanding the verdict.

[2] "Appellants are husband and wife, and were such on the 15th day of May, 1927. On that day appellant Pauline McLaughlin invited respondent to attend at the St. Francis church, in the city of Sacramento, to witness the ceremony of the first communion of appellants' eldest daughter. At the conclusion of the ceremony, the daughter not being ready to leave the church, appellant Porter McLaughlin wished to drive out to the Del Paso Country Club and invited respondent to accompany himself and wife in his automobile. Respondent accepted the invitation and got in the automobile. Upon arriving at the country club appellant Porter McLaughlin got out of the automobile, turned the wheel over to his wife, and requested her to call for him later in the day. Appellant Pauline McLaughlin then started to drive back to the said church where she had left her daughter, returning over the same road which they had just traversed in going to said country club. Respondent was in the back seat of the automobile, which was a Packard sedan, and with her in the back seat were the younger daughter of appellants' and their Japanese cook, respondent being seated on the left-hand side of said automobile, the daughter next to her and the cook on the right-hand side and appellant Pauline McLaughlin being alone in the front seat. At a point about one-quarter of a mile from said club, and near a bridge or culvert which crosses the road at that point, respondent was thrown from her seat with force sufficient to fracture or break the eleventh vertebra of her spine. The evidence produced upon the part of the respondent tended to prove that the road at the point where the accident happened was a dirt road, was rough and full of potholes and ruts, and that the said bridge or culvert was in bad condition, and the approach to it was full of ruts and potholes, with a sway in the road near the said bridge or culvert, and that at the time of the accident appellant Pauline McLaughlin was driving the automobile at the rate of from thirty to thirty-five miles per hour; that the automobile swayed back and forth across the road before the final bump or shock that threw respondent from her seat. Appellant Pauline McLaughlin denied that she was driving said automobile, at the time of the accident, in excess of twenty or twenty-five miles per hour, and denied that the front part of said automobile swayed or swerved at all. She further testified that she was under the impression that the rear wheel of her automobile went into a rut which caused the jolt that threw respondent from her seat. The principal witness produced by respondent to prove the condition of the road at the point where the accident happened was A. H. Becker, who testified that for the past five or six years he had been in the habit of passing over what he called the back road from Sacramento to the said club, twice a week, and did so in May, 1927; that from the club to the culvert or bridge, being approximately a quarter of a mile, the road was always rough, full of potholes, and that the approach to the culvert was in bad shape, that is, was rough, full of ruts and potholes, with a sway before hitting the culvert. Appellants raise the point in their brief that the testimony of Becker should not be considered for the reason that the road, regarding which he testified, was not identified as being the identical road upon which the accident happened. Appellants made no cross-examination of this witness, except to ask him a few formal questions; made no objection before the trial court to this testimony upon the ground that the road about which the witness testified was not the road upon which the accident happened; nor moved to have the same stricken on that ground. Even though this testimony was incompetent, still, being admitted without objection, and treated by the parties as competent in the trial court, the question of its competency cannot be raised in the appellate court. Curiac v. Packard et al., 29 Cal. 194; Mercantile Trust Co. v. Sunset, etc., Co., 176

Cal. 461, 168 P. 1036; Parsons v. Easton, 184 Cal. 764, 195 P. 419. However, all of the witnesses agree that the road upon which the accident happened was a dirt road leading from the city of Sacramento to the Del Paso Country Club, several of them testifying that this dirt road connects Eighth street with the road upon which the club is situated. It is admitted that the accident happened on the dirt road at the culvert about a quarter of a mile from the club. Becker testified that in going to the club from Sacramento he went out Eighth street, and then went over a back road leading from Eighth street and turning to the left to the club; that this was a dirt road, and that about a quarter of a mile from the club there was a bridge or culvert across the road. We are of the opinion that, in any event, there was evidence from which the jury might fairly deduce the inference that the road about which the witness Becker testified was the road upon which the accident happened.

[3-5] "The first ground for reversal put forward by appellants is that the third amended complaint fails to state a cause of action. Said complaint, after stating that appellants were husband and wife, sets forth that appellant Porter McLaughlin was the owner of the automobile, and that at the time of the accident respondent was riding therein as a guest of appellants, and that appellant was driving and operating the said automobile as the agent of said Porter McLaughlin, and under his authorization and direction, and that the road over which the automobile was being driven was a dirt road and was rough, rugged, bumpy, and jagged, and that said appellant Pauline McLaughlin had operated said automobile over said road prior to said accident on other occasions, and knew the said road to be in said condition, and further stated 'that the said Pauline McLaughlin did on the said 15th day of May, 1927, and at that time on said day when plaintiff herein was accompanying said defendant in said Packard automobile, drive and operate said Packard automobile along and upon said dirt road in a reckless, negligent and careless manner, in that said defendant did drive and operate said automobile at so great a rate of speed, and with such disregard to the said condition of said road as to cause the automobile, by reason of said excessive speed, combined with the condition of said road, to suddenly swerve across said road and rebound onto said road with great force, thereby causing plaintiff, who was then and there riding in the back seat of said automobile, to be thrown and hurled with great force and violence to the floor of said automobile and that plaintiff was then and there injured,' etc. While it is sufficient to plead negligence in general terms (Dewhirst v. Leopold, 194 Cal. 424, 229 P. 30; Mathes v. Aggeler & Musser Seed Co., 179 Cal. 697, 178 P. 713), a complaint is sufficient if it alleges the specific acts which constitute the negligence complained of. Cal. Jur., vol. 19, p. 674.

"We are of the opinion that the complaint stated a cause of action and that the demurrer was properly overruled. Furthermore, appellants answered and went to trial upon the issues thus formed, and there is nothing to indicate that they were misled in any way as to the issues they were to meet, and in fact did meet as best they could, and the cause appears to have been fairly tried upon the merits. Irrgang v. Ott, 9 Cal. App. 440, 99 P. 528.

[6, 7] "The next contention of appellants is that the evidence is insufficient to support the verdict because it fails to show any negligent act or omission of appellant Pauline McLaughlin which proximately caused injury to respondent. The evidence produced by respondent was to the effect that the road, at the point where the accident occurred, was a dirt road, very rough, and full of potholes and ruts, and that the bridge or culvert, at the point where respondent was thrown from her seat, was in bad shape, and the approach to the said bridge or culvert was also in bad condition, and that at the time of the accident the automobile was traveling at the rate of thirty or thirty-five miles per hour; that appellant Pauline McLaughlin had driven over the said road on two different occasions before the accident, and had been seated in the front seat with her husband when he had driven the automobile over this road in going to the said club the day of the accident. She testified that the road where the accident happened was rough; that the earth was worn away from the ends of the planks on the bridge; that she thought there were ruts in the road, although she did not get out to examine them. She further testified that the accident happened at the edge of the bridge or culvert just before she went over it, as she had passed over the bridge when she stopped the automobile, and that at the time of the accident she was traveling at the rate of twenty or twenty-five miles per hour. Respondent testified that at first the car zigzagged, then it turned to the right a little bit, then to the left, then it hit a bump and threw the small daughter of appellants between her and the front seat; that she grabbed the little girl and just then the car swung around to the right and she was thrown between the seat and the door and struck her back against something. Where the evidence is such that inferences may be drawn for or against a conclusion of negligence, it is for the jury to determine whether or not negligence existed. 19 Cal. Jur., p. 723. In the case of Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 713, 41 A. L. R. 1027, the court said: 'The rule by which appellate courts must be guided in passing upon the question whether findings of

fact or verdicts of juries are sufficiently supported by the evidence is this: "That where an honest difference of opinion between men of average intelligence can arise as to the effect of the evidence—that is, if the evidence is such as that different conclusions upon the matter can rationally be drawn [from the evidence]—then the case presented is one for the jury, or the court, if the questions of fact be submitted to its arbitrament."' So in the instant case, if the jury believed that the testimony produced by respondent and her witnesses was true, that is to say, that at the place where the accident occurred the road was a dirt road, that it was rough and full of ruts and potholes, and that the approach to the bridge, near where respondent was injured, was in bad condition, that appellant had been over this road previously on several occasions, and knew that the road was rough and in bad condition, and with this knowledge she drove the automobile in which respondent was riding as a guest, over this road at the point where the accident happened, at an excessive rate of speed, taking into consideration, on the question of speed, the condition of the road at that point, and thereby produced such jolting and swerving of the automobile that respondent was thrown and cast from her seat and injured, there was certainly evidence sufficient upon which to base their verdict that appellant Pauline McLaughlin was guilty of negligence and that this negligence was the proximate cause of respondent's injuries. Upon that state of facts the said last-named appellant would have been acting in violation of section 113 of the California Vehicle Act (St. 1923, p. 553), which, among other things, provides that no person shall operate or drive a motor vehicle on a public highway at such rate of speed as to endanger the life or limb of any person.

[8] "The next ground for reversal urged by appellants is that the trial court committed prejudicial error in giving instructions and in modifying and refusing proposed instructions. The instructions in this case are not numbered; we cannot, therefore, refer to them by numbers, which is to be regretted. One of the proposed instructions on behalf of appellants, which was refused by the court, is as follows:

"'You cannot speculate or guess *that* caused the alleged accident. In case the evidence should show that the alleged injury to plaintiff may have occurred as a result of neligence of defendants, or may have occurred without any negligence on the part of defendants, you cannot indulge in speculation, guess or conjecture as to whether negligence on the part of defendants may have caused the injury but in such event you must return a verdict for defendants and against plaintiff.'

"Presumably, it was the intention, by this instruction, to inform the jury that mere speculation, guess, or conjecture that defendants were guilty of negligence would not justify the jury in finding that defendants, or either of them, were guilty of negligence. If this was the intention of appellants, then, in substance, it was covered by the instruction given by the court, and found on pages 137 and 138 of the reporter's transcript, wherein the court instructed the jury that mere supposition or surmise that negligence on the part of defendant Pauline McLaughlin proximately caused the alleged accident would not justify a verdict against defendants, or either of them.

"The court refused the above quoted instruction on the ground that it was ambiguous, and in the ruling we think the court was right.

[9] "Appellants object to the instruction on page 161 of the reporter's transcript. In this instruction the court told the jury that, in determining whether or not defendant Pauline McLaughlin used due care and prudence and circumspection, and drove her car at a reasonable and prudent speed, it was the duty of the jury to take into consideration all the circumstances then and there existing which would have influenced the conduct of an ordinarily prudent driver in the same situation. Appellants claim that this instruction is objectionable, because it omits all reference to the element of knowledge or notice on the part of Pauline McLaughlin, and fails to confine the consideration of the jury to the condition of the road as it was known to her at the time of the accident. It is true that the instruction did not contain the words 'at the time and place of the accident,' but it is evident that the jury could not have been misled by this omission. As applied to the facts in this case, the instruction unquestionably is a correct statement of the law. Furthermore, in its instructions on pages 126-127 of the reporter's transcript, the court fully instructed the jury upon the matter of the knowledge or notice of Pauline McLaughlin regarding the condition of the road at the place of the accident. Taking the instructions as a whole they fully and fairly presented to the jury, for its determination, whether or not, under the facts of this case, the said Pauline McLaughlin was or was not guilty of negligence.

[10] "Appellants also take exception to the instruction of the court set forth on page 162 of the reporter's transcript, claiming that there was no evidence upon which it could be supported. This instruction, in substance, is to the effect that the existence of disease does not prevent recovery, but, on the contrary, recovery may be had for the increase or aggravation of same. The testimony of all the experts is that the eleventh vertebra had been weakened by disease, presumably tuber-

culosis; that the accident broke down this diseased vertebra and necessitated an operation by means of which the vertebral column was in a manner united and again supported, but at the expense of a permanently stiffened back, and the necessity for respondent having to wear a steel jacket. There is no evidence that, except for this accident, this defective vertebra would not have continued to support the vertebral column. Even though the ravages of the disease had been stayed or stopped prior to the accident, yet, according to the testimony of the experts, this vertebra was left, by virtue of said disease, in a defective condition, so much so, indeed, that the shock given to it at the time of the accident broke it down and rendered it wholly useless as a means of support to the remainder of the vertebral column. No error was committed in giving this instruction. Campbell v. Los Angeles Traction Co., 137 Cal. 565, 70 P. 624; White v. Red Mountain Fruit Co., 186 Cal. 335, 199 P. 318.

[11] The objection of appellants to the instruction given on pages 165–166 of the reporter's transcript is without merit. The part objected to is to the effect that, if the jury finds the issues in favor of respondent, then in estimating her damage they must take into consideration the condition of her health and physical ability before the accident, the nature and extent of her injuries, etc. The testimony of respondent was that before the accident she worked for the Almond Growers' Association as an almond grader, and prior to that work she had done laundry work; that since her injury she had not been able to perform manual labor of any kind; has been compelled to keep a servant to do her house work. She further testified that she had worked for the Almond Growers' Association up to within a month prior to the accident, and that her wages were $16 to $18 per week. Appellants claim that the admission of this testimony was erroneous for the reason that no claim had been made by respondent for special damages of this character. There was no error committed by the court in the admission of this testimony. Under the plea of general damages, and to prove loss of earning capacity, it is permissible to show what wages, salary, or emolument respondent was earning and capable of earning prior to the injury. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513; Ehat v. Scheidt, 17 Cal. App. 430, 120 P. 49, 50. In this last case, Hart, J. said: 'The earning capacity of the plaintiff prior to receiving the injuries complained of in the business which he had customarily followed was a proper element to be considered in the assessment of damages.'

[12] "On cross-examination Pauline McLaughlin was permitted by the court, over objection, to testify that when she left the country club she intended to drive back to get her daughter, and, in reply to questions as to whether she was anxious to get back to the church on account of her daughter, and for the reason was hurrying her return, she said that she did not think she was specially hurrying, but that her daughter at the church was on her mind. The admission of this evidence is assigned as error. Inasmuch as this witness had testified that she was driving the automobile at only a moderate rate of speed on her return from the country club to the place of the accident, and by that evidence seeking to controvert the evidence of respondent that she was driving at a speed of thirty or thirty-five miles per hour, the fact, if proven, that she had a motive for hurrying back to the church, or was hurrying back at the time of the accident, would have some evidentiary force as tending to contradict her statement that she was not traveling at the rate of thirty or thirty-five miles per hour, as testified to by respondent. For that purpose this evidence was admissible.

[13, 14] "Error is also claimed by appellants in the ruling of the court permitting testimony to be given to the effect that from the Country Club road to the place of the accident, a distance of about a quarter of a mile, the road was rough, bumpy, and full of potholes. It is urged by appellants that testimony as to the character of the road upon which the accident occurred should be limited to the place of the accident. While as a general rule this is true, yet, as tending to show notice to, and knowledge upon the part of, Pauline McLaughlin, of the nature and condition of the surface of the road over which she was traveling just prior to the accident, it was permissible to show that for at least a reasonable distance in approaching the place where the accident happened, and continuing to that place, the road was rough and in bad condition. Under the circumstances surrounding this accident, and as tending to prove that Pauline McLaughlin did know, or, in the exercise of her judgment as a reasonable person, should have known that the road, at the place of the accident, was rough and in bad condition, we are of the opinion that the trial court did not err in admitting this evidence. Nor did the court err in permitting respondent to testify as to the speed at which the automobile was traveling. She being a person of at least ordinary intelligence, so far as the evidence shows, and having opportunity for observing the said speed, was competent to testify to same. Shimoda v. Bundy, 24 Cal. App. 675, 142 P. 109; Johnsen v. Oakland, S. L. & H. E. Ry., 127 Cal. 608, 60 P. 170; Snyder v. Reeg, 86 Cal. App. 231, 260 P. 600.

[15, 16] "Appellants further contend that the verdict and judgment against Porter McLaughlin is not supported by any sufficient evidence that at the time of the accident Paul-

ine McLaughlin was acting as his agent in driving the said automobile. Porter McLaughlin himself testified that he was the owner of the automobile; that he personally invited respondent to ride out to the country club with himself and wife; he also testified that he heard his wife invite respondent to ride with them, and heard his wife say she would bring respondent back. Upon arriving at the country club he turned over to his wife the control and operation of the car, knowing that his wife intended to immediately return to the said church with respondent. Where proof is made that the car in question was owned by the husband, and was being operated by the wife at the time of the accident, with his express consent and permission, there is created a prima facie case authorizing an inference by a court or jury, in the absence of substantial proof to the contrary, that the wife was using the car as the agent of the husband. McWhirter v. Fuller, 35 Cal. App. 288, 170 P. 417; Randolph v. Hunt, 41 Cal. App. 739, 183 P. 358; Perry v. A. Paladini, Inc., 89 Cal. App. 275, 264 P. 580; Ransford v. Ainsworth, 196 Cal. 279, 237 P. 747. Appellants offered no evidence in any way controverting the inference or presumption thus created. In addition to the aforesaid presumption arising from ownership of the automobile, there was evidence from which the jury could draw the inference that at the time of the accident Pauline McLaughlin was acting as the agent of her said husband.

[17] "And, lastly, appellants contend that the verdict awarding respondent the sum of $12,500 as general damages, is excessive. At the date of the accident respondent was about forty years of age. Previous to that date she had been troubled with what her physicians termed 'smouldering tuberculosis,' but prior to the accident had been cured of this disease and had been employed as an almond assorter at wages ranging from $16 to $18 per week. Her expectation of life was stipulated to be 28.18 years. The injury inflicted upon her by the accident necessitated a very painful operation which kept her in the hospital for over three months, and thereafter she was confined to her bed in her home for another month, and was not able to get out of the house until in March, 1928, a period of some ten months after the injury. Dr. Harris, one of the physicians who treated respondent, testified that she will always have to wear a steel brace or jacket for her back, and, speaking of her future disability growing out of said injury and the operation, that she would never be able to do housework or hard work of any kind, and that for relief from continuing pain she will require future treatment. There is ample evidence that she has suffered great physical pain, and she will continue to suffer pain in the future.

"Upon this state of the evidence, we are unable to say, using the language of the Supreme Court in the case of Kelley v. Hodge Transportation System, 197 Cal. 598, 242 P. 76, 81, 'that the award of damages made by the jury and sustained by the trial court were grossly disproportionate to any compensation reasonably warranted by the facts as presented to us on appeal as to shock the sense of justice and raise at once a presumption that it was the result of passion, prejudice, or corruption, rather than an honest and sober judgment.' And this being the case, this court cannot exercise the power of revision. Darling v. Pacific Electric Co., 197 Cal. 702, 242 P. 703; Driscoll v. California Street R. R. Co., 80 Cal. App. 208, 250 P. 1062; Hale v. San Bernardino, etc., Co., 156 Cal. 713, 106 P. 83."

The judgment and the order denying the motion for a judgment notwithstanding the verdict are affirmed.

SQUIRES v. RIFFE et al.★

Civ. 3879.

District Court of Appeal, Third District, California.

April 8, 1930.

Rehearing Denied May 8, 1930. Hearing Granted by Supreme Court June 5, 1930.

1. Automobiles ⟹244(26) — Operation of automobile — Owner's consent — Inference of agency.

Evidence establishing ownership of automobile, and that driver was operating automobile with owner's consent, *held* to give rise to inference that driver was owner's agent.

2. Trial ⟹127 — Testimony showing existence of liability insurance — Error.

Admitting testimony that automobile owner had stated she had liability insurance *held* error in action for wrongful death.

3. Death ⟹9 — Liability to injured guest — Limiting statute — Retroactive effect.

Statute limiting liability of automobile owner and driver for wrongful death of guest *held* inapplicable to action arising before adoption of statute (California Vehicle Act, § 141¾, as added by St. 1929, p. 1580).

California Vehicle Act, § 141¾, as added by St. 1929, p. 1580, relieves automobile owner or driver of liability for death of guest, except in case of death resulting from intoxication, willful misconduct, or gross negligence of the owner or driver.

★Rehearing denied. Hearing granted. 295 P. 517.

Appeal from Superior Court, Lake County; Percy S. King, Judge.

Action by Edna Leota Squires, as administratrix of the estate of George E. Squires, deceased, against Winnie Riffe and another. Judgment for plaintiff, and the named defendant appeals.

Reversed.

J. Hampton Hoge, of San Francisco, for appellant.

Benjamin C. Jones, of Lakeport, and M. H. Iverson, of Ukiah, for respondent Squires.

W. H. Hazell, of Lakeport, for respondent Tallman.

FINCH, P. J.

The plaintiff recovered judgment for damages in the sum of $5,000 for the death of her husband, George E. Squires, alleged to have been caused by the negligent operation of an automobile owned by the defendant Winnie Riffe and driven by the defendant Tallman. Winnie Riffe has appealed from the judgment.

At the time of and prior to the accident the appellant owned and conducted a hotel at Upper Lake, Lake county. Tallman is the appellant's brother. He had been doing "odd jobs and errands" for her for many years, sometimes using her automobile in going on such errands. She also permitted Tallman and his wife to use her automobile "on their private errands." Tallman's wife was a waitress in the hotel. Yee Ock was employed by the appellant as a cook in the hotel.

Tallman, his wife, Squires, and Yee Ock left Upper Lake in appellant's automobile shortly before 10 o'clock in the evening on September 15, 1928. It does not appear at whose invitation Squires rode in the machine. They drove to several places during the night, and as they were returning to Upper Lake between the hours of 4:30 and 5 the next morning, at a place where the road turns sharply to the right over a bridge, Tallman lost control of the automobile and it went over the left side of the bridge. Squires was crushed beneath the automobile and killed. Part of the road near the bridge was covered with loose gravel, and, in passing through it, the rear end of the automobile skidded so far to the left that, while the front wheels went upon the bridge, the left rear wheel missed it, thereby causing the machine to topple over into the bed of the creek below. The automobile was a Jewett sedan, equipped with balloon tires. The evidence shows that the right rear tire was flat, it having been punctured by a large nail, apparently as the machine was approaching the bridge, the nail being of the kind used in the structure of the bridge. One of the witnesses testified that the flat tire "would have a tendency to throw you back and to the left." Tallman testified that he slowed down to "10 or 15 miles an hour" as he approached the bridge. There is sufficient evidence to support a finding either that the accident was caused by the flat tire, or that it was due to the negligence of Tallman in rounding the curve at too high a speed.

Mrs. Tallman testified:

"Q. Did this Yee Ock ask to accompany you on this trip? A. No sir.

"Q. How did he happen to go? A. Mrs. Riffe said if we were going to take him with us. * * *

"Q. What words did she use in that connection, if you remember? A. Not exactly. She asked if we were going. I said the lights were not good in our car. She said if we were going any place in the evening to take her car and take the little China boy (Yee Ock) along with us."

Relative to the same matter, the appellant testified:

"Q. On the occasion of permitting your car to be used on the evening before the accident happened, did you give any order to any person as to who should be taken in the car there or who should not? A. I told them to take Albert (Yee Ock), we called him Albert, if he cared to go. * * *

"Q. Did you order anybody to take him? A. No.

"Q. Did you make the use of your car dependent on them taking Albert? A. Not entirely, no."

[1] The evidence shows without conflict that the automobile in question was owned by the appellant, and was, at the time of the accident, being driven by Tallman with her consent. From these facts an inference arises that he was her agent in driving the automobile. Ransford v. Ainsworth, 196 Cal. 279, 281, 237 P. 747. In addition to this inference, the foregoing evidence tends to show, as was said in the case cited, not only that Tallman was operating the automobile with the appellant's consent, "but that in doing so he was engaged in doing things which were matters of her * * * concern." While such proof of agency is not conclusive, it is sufficient.

[2] The following occurred during the direct examination of the plaintiff as a witness:

"Q. After the death of your husband, Mrs. Squires, did you have any conversation with Mrs. Riffe? A. I did. * * *

"Q. State what that conversation was, * * * relating to the bringing of this suit and making a demand upon Mrs. Riffe?

"Mr. Honey (counsel for defendants): We submit that it is immaterial whether she made demand on Mrs. Riffe when she brought suit. * * * I have an idea it is an at-

tempt to bring in extraneous matter here that has no relation to this matter.

"The Court: I think I will overrule the objection. * * *

"A. I told Mrs. Riffe I was going to bring suit, that I thought I ought to get damages. * * * She said she didn't want it to cost her a lot of money but she realized it and that is the reason she had insurance.

"Mr. Honey: If the court please, I assign the asking of that question as misconduct on the part of counsel, injecting extraneous matter into this case, and I now move that this jury panel be discharged and this case adjudged a mistrial. * * *

"The Court: The testimony about the conversation will be stricken out and the jury admonished when a matter is stricken out it is not to be considered by you in any way, it is to be considered the same as if no such testimony had been given or called for. The balance of the motion will be denied."

At the close of the plaintiff's case in chief, counsel for the defendants renewed his motion for the discharge of the jury because of the prejudicial effect of the foregoing evidence. In denying the motion the court said: "I confess I am considerably worried about the question."

It must be presumed that counsel for the plaintiff knew the answer which his client would give to the objectionable question. Her answer could serve no purpose, except to get before the jury the fact that the appellant carried indemnity insurance. The language of the Supreme Court in Citti v. Bava, 204 Cal. 136, 138, 266 P. 954, 955, is applicable to the matter under discussion. Referring to proof of a settlement disclosing "the fact that the defendant was indemnified by a policy of insurance", it is there said: "The evidence of the settlement, alone, not connected up with any act or admission of the defendant, and concerning which he had nothing to do, was clearly inadmissible in evidence. The error in admitting it might not in and of itself require a reversal, but, coupled with the avowed purpose and successful attempt of plaintiff's counsel to get before the jury, not only the fact of the settlement, but also that the settlement was made by the insurance carrier of the defendant, puts the case in a position where section 4½ of article 6 of the Constitution will not save the judgment. The natural tendency of a line of examination that suggests to the jury that the defendant is indemnified against any judgment for damages against him is highly prejudicial to his rights, especially in a closely balanced case where the evidence otherwise would be easily sufficient on appeal to support a verdict either for the plaintiff or for the defendant. Such attempts on the part of counsel have frequently been held to be improper and prejudicial. * * * From an examination of the record in this case it is impossible for us to state that the jury would not have found a different verdict had the objectionable examination not taken place and the evidence not been admitted."

[3] Appellant contends that the provisions of section 141¾ of the California Vehicle Act (St. 1929, p. 1580), enacted after the appeal herein was taken, apply to the facts of this case, Squires being a guest in the automobile and the complaint not alleging intoxication, gross negligence, or willful misconduct on the part of the defendants. Under similar circumstances section 141¾ has been held inapplicable. Smellie v. Southern Pacific Company (Cal. Sup.) 287 P. 343; Krause v. Rarity (Cal. App.) 285 P. 879.

One of the instructions contains the word "presumption" where the word "inference" should have been used. Maupin v. Solomon, 41 Cal. App. 323, 183 P. 198. Another instruction states that it is negligence as a matter of law to "approach" a turn at a speed greater than 15 miles an hour under the conditions mentioned in section 113 (b), subd. 3, of the California Vehicle Act (St. 1917, p. 554). The limit fixed by that subdivision is "fifteen miles an hour in traversing or going around curves or corner."

The judgment is reversed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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105 Cal. App. 202

PEOPLE v. ALDERSON.

Cr. 1105.

District Court of Appeal, Third District, California.

April 12, 1930.

1. Indictment and Information ⚷189(2) — Simple assault.

Crime of simple assault is necessarily included in crime of assault by means likely to produce great bodily injury (Pen. Code, § 1159).

2. Criminal law ⚷1172(8) — Instruction — Greater offense — Lesser offense — Evidence — Prejudice.

Error, if any, in instruction authorizing conviction of lesser offense *held* not prejudicial, precluding reversal, where defendant was convicted of lesser, under evidence establishing higher offense (Const. art. 6, § 4½).

Information under which defendant was convicted of simple assault charged an assault by means and force likely to produce great bodily injury. Court gave instruction that under information jury should find defendant guilty of either assault by means and force likely to produce great bodily injury, or simple assault. Defendant contended that under evidence he should have been found guilty either of the higher offense charged in the information or not guilty. Evidence was sufficient to warrant conviction of higher offense.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Gene Alderson, whose true name is Leslie Eugene Alderson, was convicted of simple assault, and he appeals.

Affirmed.

S. V. Cornell, of Turlock, and E. H. Zion, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J.

The defendant was convicted of the offense of simple assault, upon an information charging an assault by means and force likely to produce great bodily injury. Judgment was entered upon the verdict, fining the defendant in the sum of $125 with an alternative in the county jail. From this judgment, and the order denying his motion for a new trial, the defendant appeals.

The record shows that the defendant might very properly have been found guilty of the highest offense charged in the information, as the assault consisted of striking the complaining witness with a stretcher bar consisting of a piece of wood about 2x4x4 feet in length. From the force of the blow the complaining witness suffered two broken ribs.

The appeal is based upon alleged errors of the court in instructing the jury. The instructions assailed are as follows: "The court instructs you that under the information in this case you may, if the evidence justifies it, find the defendant guilty of either,—1: an assault by means and force likely to produce great bodily injury; or,—2: simple assault." And further: "The court further instructs the jury that an assault is an unlawful attempt, coupled with the present ability to commit a violent injury upon the person of another." The contention being made that under the evidence the defendant should have been found guilty either of the highest offense charged in the information, or, not guilty. Section 1159 of the Penal Code reads: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense."

[1] While unnecessary to cite any authorities to show that the crime of assault is necessarily included in the charge contained in the information in this case, we may refer to the numerous cases cited in the annotations to section 1159 found in Kerr's Cyc. Codes.

[2] As appears by the brief filed by the appellant in this case, many courts have held that while a jury may, without reversible error, find a defendant guilty of a lesser crime included in the charge, such, for instance, as manslaughter, where a defendant is charged with murder, and the evidence shows either that the defendant should be found guilty of murder, or not guilty, yet if the court instructs the jury, under such circumstances, that a verdict of manslaughter may be returned, it is erroneous and the judgment will be reversed. Nevertheless, this question has been definitely decided in this state, contrary to the contentions of the appellant that reversal should here follow in line with the cases reaching such a conclusion.

In the case of People v. Tugwell, 32 Cal. App. 520, 163 P. 508, every question presented upon this appeal was thoroughly considered, and the cases bearing thereon, set forth and fully analyzed. In that case it was held (quoting from the syllabus): "In a prosecution for murder, where the evidence shows murder in the first degree, error in instructing the jury on the law of manslaughter is favorable and not prejudicial to the defendant, as in view of the code definitions of murder and manslaughter it must be assumed that the jury would have convicted the defendant of murder if such instruction had not been given." In this case a petition for rehearing in the Supreme Court, after decision by the District Court of Appeal, was denied.

This court, in the case of People v. Washburn, 54 Cal. App. 124, 201 P. 335, had before it a like question with the one now presented. It was there held (quoting from the syllabus): "Where a defendant charged with the offense of assault with a deadly weapon was convicted of assault, and the evidence would have amply supported a verdict for the greater offense, it was not reversible error for the court to instruct the jury as to its right to return a verdict of guilty of simple assault, although there was no evidence of such lesser offense."

In the case at bar the evidence shows that the jury might have found the defendant guilty of a much higher offense, and it may be presumed that the jury found the defendant guilty of the lesser offense, upon ascertaining that it was at liberty to do so.

While we have followed with interest the arguments of counsel to the effect that if a jury finds a defendant guilty of a lesser of-

fense, where the testimony establishes a higher, no prejudice is suffered by the defendant and no reversible error is made to appear, yet if the court erroneously instructs the jury that it may do so, prejudice has been caused and the defendant is entitled to a reversal; we cannot agree with counsel that such doctrine should be held to be the law of this state, especially in view of the two cases which we have cited and section 4½ of article 6 of the Constitution. If it were to be admitted that the instruction is erroneous, which we do not think to be the case, no reversal could be had herein for the reason that a consideration of all the testimony shows that no prejudice has been suffered by the defendant, and, under section 4½ of article 6 of the Constitution, the judgment must stand.

We have not reviewed the cases drawing fine distinctions between verdicts rendered by juries where the evidence established a higher offense, and instructions given by courts in like instances relative to lesser offenses, for the reason that under what we consider to be the established law, a discussion of cases drawing such meticulous distinctions and hypercritical refinements have no place in our jurisdictions. Section 4½ of article 6 of the Constitution was intended to eliminate just such obstructions to the administration of justice.

The judgment and order are affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

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105 Cal. App. 248

BUCK v. JAMES McCLATCHY PUB. CO., Inc.

Civ. 3999.

District Court of Appeal, Third District, California.

April 15, 1930.

1. Corporations ⟹503(3) — Libel action — Corporate defendant — Place of circulation.

Corporation sued for damages for libel in county in which publication was circulated could not have action transferred to county of its principal place of business (Const. art. 12, § 16; Code Civ. Proc. § 395).

This action was brought against a corporation publishing a newspaper which was circulated in the county in which the suit was brought. The corporation claimed the right to be sued in the county of its residence under Code Civ. Proc. § 395. However Const. art. 12, § 16, provides that a corporation or association may be sued in the county where the contract is made or to be performed, or where the obligation or liability arises or the breach occurs, subject to the power of the court to change the place of trial as in other cases.

2. Constitutional law ⟹29 — Corporations ⟹500 — Actions against corporation — Constitutional provision fixing venue.

Constitutional provision fixing venue in actions against corporation is self-executing, and takes precedence over conflicting legislative enactments (Const. art. 12, § 16).

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by L. M. Buck against the James McClatchy Publishing Company, Inc. From an order granting defendant's motion for change of place of trial, plaintiff appeals.

Reversed.

J. S. Daly, of Sacramento, for appellant.

McLaughlin & McLaughlin, of Sacramento, for respondent.

PLUMMER, J.

This cause is before us upon an appeal by the plaintiff from an order of the superior court granting the respondent's motion for a change of place of trial from the county of Placer to the county of Sacramento.

The complaint sets forth the residence of the plaintiff in the county of Placer, and that the plaintiff was, during all the times mentioned in the complaint, a resident of said county; that the defendant is a corporation organized and existing under and by virtue of the laws of the state of California, and was, during all of the times mentioned in the complaint, such corporation, having its principal place of business in the city and county of Sacramento. The complaint further alleges that the defendant corporation is the publisher of a newspaper known as the Sacramento Bee, and that on or about the 24th day of September, 1928, the defendant corporation printed and published in said Sacramento Bee, certain libelous matter of and concerning the plaintiff; that the issue of the paper containing such libelous matter was circulated in the city of Lincoln, in Placer county, and in the county of Placer generally. Damages on account of said alleged libelous publication are prayed for in the complaint.

[1] The affidavit upon which the notice of motion for change of place of trial is based sets forth that the James McClatchy Publishing Company is a corporation having its principal place of business in the city and county of Sacramento, and that a majority of the directors of the corporation were, at the time

of the commencement of the action, residents of the county of Sacramento, and that none of them were, at the time of the commencement of the action or at the time of the making of the affidavit, residents of the county of Placer, the notice of motion and motion follow the affidavit. The demand for change of place of trial is in the usual form. The fact that the affidavit upon which the notice of motion was based, and upon which the demand for change of place of trial is predicated, refers to the fact that a majority of the directors of the defendant corporation were residents of the city and county of Sacramento, and that none of them were residents of the county of Placer, need not be considered, for the simple reason that the directors are not made parties to this action. The cause is prosecuted simply against the defendant corporation, and there are no individual defendants named either in the title to the action or in any portion of the complaint. We are confronted upon this appeal simply with the question as to whether a corporation sued in the county in which an alleged libel is circulated is entitled to have the action transferred to the county of its principal place of business for trial.

In support of the order granting its application for change of place of trial, the respondent relies solely upon the case of Graham v. Mixon, 177 Cal. 88, 169 P. 1003, L. R. A. 1918F, 1023. In that action the principal question decided was as to what constitutes an injury to person, within the definition of section 395 of the Code of Civil Procedure. It was there held that section 395, in so far as that case was concerned, related only to bodily injuries, and not to injuries to character; that the former was an action in the nature of trespass, and the latter an action on the case. Under these circumstances it was held that in a purely personal action, where no corporation was involved, section 395 of the Code of Civil Procedure, as amended in 1911, did not deprive the defendant of the right to have the cause of action transferred to his place of residence. It will be further observed that in the Mixon Case, although it was for a libel published in a newspaper, it was not published by a corporation, but was published by the defendant Mixon, who was doing business under a fictitious name. Even the law relative to doing business under a fictitious name had not been complied with by the defendant, but, if it had, the application and controlling power of section 395 of the Code of Civil Procedure would not have been affected. This case does not purport to, and does not in any wise, affect the ruling followed in cases where alleged libels have been published by corporations. It is purely and simply an action between parties in their individual capacities, and is no different from other actions as to the right of the defendant to have the trial take place at his place of residence, unless specifically controlled by other sections of the Code concerning actions relative to real estate, and instances specifically mentioned. Section 16 of article 12 of the Constitution is not referred to, and no attempt is made to modify, limit, or distinguish the rulings had in the cases based thereon.

This being an action solely against a corporation, we must have resort to the Constitution controlling such actions. Section 16 of article 12 reads: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs, or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

In the case of Brady v. Times-Mirror Co. et al., 106 Cal. 56, 39 P. 209, the cause of action was prosecuted against a corporation and an individual. In that case it was held that, if the corporation had been sued alone, the right of the plaintiff not only to institute but to maintain and prosecute the action in the place of his residence where the alleged libel had been circulated would have been upheld. But, as the plaintiff saw fit to join an individual defendant, the right to resist the change of place of trial was waived.

In Tingley v. Times-Mirror Co., 144 Cal. 205, 77 P. 918, the following holding is had: "An action for libel may be maintained in the county where the plaintiff resides against a defendant corporation publishing a newspaper in another county which is its principal place of business, where the paper in which the libel was published was circulated in the former county."

In line with these cases is the case of Cook v. W. S. Ray Mfg. Co., 159 Cal. 694, 115 P. 318, 319. In this case the section of the Constitution relative to the institution and maintenance of an action for libel in a county other than that in which the corporation has its principal place of business is further amplified. After quoting the section of the Constitution, the court there says: "And this has been held to mean, not merely that an action against a corporation may, at the option of the plaintiff, be commenced in one of the designated counties other than the one in which the defendant has its principal place of business, but that it may be prosecuted to final judgment where commenced, unless the defendant can allege and show some sufficient ground for a change of the place of trial distinct from the fact that the residence of the corporation is in another county"—citing authorities.

It is further held in the Cook Case that the section of the Constitution referred to does not violate any of the provisions of the Fourteenth Amendment to the Federal Constitution.

In Raphael v. People's Bank of Benicia, 41 Cal. App. 115, 187 P. 53, the same question was before the District Court of Appeal of the

First District that we are now considering, and it was there held that section 16 of article 12 of the Constitution was not violative of the Federal Constitution. It was also there held that, under the section of the Constitution which we are considering, such an action might not only be instituted, but prosecuted to final judgment, unless the defendant could show some ground for change of place of trial *distinct* from the fact of residence of the corporation. This case likewise refers to section 395 of the Code of Civil Procedure, and points out that the rights of the parties are not dependent upon that section of the Code.

In W. J. Bush & Co. v. Van Camp S. F. Co., 51 Cal. App. 440, 196 P. 918, section 16 of article 12 of the Constitution was under consideration, and it was there held (quoting from the syllabus): "A corporation in an action for damages for breach of contract is not entitled to have the place of trial changed to the county in which its principal place of business is situated, where the action is brought in the county where the contract is to be performed and no reason other than its residence exists for the change." While the opinion in that case is brief, it cites a number of decisions supporting the rule just stated.

In Strassburger v. Santa Fé L. I. Co., 54 Cal. App. 7, 200 P. 1065, the constitutional provision here involved was again before the District Court of Appeal for the First District, and it was there held that, even though individuals were joined as defendants, as to the corporation defendant, no right to change the place of trial was given, and that, as to the corporation, the constitutional provision was not waived. The syllabus states succinctly the holding of the court in that case, and we quote it as follows: "The right, conferred by section 16 of article 12 of the constitution, to sue a corporation in a county other than that of its residence or in which its principal place of business is situated, is not waived by the joinder of individuals as defendant; and where, in accordance with that constitutional provision, a corporation is sued in a county other than that of its residence, and individuals are joined as defendants, the latter have the right to have the place of trial changed to the county of their residence, but the corporation has not that right."

In the case of Nakata v. Guarantee Mortgage Co., 60 Cal. App. 260, 212 P. 937, it is held that an action against a corporation for fraud committed in a county other than its principal place of business may prosecute in the county in which the fraud is committed, and a corporation has no right to a change of place of trial. This case also cites the cases to which we have just referred.

In the recent case of Ray Wong v. Anthong, Inc., 199 Cal. 15, 247 P. 894, section 16 of article 12 of the Constitution was under consideration by the Supreme Court, and in an opinion written by Presiding Justice Finch of this court, sitting as justice pro tem., it was held that a corporation, in an action for damages based upon malicious prosecution, instituted in a county other than the residence of the corporation, entitles the plaintiff to maintain the action in the county where the liability arose, and that the corporation, under the section of the Constitution, had no right to a change of the place of trial. The opinion in the Ray Wong Case cites many decisions to support the ruling there followed.

[2] It likewise appears from a consideration of the cases that section 16 of article 12 of the Constitution is self-executing, and, in so far as it conflicts with any legislative enactment, it takes precedence. 7 Cal. Jur. p. 118, § 614.

We think there is no escape from the conclusion, and what we have said, that the case of Graham v. Mixon, supra, relied upon by the respondent, and followed by the trial court, has no application to the question here presented, and that it was error to grant the respondent's motion for a change of place of trial.

The order appealed from is reversed.

We concur: FINCH, P. J.; THOMPSON, J.

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104 Cal. App. 573

NUNZIATO v. PROUT.

Civ. 3982.

District Court of Appeal, Third District, California.

April 18, 1930.

Appeal and error ⟹907(3) — Appeal on judgment roll — Presumption.

Trial court's findings will be assumed to be supported by evidence, where appeal was simply on judgment roll.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 286 P. 455.

Sherman & Sherman, of Los Angeles, for appellant.

John L. Schaefer and Roy C. Kaiser, both of Los Angeles, for respondent.

PER CURIAM.

Appellant, in his petition for a rehearing insisting that the trial court should have either entered judgment in favor of appellant for the sum of $4,500 alleged to be the unpaid

portion on the contract involved in this action, or should have entered judgment for damages in favor of the plaintiff, overlooks the fact that under the contract involved in this action, after the sum of $3,000 was paid thereon, the remainder of the purchase price did not become due and payable until the machinery in question had been installed and placed in a satisfactory working condition.

Finding No. 2 of the trial court is to the effect that the machinery just referred to, to wit, two macaroni presses, did not function satisfactorily when installed, and that the appellant has never put said presses on a satisfactory working basis.

This being simply an appeal upon the judgment roll, it must be assumed that the finding of the trial court is amply supported by the testimony. Under such circumstances, the remainder of the purchase price mentioned in the contract has not become due and payable, and will not become due and payable until the presses have been put in the working condition called for by the terms of the contract.

The petition for a rehearing is denied.

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105 Cal. App. 278

O'BRIEN v. RAUDIO.

Civ. 3936.

District Court of Appeal, Third District, California.

April 17, 1930.

Appeal and error ⚷1011(1) — Conflicting evidence — Review.

It is not within province of reviewing court to re-examine disputed questions of fact and determine anew any conflict arising therefrom.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by P. J. O'Brien against Oscar Raudio. Judgment for defendant, and plaintiff appeals.

Affirmed.

A. W. Hill, of Eureka, for appellant.

Charles Kasch, of Ukiah, and Leonard Stone, of Ft. Bragg, for respondent.

PARKER, Justice pro tem.

Plaintiff, as assignee and for purposes of collection, brought suit to recover upon a certain promissory note.

Defendant admitted the execution of the note, but alleged a lack of consideration, and also the further defense that the execution and delivery of the said note was procured through duress and fraud.

On these issues trial was had, and a judgment went for the defendant. From the judgment entered plaintiff appeals. The sole ground of the appeal is that the judgment is not supported by the evidence, and that the evidence does not sustain the findings upon which the said judgment is predicated.

It is conceded by appellant that it is not within the province of a reviewing court to again examine into disputed questions of fact and to determine anew any conflicts that might arise therefrom. With that concession, the appeal falls of its own weight. Not only is the evidence supporting plaintiff's claim wholly unreliable and in itself weak and unsatisfactory, but the conflict created by the evidence of defendant is a real conflict and more persuasive. Not one error of law is complained of. The entire brief of appellant is but an argument on the facts and an attempt to show that the conclusions of the learned trial judge were erroneous. When it is possible to array the facts presented by each side and then build up an argument requiring many pages of printed brief with topical headings and subheadings, then, at least, one thing is demonstrated; namely, that ample reasons are present to indicate a fair difference of opinion.

We do not feel that this appeal, so lacking in merit, is worthy of a recital of the facts. Such a recital would serve no purpose, useful or otherwise. The harmful effect, however, of a lengthy detail of facts might be to establish a precedent that would lead every unsatisfied litigant to hope that courts of appeal might engage in a trial de novo of his particular case. It might be noted that the trial court reopened the case, and even thereafter permitted another reopening for the purpose of receiving depositions.

While our reports contain hundreds of cases announcing the rule of appellate courts, it will suffice to quote the language of the Supreme Court in the case of Hotaling v. Hotaling, 187 Cal. at page 699, 203 P. 745, 747, wherein the court, in referring to the point raised on conflicting evidence, says: "In passing upon this point the function of this court is much less complicated than was that of the trial court. The trial judge was called upon to delicately adjust the balance so as to determine upon which side, in this great mass of conflicting evidence and inference, the preponderance might lie, while upon this appeal our only duty is to ascertain if there was any substantial showing in behalf of the court's finding to give rational support to the conclusion reached."

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

NEW YORK INDEMNITY CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. *

Civ. 6802.

District Court of Appeal. Second District, Division 1, California.

April 14, 1930.

Rehearing Denied May 13, 1930. Hearing Granted by Supreme Court June 12, 1930.

1. Master and servant ⟹414 — Workmen's Compensation Act — Relation of employer and employee — Determination — Industrial Accident Commission.

Ordinarily, duty of determining whether relationship of employer and employee exists rests primarily on Industrial Accident Commission (Workmen's Compensation, Insurance, and Safety Act, §§ 7, 8(a), as amended).

Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 835), §§ 7, 8 (a), as amended, define an employee as one who is in the service of another under a contract of hire.

2. Master and servant ⟹417(6, 7) — Workmen's Compensation Act — Relation of employer and employee — Conclusion of Industrial Accident Commission — Finality — Fact or law question.

Industrial Accident Commission's conclusion as to relationship of employer and employee is final, where question is one of pure fact, but reviewable, where it depends wholly or principally on question of law (Workmen's Compensation, Insurance, and Safety Act, §§ 7, 8 (a), as amended).

3. Master and servant ⟹397 — Workmen's Compensation Act — Industrial Accident Commission — Jurisdiction — Relation of employer and employee.

Relationship of employer and employee must exist to give Industrial Accident Commission jurisdiction, and it cannot confer jurisdiction on itself by erroneous legal conclusion that such relationship exists (Workmen's Compensation, Insurance, and Safety Act, §§ 7, 8(a), as amended).

4. Master and servant ⟹417(7) — Workmen's Compensation Act — Industrial Accident Commission — Fact findings — Conclusiveness.

Industrial Accident Commission's fact finding, dependent on correct legal conclusion from consideration of many facts with legal principles, is not binding on certiorari (Workmen's Compensation, Insurance, and Safety Act).

5. Master and servant ⟹417(6) — Workmen's Compensation Act — Relation of employer and employee — Law question.

Whether relationship of employer and employee existed between newspaper publishers and newsboy *held* law question for Court of Appeal to determine on certiorari from evidence before Industrial Accident Commission (Workmen's Compensation, Insurance, and Safety Act, §§ 7, 8(a), as amended).

6. Master and servant ⟹361 — "Servant" — "Employee."

Word "servant" is generally synonymous with "employee" (Civ. Code, § 2009).

Civ. Code, § 2009, defines "servant" as one employed to render personal service to his employer, otherwise than in pursuit of independent calling, and remaining entirely under employer's control and direction in such service.

[Ed. Note.—For other definitions of "Employé" and "Servant," see Words and Phrases.]

7. Master and servant ⟹361 — Workmen's Compensation Act — Definition of employee — "Contract of hire" — Personal service.

"Contract of hire" in statutory definition of employee calls for personal service (Workmen's Compensation, Insurance, and Safety Act, §§ 7, 8(a), as amended).

[Ed. Note.—For other definitions of "Contract of Hiring," see Words and Phrases.]

8. Master and servant ⟹361 — Workmen's Compensation Act — Relation of employer and employee — Right of control.

Relation of employer and employee does not exist, unless person for whom service is performed has right to control manner of doing work (Civ. Code, § 2009).

9. Master and servant ⟹361 — Workmen's Compensation Act — Relation of employer and employee — Contract of "hire" — Reward or compensation.

Word "hire," in connection with contract of employment, implies reward or compensation for services (Workmen's Compensation, Insurance, and Safety Act, §§ 7, 8(a), as amended).

[Ed. Note.—For other definitions of "Hire; Hiring," see Words and Phrases.]

10. Master and servant ⟹361 — Workmen's Compensation Act — Employee — Newsboy.

Newsboy, purchasing papers from publishers for resale at higher price, fixed by publishers, at place stipulated, on penalty of refusal to sell him any, and assuming risk of loss, *held* not "employee" (Workmen's Compensation, Insurance, and Safety Act, §§ 7, 8(a), as amended).

Proceeding for compensation under the Workmen's Compensation Act by Claude Eus-

*Rehearing denied. Hearing granted. 1 P.(2d) 12.

tace, employee, opposed by the Los Angeles Evening Herald, a corporation, and another, employers, and the New York Indemnity Company and another, insurance carriers. To review an award of compensation by the Industrial Accident Commission, the insurance carriers bring certiorari

Award annulled.

E. Herbert Herlihy and F. George Herlihy, both of Los Angeles, for petitioners.

Edward O. Allen, of San Francisco, for respondent Industrial Accident Commission.

Flint & MacKay, of Los Angeles (Edward L. Compton, of Los Angeles, of counsel), for respondent Los Angeles Evening Herald.

HOUSER, J.

By this proceeding petitioner seeks the annulment of an order made by the respondent commission by which an award of compensation was made to one Eustace for injuries admittedly received by him while engaged in the occupation of selling newspapers on a street corner within the city of Los Angeles. The question to be here determined is whether at the time Eustace sustained the injury, which resulted in the award of compensation to him, he was an employee of each of the respective proprietors of the newspaper business whose newspapers Eustace was selling. As at once it is apparent that consequences which might follow from a final determination that the relationship of employer and employee exists as between the publisher of a newspaper and each of the several newsboys engaged in selling his product might be far-reaching, the question presented is worthy of serious consideration. For example, if in law a newsboy, who is selling a newspaper, is to be regarded as an employee of the publisher of such newspaper, it is not impossible that such publisher would be liable in damages arising from tort, or, in fact, from any act of negligence, which might be committed by the newsboy while operating within the scope of his employment.

Although not without contradictions in many particulars, from the evidence adduced at the hearing of the application presented by Eustace to the respondent commission for an adjustment of compensation to be paid to him for his injuries and as a basis for its finding that Eustace was "*employed as a news vendor*," the respondent commission was authorized to accept as established the following pertinent facts: Eustace was a newsboy who was engaged in the occupation of selling each of two certain evening newspapers, known respectively as the Los Angeles Evening Herald and the Los Angeles Record. Instead of obtaining his supply of newspapers directly from the office of the publisher thereof, Eustace procured his supply from a wholesaler of such newspapers, known as a district manager, who purchased them in large numbers from their respective publishers and furnished them in suitable lots to Eustace and other newsboys. Eustace was obliged to buy from the district manager at least 130 Heralds each day; but neither daily, nor otherwise, was he required to purchase any specified number of Records. The price paid by Eustace for Heralds was two cents each; but the Records were sold to him at the rate of $1.25 per hundred. He was required to sell each of the respective newspapers at a price fixed and determined in advance by the publisher thereof, but all moneys received from their sale, whether in exact payment of such price, or given to and received by Eustace as a "tip" or gratuity, were considered as his property. If he was unable to sell all the Heralds purchased by him, or if any of them were lost or destroyed, the loss fell on Eustace; but he was permitted to return all unsold Records to the district manager and to receive credit for them at the rate at which they had been purchased. As to the place of sale of both the Heralds and the Records, Eustace was restricted and confined to a designated street corner, except that he was also privileged to sell newspapers in unoccupied territory, such as between street corners. The penalty for violation of either of such conditions was that he would not be permitted to purchase any more newspapers from the district manager; although the evidence further showed that he would not be precluded from purchasing an additional supply directly from the office of the publisher. Payment for all newspapers purchased by Eustace was made by him "at the end of every day," although, had he wished to do so, he might have paid for them at the time they were purchased. He "was not carried on the payroll of either newspaper. He received no checks, nor cash, nor bonus from the publisher of either newspaper or their agents."

[1, 2] As far as applies to this proceeding and as defined by sections 7 and 8(a) of the Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831, as variously amended), an employee is one who is in the service of another under a contract of hire. It is manifest that, ordinarily and generally speaking, one of the duties of determining whether such relationship existed as between Eustace and the proprietor of either or both of the newspapers which Eustace was selling primarily rested upon the respondent commission. It is also clear that, in a given state of foundational facts, a determination of the question might involve nothing more than a plain conclusion of an ultimate fact; while in different circumstances, perhaps complicated, and intermingled with various and sundry preliminary legal problems, a final determination as to the existing relationship between the interested parties might present for consideration, as an ultimate conclusion, an unmistakable question of law. When the former

situation is presented, the authorities are unanimous that a finding of pure fact by the commission is final and conclusive; but manifestly where the determination of whether the relationship of employer and employee exists between contending parties depends either wholly or principally upon a question of law, the conclusion reached thereon is subject to review.

In the case of Southern Pacific Co. v. Pillsbury, 170 Cal. 782, 151 P. 277, 278, L. R. A. 1916E, 916, it was ruled that whether one was engaged in interstate commerce work or was in intrastate employment presented a question of law, and consequently that a purported finding of fact on that issue by the Industrial Accident Commission was reviewable in a certiorari proceeding. In part, the court said:

"* * * The industrial accident commission concluded from these facts that the deceased at the time he sustained his injury, while in the employ of petitioner, was not engaged in interstate commerce work.

"No question is here presented as to the finality of this last finding of the commission. But, indeed, that finding is not, in strictness, a finding of pure fact, but rather is it a conclusion of law drawn from a consideration of the admitted facts, to which consideration have been applied *principles of law of more or less intricacy.* In this respect it may be compared to a finding of ownership of land. It may be, and often it is said that it is, a mere statement of fact to declare that one owns a piece of land. But, after all, it is the ultimate conclusion arrived at from the consideration of many facts, such as written instruments and their recordation, which facts necessarily have to be considered in connection with principles and propositions of law often abstruse and difficult of determination, such as the sufficiency of the recordation and the legal meaning of the instrument asserted to convey title. Savings & Loan Society v. Burnett, 106 Cal. 514, 538, 39 P. 922. In this case all of the facts touching the nature of the deceased's employment, the character and use of the instrumentality in the repair of which he was engaged at the time of his death, being beyond controversy and fairly found by the commission, *the one important legal question is that of the jurisdiction of the commission to retain and consider the application* for relief. * * *"

In the case of Hines v. Industrial Accident Commission, 184 Cal. 1, 192 P. 859, 860, 14 A. L. R. 720, where a similar situation was involved, the ruling in the case of Southern Pacific Co. v. Pillsbury, 170 Cal. 782, 151 P. 277, L. R. A. 1916E, 916, was approved. After quoting a part of the language of that opinion, the court said:

"* * * This language [referring to that taken from the opinion in the other case] is clearly applicable to the finding under consideration, which must therefore be regarded as a conclusion of law and as presenting the question of the jurisdiction of the commission to make the award—a question which may be considered on certiorari." See, also, 27 Cal. Jur. 576, and authorities there cited.

[3-5] However, in what of first impression might appear to be in seeming opposition in part to the principle announced in each of the cases just cited, it has been indicated, if not directly decided, that when the finding of fact involving the existence of the relationship of employer and employee depends upon the solution of a question of *mixed law and fact,* it is "to be proved like any other question," and that unless there is such an "entire absence of evidence in the record as to render the finding unreasonable, or *in excess of the powers of the commission,* the court is not empowered to set it aside." Hillen v. Industrial Acc. Com., 199 Cal. 577, 580, 250 P. 570, 571. But it is clear that the relationship of employer and employee must be present before the commission may acquire jurisdiction of a proceeding; and that, however apparently supported by quasi foundational facts, the commission cannot by its erroneous conclusion of law thereon, to the effect that such a relationship exists, confer jurisdiction upon itself; furthermore, that if, basing jurisdiction upon its erroneous conclusion of law, it assumes to act and to order an award in the premises, such award is "in excess of the powers of the commission." It thus becomes apparent that where the controlling so-called finding of fact in a given case is dependent upon a correct conclusion of law to be drawn from a "consideration of many facts, * * * which facts necessarily have to be considered in connection with principles and propositions of law often abstruse and difficult of determination" (Southern Pacific Co. v. Pillsbury, 170 Cal. 782, 784, 151 P. 277, 278, L. R. A. 1916E, 916), such "finding of fact," although consisting of "mixed law and fact," and which is "to be proved like any other question" (Hillen v. Industrial Acc. Com., 199 Cal. 580, 250 P. 570, 571), possesses no binding force when called in question by a writ of certiorari. The duty, then, of this court, in this proceeding, is to determine, not a question of fact, but one of law arising from the facts adduced in evidence before the commission, and which, notwithstanding the many contradictions and inconsistencies appearing in the testimony of the several witnesses, may be assumed to have been hereinbefore correctly summarized. Reduced to a legal proposition, the inquiry may be limited to a determination of whether the relationship of employer and employee exists between the publisher of a newspaper and a newsboy, where the latter purchases newspapers from the former for the express purpose of making resales of such newspapers

to the public at a profit over the cost price, and which newsboy assumes all risk of loss from whatever cause and is under no control of the publisher, except as to the price at which and the place where such newspapers are to be sold, upon penalty for violation of such regulation that thereafter the publisher may refuse to sell any newspapers to the newsboy.

An identical situation arises from the management and operation of many different commercial enterprises, including the sale of books, magazines, periodicals, and various and sundry agricultural implements, as well as patented articles of food and clothing. Perhaps the best-known illustration of the practice is that connected with the manufacture and distribution throughout the United States of any one of the many different makes of automobiles. It is common knowledge that ordinarily, the custom is that the manufacturer of any given automobile enters into a contract with each of his or its several so-called "sales agents," by which in effect the "sales agent" is obligated to purchase outright from the manufacturer a stated number of automobiles each year, which automobiles the "sales agent" is bound to sell at a predetermined price fixed by the manufacturer, and only within a specified and definite territory—all loss, if any, arising from such arrangement to be borne and paid by the "sales agent."

[6, 7] It would now appear opportune to consider, if not the essentials of a contract of employment, at least some of the incidents by which such a contract possibly may be distinguished from other relations which may exist as between different respective individuals. The word "servant" is generally synonymous with the word "employee"; and by the provisions of section 2009 of the Civil Code a servant is defined as "one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter. * * *" Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 810, 159 P. 721, 723, and authorities there cited. As hereinbefore pointed out, an employee is one who is in the service of another under a "contract of hire" (sections 7 and 8(a), Workmen's Compensation, Insurance and Safety Act); and as far as the compensation law is concerned, that such a contract necessarily calls for *personal* service is emphasized by the fact that compensation to be awarded to an employee who is injured while performing service within the scope of his employment is based upon the amount of wages earned by such employee. Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 810, 159 P. 721, 723; Press Publishing Co. v. Industrial Acc. Com., 190 Cal. 114, 119, 210 P. 820. In the former case, among other things, it is said:

"* * * Doubtless there could be a contract of service without stipulated wages, but there could be no employee unless his *personal* services were rendered to the employer, and since wages are generally paid for personal services, wages or salary are made the criteria of compensations given to injured employees. * * *" It will thus be noted that the element of *personal* service is judicially recognized and accentuated as an essential in the legal relation of employer and employee, from which it may be inferred that in accomplishing the ultimate object of the arrangement between the parties thereto, if, either expressly, impliedly, or by custom, the one who agrees to perform service for the other is at will privileged to substitute some other person in his place, the contract in that particular will not measure up to the statutory requirement. In the instant proceeding it appears that, although a newsboy might purchase from the district manager any number of newspapers, in no way was he obligated to render a *personal* service in effecting their sale to the general public. Indeed, it was a common practice for one newsboy to sell newspapers to another, who in turn disposed of them by sale to any one who would become a purchaser thereof. Another illustration of the absence of the requirement of *personal* service is shown by the custom which prevailed in hiring, by the original purchaser, of other newsboys who would be compensated for their work, either by a commission for the newspapers which such newsboys actually sold, or by the payment of an agreed sum of money for the performance of a certain amount of work.

[8] Another characteristic element noticeable in the statute to which attention has been directed (section 2009, Civ. Code) is that the one who performs the service for the other "remains entirely under the control and direction of the latter." Nor is the substance of such statute exceptional in regard to such requirement. The authorities generally are unanimous in demanding that before the relation of employer and employee may be said to exist, it must appear that the person for whom the service is to be performed has the right of exercising control over the manner in which the work is to be done. In volume 1 of Labatt's Master and Servant many pages of text and footnotes are devoted to a consideration of the single essential element of "control" in the master; and volume 39 of Corpus Juris is likewise replete in its discussion and illustration of the same feature. But it is apparent that the word "control" in itself is a generalization which may not be entirely dependable as a guide to a correct conclusion in a situation in which either clear or ambiguous acts or conduct are involved; and so in section 160, volume 1, of Shearman & Redfield on the Law of Negligence (6th Ed.), may be found the declaration that "he is to be deemed the master, who has the supreme choice, control and direction of the servant, and whose will the servant represents, not

merely in the ultimate result of his work, but in all its details. * * *" And, in effect, such construction of the word is recognized by the Supreme Court of this state in Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 810, 159 P. 721, where, in determining its significance in the statute (section 2009, Civ. Code), it is said: "* * * It is true that many authorities specify 'control' of the person performing work as the means of differentiating service from independent employment. The test of 'control,' however, means '*complete* control. * * *'"

Reverting to the situation presented by the facts in the instant proceeding, as well as to such other facts as are common knowledge, it becomes patent that, as to many of the details connected with the sale of newspapers by newsboys on the streets of the city of Los Angeles, it would approach an absurdity to contend that the publisher of any newspaper could possibly exercise *complete* control as to details. Whether the newsboy must sell his newspaper for not more than the exact price theretofore fixed by the publisher, or whether to the contrary, he may accept or even solicit a "tip" or gratuity in advance of such price; whether in making a sale, or offering for sale, an alluring or lurid "extra," the newsboy shall remain on the sidewalk in comparative safety, or, at will, may leave that position, dart suddenly and unexpectedly hither and yon in the crowded street, thereby endangering his life or limb, for the purpose of approaching some possible purchaser of his newspaper who may be traveling either in a street car or in an automobile; whether the newsboy shall be seated and remain silent and statuesque, or vociferously and raucously shout his wares and race in a simulated excitement or pretended frenzy from one prospective customer to another; or whether by suavity and polite speech he conduct himself in an insinuating and gracious manner, or by rudeness and roughness and the veritable tactics of a French gamin he proclaim the advisability, if not the absolute and undeniable necessity of the general public acquainting itself at first hand with the latest news of the day—while either or some of such methods of effecting sales may represent the acme of the art of the vocation of a newsboy, dependent upon the temperament or deliberate and studied choice of the individual salesman—the compliance by the newsboy with any of such details apparently would be quite beyond the "remote control" or even the suggestion of the publisher of the newspaper.

[9] Again adverting to sections 7 and 8(a) of the Workmen's Compensation, Insurance, and Safety Act, it will be noted that the relationship of employer and employee involves "a contract of *hire*." That the word "hire," when used in connection with a contract of employment, implies that a reward or compensation shall be paid for the services performed is indicated in the case of McCluskey v. Cromwell, 11 N. Y. 593, 599, where it is said that "* * * to employ, is 'to engage in one's service; to use as an agent or substitute in transacting business; to commission and intrust with the management of one's affairs;' and when used in respect to a servant or hired laborer, is equivalent to hiring, which implies a request and a contract for a compensation, and has but this one meaning when used in the ordinary affairs and business of life. * * *" To the same effect are: Carter-Mullaly Transfer Co. v. Angell (Tex. Civ. App.) 181 S. W. 237, 238; Commonwealth v. Radocchia, 205 Mass. 455, 91 N. E. 856. As far as concerns any compensation to be paid to the newsboy, the contract here under consideration was to the effect that the newsboy would purchase from the publisher of the newspaper, and the latter would sell to the former, newspapers at a fixed price, and that if practicable the newsboy would resell each of such newspapers, also at a predetermined price. The "contract" contained no express stipulation that for the "services" to be performed by the newsboy any reward or compensation as such would be paid to him. To the contrary, the reward, if any, to which the newsboy might become entitled depended, not upon the time diligently expended by him in his efforts to resell the newspapers, but rather depended upon the profits which might be derived from sales actually made, and which profits, as far as the Herald was concerned, were entirely dependent upon his success in disposing of a sufficient number of newspapers to more than offset in money received therefor the amount which the newsboy was obligated to pay each day for the newspapers which he was required to purchase. For example, if in accordance with the requirements of the publisher of the Herald newspaper, the newsboy purchased 130 Heralds at two cents each, and after working many hours succeeded in selling any number of such newspapers less than 87 at three cents each, it is apparent that, as far as profit, or reward, or compensation was concerned, his labor would have been in vain. He might even operate at a loss. In effect, the only difference between his "contract" with the Herald and that with the Record was that for such Records as he did not sell he was reimbursed at the same price for which they were sold to him, which, of course, guaranteed him against actual money loss, but did not insure any reward or compensation for his work, except in proportion to the newspapers which he actually sold.

[10] In some of the authorities which relate to the method or rule by which the relation of master and servant may be determined, the power of dismissal or discharge of the employee by the employer is suggested, not at all as conclusive, but as an incident which should be taken into consideration. If the force of

such suggestion be recognized as at all indicative, the presence in the instant case of the power of dismissal, if discernible, is so negligible and so uncertain that it cannot be adopted as a controlling or deciding feature in determining the relationship which existed between the interested parties. For any violation of any material condition under which the newsboy was to operate, his discharge as an *employee* apparently never was thought of or contemplated. Like any other "sales agent," notably that of an automobile, who disregarded his covenant in that he sold his merchandise at a price less than that authorized by its producer, or who operated in a territory other than that to which he had been assigned, he was punishable by not being thereafter permitted to purchase his wares from the producer or publisher. As it would seem clear that by no stretch of the suggested rule could a "sales agent" of an automobile be regarded as an *employee* of the manufacturer thereof, and, hence, under the provisions of the Workmen's Compensation, Insurance, and Safety Act, be entitled to compensation for injuries received by him in the course of his employment, so here, under similar contractual conditions, the newsboy or "sales agent" of the publisher of the newspaper may not be held to be an employee of such publisher and entitled to the benefits arising from the provisions of the statute.

Because Eustace "was not carried on the payroll" of either newspaper; because, by the terms of the contract, he was to render no *personal* service; was not under the "*complete* control" of the publisher; was to receive no assured compensation for his labors, and was not subject to "discharge" as an employee; this court is of the opinion that the relationship of employer and employee did not exist in favor of the applicant for adjustment of compensation before the respondent commission, and, consequently, that the award of compensation therein should be annulled. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

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105 Cal. App. 270

Ex parte BERMAN.

Cr. 1959.

District Court of Appeal, Second District, Division 2, California.

April 17, 1930.

1. Bail ⚷53 — Amount — Alteration — Good cause.

Order altering amount of bail, not based on showing of good cause, is arbitrary and unauthorized exercise of judicial power (Pen. Code, § 1289).

2. Bail ⚷53 — Amount — Alteration — Good cause — Judicial discretion.

Ordinary judicial discretion exists in superior court to determine what constitutes good cause for altering amount of bail previously fixed (Pen. Code, § 1289).

3. Bail ⚷53 — Necessity — Judicial discretion — Abuse.

Remanding defendant to custody and refixing bail after release on his own recognizance and previous bail exonerated *held* not as matter of law abuse of discretion under trial judge's statement (Pen. Code, § 1289).

Trial judge's statement when refixing bail showed that he would not have exonerated defendant's bail and released him on his own recognizance if court had been advised of certain facts.

4. Bail ⚷74(1) — Exoneration — Setting aside order.

Court setting aside order exonerating bail should have restored order previously existing fixing bail which was exonerated.

Defendant, at time indictment was returned charging him with forgery and embezzlement, was out of the state, and bail was fixed at $250,000. Subsequently defendant voluntarily returned, and was released on his own recognizance, and, after appearing from time to time, case was set for trial and bail fixed at $10,000. Bail so fixed was exonerated when indictment was ordered off calendar, and subsequently court restored cause to calendar for trial, remanded defendant, and again fixed bail at $250,000.

5. Bail ⚷51 — Amount — Fixing — Grand jury — Court.

Grand jury has no authority to participate in fixing amounts of undertakings; responsibility therefor being with court.

6. Bail ⚷53 — Good cause — Reduction.

Setting aside order requiring bail and fixing smaller amount when accused returned to jurisdiction and was released on his own recognizance *held* necessarily to involve determination that good cause existed (Pen. Code, § 1289).

7. Constitutional law ⚷72 — Prosecution — Matters of policy.

Matters of policy affecting prosecution of criminal case are not within province of court, but are questions for district attorney.

Original application by Jacob Berman for a writ of habeas corpus prayed to be directed

to the Sheriff of Los Angeles County to secure petitioner's release from custody on ground of illegal commitment after having been released pending trial.

Writ granted, and petitioner remanded, with directions.

Otto Christensen, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

CRAIG, Acting P. J.

The return to the writ of habeas corpus issued upon the petition of Berman recites that, at the time of the issuance and service of the writ upon the sheriff, that official held petitioner in custody by virtue of an order of the superior court made by Hon. Marshall McComb, one of its judges. It appears that this order was made in open court on the 11th day of April, 1930, without notice to either the defendant or the district attorney, and under the following circumstances alleged in the petition, and not controverted: On the 19th day of May, 1927, an indictment was returned by the grand jury of Los Angeles county, charging Berman with forgery and embezzlement. At that time he was out of the state of California. Bail was fixed at $250,000. On the 12th day of September, 1927, Berman voluntarily returned to California, and was released on his own recognizance. Thereafter from time to time he appeared as directed by the court, and on the 10th day of September, 1929, the case was placed off calendar to be restored on notice of ten days. It appears that on September 11, 1928, the case was set for trial, and bail was fixed at $10,000. This bail was exonerated when the indictment was ordered off calendar on September 10, 1929. The next action in the matter occurred on April 11, 1930, when the court entered the following order: "Cause ordered restored to calendar for trial April 23, 1930—defendant remanded—bail fixed at $250,000." During the period covered by these proceedings the petitioner has been made defendant in other criminal prosecutions in both the state and federal courts. He is now at liberty on bail under such charges, the total amount of which is $45,000.

[1] If no other facts appeared than the foregoing, it is clear that under the authority of In re Aydelotte (Cal. App.) 275 P. 510, the petitioner would be entitled to relief upon this application. It was there held in effect that, a defendant having been admitted to bail, the court may not, without good cause being shown, increase or decrease the bail. An order altering its amount not based on a showing of such good cause is an arbitrary exercise of judicial power, unauthorized by section 1289 of the Penal Code, and this is the provision conferring upon the superior court authority to alter the amount of bail. But in this case at the time of entering the order above quoted the court said:

"I find that some time ago the trial of this indictment was marked off the calendar in this department at the request and upon the stipulation of both the district attorney and the defendant; also that the bail was exonerated upon the representation that the defendant was under bond in other cases. At the time this court endeavored to fix a date for the trial of the defendant on this indictment the court was assured by the district attorney that the defendant would be prosecuted upon another indictment charging him with bribery, and that therefore this indictment could be placed off calendar. The court was not told by the district attorney that a promise of immunity had been made to the defendant on the bribery charge, as subsequently was disclosed."

[2, 3] The ordinary judicial discretion exists in the superior court to determine what amounts to good cause shown. It is contended by petitioner, and conceded by the district attorney, that the court's action in entering the order of April 11, 1930, amounted to an abuse of discretion. The facts stated by the trial court are not disputed. By the statement of the judge thereof he indicates that he would not have exonerated Berman's bail and released him on his own recognizance had the court been apprised of certain facts. While it is not clear why these facts, if disclosed, would have suggested the necessity for requiring bail, still, since the trial judge has indicated that such a result would have been brought about, we are not prepared to hold as a matter of law that an abuse of judicial discretion has been shown.

[4] However, it seems indisputable that logically and legally if the court was authorized to set aside its order exonerating bail, the order previously existing and which was exonerated should have been restored. The effect of the recent order of the court was to set aside that of September 10, 1929. Previously to that, and on September 11, 1928, bail had been fixed at $10,000. The petitioner is entitled to have this amount remain without increase except upon good cause shown. The cause which operated to justify the court's order of April 11, 1930, is not contended to have had any bearing upon the consideration which moved the court in September, 1928, to fix the bail at $10,000.

[5, 6] In the statement made by the trial court, a part of which we have quoted, it is said that the grand jury which returned the indictment here involved recommended that bail be fixed at $250,000. Of course, the grand jury has no authority to participate in fixing the amounts of undertakings. The responsi-

bility therefor is with the court. When Berman returned to this jurisdiction of his own volition, and the court released him on his own recognizance and set aside the order requiring bail of $250,000, it necessarily determined that good cause appeared for the action which it then took. On September 11, 1928, it substituted its deliberate judgment on the subject of bail for all orders which had theretofore been made.

[7] Other things said by the trial court in its statement do not require specific mention. No other facts than those which we have discussed are contained in it, and it is not the province of the court to concern itself with matters of policy affecting the prosecution. These are questions for the district attorney, and are not of such a nature as to require or justify our attention.

We conclude that, upon the making of the order of April 11, 1930, which in effect set aside the order previously made allowing the defendant to go on his own recognizance, the order of September 11, 1928, fixing bail at $10,000 should have been restored.

It is ordered that the petitioner be remanded, and that he be admitted to bail, pending the final disposition of indictment No. 30741 (the accusation involved in this proceeding), upon giving an undertaking as required by law in such cases, in the sum of $10,000, said undertaking to be approved by a judge of the superior court of the county of Los Angeles.

We concur: IRA F. THOMPSON, J.; NORTON, Justice pro tem.

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105 Cal. App. 280

SAKS et al. v. KNAPP INV. CO*

Civ. 5867.

District Court of Appeal, Second District, Division 2, California.

April 18, 1930.

Rehearing Denied May 17, 1930. Hearing Denied by Supreme Court June 16, 1930.

1. Landlord and tenant ⚷208(2) — Assignment of lease — Rents — Inconsistent claim.

Defendant claiming leasehold under assignment and taking possession and receiving reduction of rent could not, in lessor's action for rent, contend others were lessees or that assignment was void.

The defendant's assignor had originally assigned lease to another with a contract of conditional sale of furniture and fixtures, with provision that the assignment should not become effective until the assignee complied with obligations under the sales contract. The first assignee gave two notes for the purchase price of the furniture and the assignor sold one of these to defendant, transferring at the same time his interest in the conditional sales contract "together with all leasehold rights in said premises." The original assignee became delinquent, and thereupon the defendant induced the lessor to recognize it as a tenant in possession and to reduce the rent. Defendant now claims that the original assignee was still the lessee and that the assignment to defendant was as collateral only and was void because both notes were not transferred, and because given for security.

2. Landlord and tenant ⚷208(2) — Assignee of lease — Rent — Inconsistent claims.

One taking possession as assignee of lease could not claim, in action for rent, that possession was not under lease.

3. Landlord and tenant ⚷231(8) — Rent — Amount — Notice to quit — Sufficiency.

Evidence, in action for rent, sustained finding that amount set forth in notice to quit was correct.

Appeal from Superior Court, Los Angeles County; E. T. Bishop, Judge.

Action by Morris Saks and others against the Knapp Investment Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Dudley Robinson, of Los Angeles, for appellant.

C. W. Hall, of Los Angeles, for respondents.

IRA F. THOMPSON, J.

The plaintiffs are the owners in fee of a certain apartment house in the city of Los Angeles, which, by an agreement in writing dated May 17, 1923, they leased to Abraham Spiegelman and Frank Soronow for a period of ten years at a monthly rental of $1,728. This lease was transferred several times and finally assigned to the defendant and appellant. This last transfer came about in the following manner: On January 31, 1925, N. M. Eastman, who was the assignee of Spiegelman, assigned to H. Tyler and Mary R. Tyler, his wife, and at the same time entered into a contract of conditional sale to the Tylers of the furniture and fixtures, the assignment providing that it did not "become effective until after all obligations had been complied with by vendees as expressed in said sale contract." Evidencing the purchase price of the furniture, the Tylers executed two promissory notes and delivered them to Eastman, one in the sum of $32,000 and the other for $8,000. On February 3, 1925, Eastman sold the larger note to one Baumgarten, trans-

ferring at the same time his interest in the conditional sale contract, "together with all leasehold rights to said premises." Baumgarten, in turn, transferred the note, contract, and leasehold rights to the appellant. In the month of July, 1925, the Tylers became delinquent and apparently abandoned the premises after action was started to recover the rental due, and the appellant took possession, evicting a woman who had been put in charge by a man named Jack Phillips. Thereafter, and after considerable negotiation with the lessors and their attorney, the former agreed on August 20, 1925, in writing, to recognize the appellant as the tenant in possession "unless the court should decide differently," and also agreed to reduce the rental in the sum of $216 per month, which sum was designated as an allowance for the superintendency of the building. The rental due was adjusted and paid to September 1, 1925, and the appellant continued in possession, paying at the rate of $1,512 per month until January 1, 1926. For the months of January, February, March, April, and May the appellant paid only $1,296 per month, there being at the time negotiations pending for a further reduction of the rental to that figure, which attempt, however, did not culminate in an agreement. On July 16, therefore, when the notice to pay rent or quit was served on appellant it was in default in the sum of $216 per month for five months and $1,512 for two months. Judgment was given by the trial court for this amount plus the rental falling due thereafter and prior to the trial of the action. The defendant prosecutes this appeal from the judgment.

[1] It is insisted that there should be a reversal because (1) the Tylers are still the lessees by direct agreement with the plaintiffs; (2) the assignment by Eastman was as collateral only; (3) this assignment by Eastman was void for the reason that both notes were not transferred; and (4) the assignment to the appellant was as security only and was, therefore, void. There are other points to be discussed, but we think these four may be disposed of as one argument. As between the various assignees and the appellant in an appropriate proceeding, the contentions presented to us might be entitled to serious consideration, and undoubtedly that is the reason the lessors in one of the letters of August 20, 1925, when agreeing to recognize appellant as lessee, said: "and will hereafter consider you as such unless the court should decide differently," and in another part of the same letter, "In other words, it is understood you are possessed of all the rights and benefits and have accepted the responsibilities of said lease, the same as if a new lease had been executed by us directly to you. We hereby waive any and all question as to any irregularities or insufficiencies of the assignment of said lease heretofore made." Claiming under the assignment, acting under the assignment, receiving the benefits of the claim asserted thereunder, and receiving a reduction of the rent, the appellant is not in a position to urge here those contentions which properly belong to a contest between other parties.

[2] The fifth reason assigned by counsel for appellant why the judgment should be reversed is very similar to those already mentioned. It is that the appellant did not take or hold possession of the premises under or by virtue of the lease. This argument also comes with poor grace from the appellant, who entered the building under claim of right—that of being the assignee of the lease. It was not necessary for it to take possession of the realty in order to recover possession of the furniture. It could very well have removed the personalty if that were all it sought. But it saw fit to assert its rights to the lease, the title to which had never passed to the Tylers because of their failure to comply with the terms of the conditional sales contract. On August 20, when the lessors finally agreed to recognize the claim advanced by the appellant, the latter paid the back rent, amounting to $6,184, took advantage of the reduction granted, and in general comported itself as the legitimate assignee. Under these circumstances Lopizich v. Salter, 45 Cal. App. 446, 187 P. 1075, 1076, and the cases therein cited, are conclusive of the assigned error. It is there said: "This covenant on the part of defendant constituted the consideration, not only for the assignment made, but for the consent thereto given by the lessors. It could not, in thus accepting the lease, appropriate to itself the benefits thereof and repudiate the burden attached to the transfer. In the case of a lease signed by the lessor under which, without signing, the lessee enters into possession of the demised premises and pays the rent in accordance with the terms thereof, it is of the same binding force and effect as though the lessee had signed the same."

[3] But one question remains. Was the notice to pay rent or quit sufficient? It is asserted that the amount set forth in the notice, to wit, $4,104, was excessive in the sum of $292.95. In this particular it is sufficient to say, as we have already indicated in our statement of the facts, that there was testimony sufficient to warrant the court in finding, as it did, that there was $1,080 due for the months of January, February, March, April, and May, and $3,024, from May 26 to July 25.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; NORTON, Justice pro tem.

105 Cal. App. 274

FAGIANI v. GENERAL ACCIDENT FIRE & LIFE ASSUR. CORPORATION, Limited.★

Civ. 3930.

District Court of Appeal, Third District, California.

April 17, 1930.

Rehearing Denied May 17, 1930. Hearing Denied by Supreme Court June 16, 1930.

1. Insurance ⟹435 — Liability policy — Operator's license — Construction — "Legally operating automobile."

Insured's wife operating automobile without operator's license *held* covered by liability policy extending to persons "legally operating automobile"; language of policy being uncertain.

While, under liberal definition of term, one is not "legally operating" an automobile when he is driving it in violation of any provision of law, the term "legally operating automobile," as used in liability policy extending benefits thereof to persons legally operating automobile with insured's consent, is not used in broad sense, because to give it that meaning would be to destroy protection which policy purports to give such persons; it being a matter of common knowledge that nearly every automobile accident is due to breach of some statutory provision.

2. Insurance ⟹146(3) — Liability policy — Uncertain language — Construction against insurer.

Uncertain language of liability policy would be construed against insurer.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Nicola F. Fagiani against the General Accident Fire & Life Assurance Corporation, Limited. Judgment for plaintiff, and defendant appeals.

Affirmed.

Redman, Alexander & Bacon, of San Francisco, and Nathan F. Coombs, of Napa, for appellant.

Clarence N. Riggins, of Napa, for respondent.

FINCH, P. J.

The plaintiff is the father of Anita Fagiani, a minor, who was struck and injured by an automobile owned by W. A. Bennett and driven at the time of the accident by his wife, Celeste Bennett. Based upon such injuries, the plaintiff recovered judgment for damages against Celeste Bennett. Thereafter this action was commenced to recover the amount of said judgment from the defendant herein, under the terms of a policy of liability insurance issued by the defendant to W. A. Bennett. Judgment was entered in favor of the plaintiff, and the defendant has appealed.

The policy contains the following provisions:

"Additional Assureds. The insurance provided by this policy is so extended as to be available, in the same manner and under the same provisions as it is available to the named assured, to any person or persons while riding in or legally operating any of the automobiles described in the declarations or to any person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the named assured, or if the named assured is an individual, with the permission of an adult member of the named assured's household other than a chauffeur or a domestic servant. * * *

"Exclusions. * * * This policy does not cover while any automobile insured hereunder is being (4) used for any purpose other than specified in declaration No. 9, (5) driven or manipulated by any person in violation of law as to age, and if there is no legal age limit, then under the age of 16 years, (6) driven or manipulated in any race or contest, (7) used for towing or propelling any trailer or any other vehicle used as a trailer, (8) rented or hired to others or being used to carry passengers for a consideration."

The answer alleges that "Celeste Bennett was not legally operating the automobile referred to at the time of the alleged accident." It was stipulated at the trial that she did not have an operator's license at the time of the accident or prior thereto. She was driving the automobile with the express permission of W. A. Bennett.

[1] The only question presented by the appellant is whether Celeste Bennett was "legally operating" the automobile within the meaning of the quoted words as used in the policy; she not having been licensed to drive any automobile. Under a liberal definition of the term, one is not "legally operating" an automobile when he is driving it in violation of any provision of law, but obviously the term was not used in that broad sense in the policy in question, because to give it that meaning would be to destroy the protection which the policy purports to give to persons driving the automobile with the permission of the owner. It is a matter of common knowledge that nearly every automobile accident is due to a breach of some statutory provision. In Fireman's Fund Ins. Co. v. Haley, 129 Miss. 525, 92 So. 635, 636, 23 A. L. R. 1470, it is said that, where there is nothing in the policy exempting the insurance company from liability because of the violation of the highway laws, "if such a defense were permissible in this state, automobile insurance would be practically valueless." In Messersmith v. Ameri-

can Fidelity Co., 232 N. Y. 161, 133 N. E. 432, 19 A. L. R. 876, Cardozo, J., in delivering the opinion of the court, said: "To restrict insurance to cases where liability is incurred without fault of the insured would reduce indemnity to a shadow. * * * Liability of the owner, who is also the operator, can never be incurred without fault that is personal. Indeed, the statute has so covered the field that it can seldom, if ever, be incurred without fault that is also crime."

The foregoing considerations are to be kept in mind in construing the uncertain terms of a policy under which the insurer claims exemption from liability. "Legally operating" an automobile, in common parlance, relates to the manner of its operation rather than to authorization to operate it, although, as stated, in a broader sense the term may include both. It is not to be presumed that by the provision of the policy in question it was intended to give a mere shadow of protection to persons driving the automobile with permission of the owner. That it was not so intended is indicated by other provisions of the policy. Under the terms thereof, the defendant could not escape liability to the owner on the mere ground that he was driving the automobile at the time of the accident without an operator's license, or that it was driven, with the owner's knowledge, by his unlicensed agent, or liability to any other person "legally responsible for the operation thereof" while it was driven by such person's unlicensed agent. It the automobile had been driven at the time of the accident by an unlicensed agent of Celeste Bennett, she knowing him to be unlicensed, the defendant would be liable to her in the same manner as if such agent had been duly licensed.

[2] If it was the intention to exempt the defendant from liability under circumstances such as are involved herein, one would naturally expect such exemption to be included in the express statement of "Exclusions." All of such exclusions are made applicable alike to the "named assured" and the "additional assureds," and no reason appears for requiring an operator's license as a condition of liability to one assured and not to the others. Undoubtedly an insurer might make such a distinction in its policy of insurance, but the fact that there is no apparent reason for the distinction may be considered in determining the meaning of an uncertain term of the policy. It is not necessary to determine what was intended by the use of the term "legally operating," but it is sufficient to show that it is uncertain whether it was the intention of the parties to the contract to give it the meaning for which appellant contends.

"A policy of insurance is but a contract, and, like all other contracts, it must be construed according to the language and terms used therein in order to arrive at its true sense and meaning. Courts will not undertake to relieve parties from the express and plain stipulations into which they have entered. But, while this is true, it is also a rule well established by the courts that provisos and exceptions contained in a policy of insurance must be strictly construed against the insurer and liberally in favor of the insured. This rule is based upon the fact that the contract of insurance is drawn by the insurer, and in it are usually placed many exceptions, conditions, and forfeitures deliberately and purposely by the insurer so as to avoid liability, and the ordinary person in paying a premium and accepting a policy does not read, or, if he does read, he cannot understand the many conditions, exemptions, and exceptions contained therein. In fact such provisions, exceptions, and conditions in many cases, on account of their ambiguity, have been construed differently by the most eminent lawyers and the highest courts of the land. Therefore the courts endeavor to carry out the contracts as made by the parties, and, at the same time, prevent, if possible, the exceptions and conditions from wholly devouring the policy. It is therefore a fundamental rule that the insurer is in duty bound to use such language as to make the conditions, exceptions, and provisions of the policy clear to the ordinary mind, and, in case it fails to do so, any ambiguity or reasonable doubt must be resolved in favor of the insured and against the insurer." Pacific, etc., Co. v. Williamsburgh City Fire Ins. Co. of Brooklyn, 158 Cal. 367, 369, 111 P. 4, 5.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

209 Cal. 418

O'NEILL v. CITY AND COUNTY OF SAN FRANCISCO.★

S. F. 12916.

Supreme Court of California.

April 29, 1930.

Rehearing Denied May 29, 1930.

1. Trial ⟹243.

Instructions requiring plaintiff in personal injury action to prove negligence were not in conflict with instruction on res ipsa loquitur.

Instructions on proof were to the effect that there was no legal presumption of negligence, but that it was a fact which must be proved, and that it was necessary for plaintiff to prove that accident and resulting injuries were proximately due to negligence of defendant and his servant.

2. Negligence ⟹138(2).

Instruction in personal injury action on doctrine of res ipsa loquitur, though not clear, *held* not misleading.

The instruction was to the effect that a carrier of passengers for hire must use the highest degree of care and diligence for safety, and that, in case jury found that plaintiff was injured in act of alighting from street car, or before she had an opportunity to reach a place of safety, the burden of proof was cast on defendant to prove injury was occasioned by inevitable casualty, or upon some other cause which human care or foresight could not prevent.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Catherine O'Neill against the City and County of San Francisco. Judgment for defendant, and plaintiff appeals.

Affirmed.

Daniel A. Ryan and Samuel M. Samter, both of San Francisco (George F. Snyder, of San Francisco, of counsel), for appellant.

John J. O'Toole and Henry Heidelberg, both of San Francisco, for respondent.

PER CURIAM.

This is an action for damages for personal injuries. It is admitted that defendant operates an electric street railway in San Francisco and that on the day in question plaintiff was a passenger for hire on one of the street cars of defendant. It is also admitted that the street car in question stopped to discharge passengers, including plaintiff, at the intersection of Van Ness avenue and Green street. Plaintiff contends that, while the plaintiff was in the act of alighting from the street car and before she reached the street, the street car started up, causing plaintiff to fall to the street, receiving the injuries of which complaint is made. The defendant contends and introduced evidence to show that plaintiff had alighted from the car and had safely reached the street, when she was menaced by a passing automobile, and then, in order to protect herself, she grabbed hold of the rear stanchion or grab handle of the street car just after the street car started up. This grab handle, defendant's evidence tended to show, was five or six feet from the spot at which plaintiff had alighted. On the issues thus presented, the case went to trial before the court and jury, and, after a full trial, the jury rendered a verdict in favor of the defendant.

Appellant makes no contention that the evidence does not support the verdict, but appeals solely on asserted error of the trial court in the giving and the refusing to give certain instructions.

The trial judge, in effect, instructed the jury that in such case, "there is no legal presumption of negligence but negligence is a fact which like other facts must be proved"; and also instructed the jury that it was necessary "for plaintiff to prove that the accident and resulting injuries were proximately due to negligence of defendant and his servant."

[1] Plaintiff contends that the doctrine of res ipsa loquitur applies to the above facts, and that, even though the jury was properly instructed in regard to that doctrine, the above two instructions created such a conflict that the case must be reversed. We cannot agree with appellant in this regard. In Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 P. 164, it was contended that instructions to the effect that the burden of proof is on the plaintiff and that plaintiff must show by a preponderance of evidence that defendant was negligent, were inconsistent with a proper instruction on the doctrine of res ipsa loquitur. The court held, at page 345 of 139 Cal., 73 P. 164, 166, that it was true that the proving of the accident by the plaintiff raised a prima facie case, but "it still remained the law that, upon the whole evidence, the plaintiffs must have the preponderance in order to succeed." The doctrine that an instruction to the effect that burden of proof is on the plaintiff is not inconsistent with an instruction embodying the doctrine of res ipsa loquitur was also enunciated in the case of Onell v. Chappell, 38 Cal. App. 375, 176 P. 370.

[2] The appellant contends, however, in addition to the contention made above, that the jury was not properly instructed in reference to the doctrine of res ipsa loquitur, and that the court erred in refusing certain instruc-

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied.

tions offered by appellant embodying that doctrine. The jury was instructed that a carrier of passengers for hire must use the highest degree of care and diligence for their safety; that, if they shall find that plaintiff was injured in the act of alighting from the street car, or before she had an opportunity to reach a place of safety, "then the burden is cast upon the defendant to prove that the injury was occasioned by an inevitable casualty, or upon some other cause which human care or foresight could not prevent." Although this instruction may not contain as clear a statement of the doctrine of res ipsa loquitur as might be desired, we are unable to perceive how the jury was misled thereby, or that the plaintiff was prejudicially affected by the giving of the same. That instruction, when read in connection with the entire charge of the court, and in particular when read in connection with the instructions concerning the burden of proof, clearly told the jury that the burden of disproving its negligence rested on defendant if the jury believed plaintiff's story of the accident. In other words, the jury was told, in effect, that the mere happening of the accident created an inference of negligence—an instruction that would have been more technically correct. Dowd v. Atlas T. & A. Service, 187 Cal. 523, 202 P. 870. We think the jury as reasonably intelligent men must have so understood the instruction. That being the case, the plaintiff has shown no injury.

The judgment appealed from is affirmed.

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209 Cal. 360

LUCKEY v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 11891.

Supreme Court of California.

April 22, 1930.

1. Executors and administrators ⚷23.

Vacancy must occur by order of court, in administration of estate, before court can appoint another administrator.

2. Executors and administrators ⚷21(2).

Petition and notice of hearing thereon for issuance of letters of administration with will annexed *held* to give court jurisdiction to appoint administrator on showing of intestacy.

The facts alleged in petition presented a case of intestacy calling for the appointment of an administrator, since the following instrument: "I hereby revoke all wills and codicils heretofore made by me"—designated by petitioner as will, was not testamentary in character.

3. Executors and administrators ⚷20(9).

Order appointing administrator could be impeached only for want of jurisdiction on face of proceedings, in collateral attack made in proceedings for removal.

4. Executors and administrators ⚷21(2).

Petition for letters of administration with will annexed must be deemed application for general letters or for letters with will annexed, according to whether deceased died intestate or testate.

5. Executors and administrators ⚷21(1).

Administrator with will annexed derives right to appointment from provisions of law, rather than by act of decedent.

6. Executors and administrators ⚷21(1).

Propriety of making order for issuance of letters with will annexed is dependent on establishment of will apparently valid.

7. Pleading ⚷49.

Subject-matter of action and issues involved are determinable from facts pleaded, rather than from title or prayer for relief.

8. Judgment ⚷252(1), 504(3).

Judgment relating to subject-matter of proceeding as stated in pleadings is not void and subject to collateral attack, because pleader asked for other relief than which could properly be awarded.

9. Certiorari ⚷64(2).

On certiorari, only errors going to jurisdiction of court may be reviewed (Code Civ. Proc. § 1074).

10. Executors and administrators ⚷35(17).

Order of removal of administrator, entered on evidence insufficient to establish existence of cause therefor, is in excess of court's jurisdiction.

11. Executors and administrators ⚷35(15).

Evidence *held* to establish cause for removal of administrator who was proponent of will giving him large share of decedent's estate.

12. Executors and administrators ⚷35(1).

Probate court has power to remove administrator, where necessary or expedient to protect decedent's estate.

13. Wills ⚷222.

Charges that will offered for probate by administrator was product of forgery, fraud, and undue influence could not be determined in proceeding for removal of administrator.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

14. Executors and administrators ⟹35(13).

Order of removal of administrator *held* not in excess of court's jurisdiction because of lack of citation of administrator, where situation arising from administrator's application for letters testamentary on contested will called for removal of administrator.

15. Executors and administrators ⟹35(13).

Administrator *held* to have waived citation to appear and show cause why he should not be removed by participating in proceedings.

16. Process ⟹166.

Service of process in civil action may be waived.

17. Executors and administrators ⟹22(2).

Probate court *held* to have properly appointed disinterested person as special administrator pending will contest, where administrator had been validly removed.

In Bank.

Petition by David Burr Luckey, administrator of the estate of George Lafayette Finn, also known as G. L. Finn, deceased, for certiorari, to annul an order of the Superior Court in and for Los Angeles County, the Honorable Charles S. Crail, Judge, and others, revoking letters of administration.

Order affirmed. Writ discharged.

Ben F. Griffith, of Los Angeles, for petitioner.

Edmund Wheeler Pottle and Chas. A. Son, both of Los Angeles, for respondents.

SEAWELL, J.

[1] Petitioner, David Burr Luckey, seeks to have annulled on certiorari an order of the superior court of the county of Los Angeles revoking his letters of administration upon the estate of George Layette Finn, deceased, and appointing one E. A. Lane special administrator of said estate. Petitioner contends that the portion of the court's order revoking the general letters granted to him is void and of no effect because the procedure prescribed by sections 1436–1438, Code of Civil Procedure, for the revocation of letters of administration had not been complied with, from which it follows that the portion of the order appointing a special administrator was also void. A vacancy must occur by order of court in the administration of an estate before the court has the power to appoint an administrator to take the place of one who has been appointed to administer the affairs of an estate. Schroeder v. Superior Court, 70 Cal. 343, 11 P. 651; Haynes v. Meeks, 20 Cal. 288; Estate of Hamilton, 34 Cal. 464; 11 Cal. Jur. 406.

Petitioner's attack upon the court's order assumes the validity of the prior decree appointing him administrator. If, as respondents contend, it appears upon the face of the proceedings for appointment that the court exceeded its jurisdiction, said decree of appointment was void, and the court was not required before appointing a special administrator to follow the statutory procedure for removal of an administrator, but was warranted in treating said decree as a nullity. "A void judgment is, in legal effect, no judgment. By it no rights are devested. From it no rights can be obtained. * * * It neither binds nor bars any one." Bennett v. Wilson, 122 Cal. 509, 55 P. 390, 391, 68 Am. St. Rep. 61; 15 Cal. Jur. 49.

[2, 3] Respondents contend that a lack of jurisdiction to appoint petitioner general administrator existed for the reason that his appointment was based upon an application entitled "Petition for Letters of Administration with the Will Annexed," and the only notice posted and mailed to heirs gave notice of the time set for hearing of the application of petitioner for the issuance of letters of administration with the will annexed. This situation arose from petitioner's designating the following instrument a will: "I hereby revoke all wills and codicils heretofore made by me." The petition prayed for the probate of said instrument as a will and for the issuance to petitioner of letters of administration with the will annexed. In all other respects the petition and notice satisfied the requirements of a petition and notice for letters of administration. Said instrument not being testamentary in character, the court directed letters of administration to be issued to petitioner. An attack made upon the order of appointment in subsequent proceedings for removal or for the appointment of a new administrator is a collateral attack, and governed by the rule that in a collateral attack upon a judgment it can be impeached only for a want of jurisdiction appearing upon the face of the proceedings. Estate of Davis, 151 Cal. 318, 86 P. 183, 90 P. 711, 121 Am. St. Rep. 105.

[4-6] We regard the petition filed and notice given as sufficient to invoke the jurisdiction of the court to make the appointment. Estate of Heuler, 282 P. 500, recently decided by this court, is authority on this point. In that case the nominee of the decedent's widow was appointed administrator. Thereafter the court admitted to probate as a will an instrument executed by the decedent and designated a marriage contract, which was found by the court to be testamentary in character. At the same time the court revoked the letters granted to the widow's nominee, issuing letters of administration with the will annexed to a son of decedent.

Upon appeal this court affirmed the order admitting the instrument to probate, but reversed the order revoking the letters of administration issued to the widow's nominee, with directions to the lower court to so amend the order of appointment of said nominee as to provide for the issuance to him of letters of administration with the will annexed. The prior petition of the widow's nominee for letters of administration, upon which such letters were in fact issued, being held sufficient to support a grant of letters of administration with the will annexed, we can perceive no reason in logic or policy why a petition for letters with the will annexed should not support a grant of general letters upon a showing of intestacy, notwithstanding said petition may appear to have been irregular. The petition is to be deemed an application for general letters or for letters with the will annexed, according as the facts offered upon the hearing establish that the decedent died intestate or testate. An administrator with the will annexed, no less than an administrator in cases of intestacy, derives the right to appointment from the provisions of law, rather than by the act of the decedent, as in the case of an executor. The propriety of making an order for the issuance of letters with the will annexed is dependent upon the establishment of a will apparently valid. A notice of filing of a petition for letters with the will annexed must be deemed to import to those who may be interested that, should petitioner fail to establish testacy, letters of administration will be granted.

[7, 8] The facts alleged in the petition present a case of intestacy calling for the appointment of an administrator. Although the petition contained an allegation that the decedent left a will, the instrument offered for probate with the petition, and upon which this allegation was based, was not a will but a revocation of all former wills. The subject-matter of an action and the issues involved are determinable from the facts pleader, rather than from the title or prayer for relief. 1 Freeman on Judgments, § 366; Hinkel v. Crowson, 83 Cal. App. 87, 256 P. 479. A judgment relating to the subject-matter of a proceeding, as stated in the averments of the pleading, is not void upon a collateral attack because the pleader has asked for other relief than that which can properly be awarded.

[9-11] Having determined that the order appointing petitioner administrator was valid, we pass now to consider the order removing him. Upon certiorari, only errors going to the jurisdiction of the court may be reviewed. Section 1074, Code Civ. Proc.; Fickert v. Zemansky, 176 Cal. 443, 168 P. 891; 4 Cal. Jur. 1022. Conceding that an order of removal, entered upon evidence which is wholly insufficient to establish the existence of a legal cause therefor, is in excess of the jurisdiction of the court and does not merely present error in the exercise of jurisdiction, we are of the view that the evidence before the court established cause for removal. In the order of removal the probate judge assigns as reasons therefor that there exists a doubt as to the regularity of petitioner's appointment and a conflict of interest between the petitioner as administrator and other persons interested in said estate, due to the circumstance that petitioner is one of the chief beneficiaries under an alleged subsequently produced will offered for probate, to which Gladys L. McAfee, grandniece of the decedent, had instituted a contest, which was then pending, on the grounds of forgery, fraud, and undue influence. As noted above, the appointment of petitioner was valid, but we cannot say that the probate judge was not justified in removing the administrator in the light of subsequent developments, which disclosed the existence of two wills, the latest of which gave petitioner a large share of decedent's estate and cut out respondent Gladys L. McAfee with one dollar, while the earlier will gave her a substantial legacy. There are a number of other facts and circumstances, in addition to petitioner's ample share in a will that is alleged to be the product of forgery, fraud, and undue influence, and to which the subscribing witnesses were decedent's physician and nurse, who, it is alleged in said will contest, hold notes executed by decedent for $100,000, although decedent was never indebted to them in that sum, that are peculiar to this proceeding, and hence the discretion of the probate judge will not be interfered with, as no abuse of discretion appears.

For the better understanding of the situation, we will briefly review the steps in the probate proceeding as they appear from the record. The decedent, who had been infirm in health for some time before his death, died at the age of 83 years, and left neither wife, children, grandchildren, nor parents surviving him. His heirs at law were three aged brothers, two of whom were nonresidents, a niece, a grandniece, Gladys L. McAfee, who is the contestant to the will offered for probate, and petitioner herein, David Burr Luckey, a nephew. The estate of decedent in the state of California was valued at $650,000 in petitioner's application for administration. Upon the hearing of petitioner's application for letters of administration on February 18, 1929, he presented an instrument signed by the decedent and dated January 16, 1929, four days before his death, whereby he revoked all former wills and codicils. Petitioner, who upon occasions had acted as decedent's attorney, denied knowledge of any wills prior or subsequent to the date of the revocation, as did Dr. Murphy, decedent's physician, and one Dickey, decedent's nurse, who signed

the revocation as witnesses. On June 28, 1929, petitioner produced under court order issued upon the affidavit of Gladys L. McAfee, a will of decedent executed in 1925, with several codicils annexed thereto. By said will petitioner and his wife were bequeathed $50,000 jointly, and Gladys L. McAfee was also bequeathed $50,000, but her bequest was cut down by a subsequent codicil to $20,000 and by another codicil raised to $25,000. The Security Trust & Savings Bank and petitioner were named as executors by a codicil. At the time said will was produced in court, petitioner testified that it first came into his possession upon the opening of decedent's safe deposit box a few days after the issuance of letters of administration to him on February 18th. Upon the occasion of another hearing before the court, he testified that Gladys L. McAfee was present at the opening of the safe deposit box. The revocation of January 16, the validity of which has never been attacked, would revoke said will of 1925 and said codicils thereto.

At about the date petitioner was ordered to produce the 1925 will and codicils thereto, a court order was issued to Dr. Frank Murphy and John Dickey, directing them to produce a will of decedent in their possession. This order was based on the petition of the attorney for Luckey. A will filed June 27 bears date January 17, 1929, and the attestation clause appears to be signed by said Murphy and Dickey as witnesses to the will. Both Murphy and Dickey had testified, upon the hearing of petitioner's application for letters of administration, that they had signed the revocatory instrument of January 16, 1929, as witnesses, and both absolutely denied having any knowledge of a subsequent will. To this will, which named petitioner executor and in respect of which he has applied for letters testamentary, Gladys L. McAfee filed a contest on July 16, 1929. By said will, as before stated, she was cut off with a bequest of one dollar, while petitioner, together with decedent's brothers, David and W. N. Finn, and his niece, Jane Corwin Finn, are bequeathed equal shares in the residue remaining after payment of specific bequests totaling about $27,500. A third brother, aged 80 years, is also cut off with one dollar. Upon the hearing which preceded petitioner's removal on July 17, he denied having received knowledge of the existence of said later will until three or four weeks before said hearing.

On the day after she filed objections to the admission of said will to probate, to wit, July 17, 1929, Gladys L. McAfee also filed an application denominated "Petition for Appointment of a Special Administrator." Said application is also in legal effect a petition for the removal of petitioner as administrator. At the hearing upon said petition, petitioner herein was examined concerning certain charges made in a prior petition of said Gladys L. McAfee for revocation of his letters, filed May 9, 1929, and which appears never to have been disposed of, which petition alleged him guilty of mismanagement, waste, and neglect in the management of the estate. Were it necessary to the decision herein we should be disposed to hold that said evidence falls short of establishing some of the specific grounds urged for removal. Nevertheless, the statement of the probate judge made at the conclusion of the hearing indicated that he felt, as do we from a consideration of the proceedings before us, a substantial doubt as to whether petitioner had exercised the highest degree of good faith in his management of the estate.

All pleadings, files, and papers in the estate proceeding were received in evidence before the probate judge without objection. The charges made against petitioner in the contest filed by Gladys L. McAfee to the admission to probate of the instrument of January 17, 1929, if substantiated, would not only render the instrument invalid as a will, but would call for the removal of petitioner as administrator. It is alleged therein that the name of decedent signed to said instrument was a forgery and that it was improperly executed, but that if the signature was in fact that of decedent, the instrument was the product of duress, menace, fraud, and undue influence practiced upon decedent by petitioner and by Jane Corwin Finn, his niece, and by Dr. Murphy and Dickey, the nurse, three days before his death, at a time when he was suffering from cancer and dependent upon opiates for relief from pain; that petitioner herein and said Jane Corwin Finn during the last weeks of decedent's life had undertaken to manage his affairs and they and Dr. Murphy and Dickey, conspiring together to secure the bulk of the estate for themselves, had kept other persons from him, and, by granting or withholding relief from pain through the administration of opiates, had controlled decedent and substituted their will for his, thereby causing him to execute the will in question and to execute notes for $100,000 each in favor of Murphy and Dickey, although he was not indebted to them except for the reasonable value of their medical services. A person guilty of such conduct would be far from a person in whom the probate court should repose trust and confidence as an administrator.

An administrator in the position of petitioner, who is the proponent of an after-discovered will, the effect of which is to give him a larger share of the estate of a decedent than he would receive in the event of intestacy at the expense of a contestant who would profit from an intestate succession, has an interest adverse to said contestant and to the estate, both in securing a larger portion of the estate and in establishing his own innocence of guilty conduct. His self-interest may prompt him to uphold the will attacked as a

forgery and as the product of his own undue influence and fraud. It is true that the personal representative of an estate in a great number of cases is an heir or legatee possessing pecuniary interest in the estate. But there is a distinction between the interest of a representative under a will duly admitted to probate and that of an administrator who is the proponent of an unadmitted will under attack, on the ground that it is the product of the fraud and undue influence of said administrator.

[12] Furthermore, there are unexplained circumstances in this case calculated to justify the court's action. The will of January 17, 1929, in respect of which petitioner has applied for letters testamentary, purports to be signed by Murphy and Dickey as witnesses. They testified at the hearing of February 18, on which date petitioner was appointed administrator, that they had witnessed the revocation then presented to the court and that they knew of no will subsequent to the date of the revocation. A motive on the part of Murphy and Dickey for concealing the will of January 17 from petitioner and the court is not apparent, since they would not profit as heirs from an intestate succession, nor were they legatees in the will. "To the probate court is given, in the first instance, the supervision and protection of estates of deceased persons, with power, in the exercise of that supervision, to remove an executor when, in its discretion, such step is necessary for the protection of the estate; and that power is not to be interfered with by the appellate court unless there has been a clear abuse of that discretion." Estate of Bell, 135 Cal. 194, 67 P. 123. We are of the view that this power must be held to exist where necessary or expedient to protect the estate, although, as in the instant case, there is no code section providing for removal in the specific situation before the court. As the chancellor is the guardian of a ward's interests, so the probate judge is charged with a similar duty with respect to the heirs of decedents.

[13] The removal is in no wise a decision on the verity of the grounds of attack upon petitioner in the will contest. The validity of the charges made against him in said pending will contest is a matter to be determined at the hearing upon said contest, and not in the proceedings for removal and appointment of a special administrator. But we are of the view that meanwhile he was properly removed and a special administrator appointed in his stead.

[14, 15] Petitioner attacks the order of removal on the further ground that it was in excess of the jurisdiction of the court for the reason that no court order had been issued pursuant to section 1436, Code of Civil Procedure, citing him to appear at the hearing of July 17 and show cause why he should not be removed, nor had a citation been served upon him. We do not regard the order of removal as having been made under said section. The situation arising from petitioner's application for letters testamentary upon the will of January 17, and the filing of the contest to said will, which situation calls for the removal of petitioner, appeared from the court records, and there were no facts which petitioner could produce on a removal hearing which would justify his continuance in office. A notice signed by the attorney for Gladys L. McAfee, to the effect that her application for the appointment of a special administrator would be heard on July 17, was served on petitioner on the preceding day. He was in fact present at said hearing. We cannot see that additional notice would have been of any benefit to him. Furthermore, the court had made orders for the issuance of citations upon the filing in May of the petitions for removal of petitioner by Mrs. McAfee and Charles Finn, and citations showing May 24 as the date set for hearing upon said petitions had been served upon him. Said petitions were not disposed of on said date. Petitioner was not in ignorance, when he appeared at the July hearing, that his removal was desired.

[16] But even if a court order citing petitioner to appear on July 17 should be held to have been required, we should be disposed to hold that it had been waived by petitioner's conduct. Service of such a citation, like service of process in an ordinary civil action, may be waived. Although petitioner objected at the outset to the hearing of the application for the appointment of a special administrator on the ground that his letters had not been revoked, he did not object to the court's then considering the matter of a revocation on the ground that no citation had been served upon him pursuant to court order. He participated in the proceedings which were held in his presence, and was denied no substantial right.

[17] The petitioner having been validly removed, the court properly appointed a disinterested person to act as special administrator of the estate pending the outcome of the will contest. The office of administrator is created as a means of assisting the court in the business of administering estates expeditiously and fairly, and its powers should not be curtailed so long as they are not arbitrarily exercised.

Order affirmed, and writ discharged.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; SHENK, J.; PRESTON, J.

209 Cal. 350

PATRICK v. RILEY, State Controller.

S. F. 13708.

Supreme Court of California.

April 21, 1930.

1. Health ⟹20.

Whatever reasonably tends to preserve public health is subject on which Legislature, within police power, may take action.

2. Animals ⟹29.

Primal object of Bovine Tuberculosis Law is promotion and preservation of public health (St. 1929, p. 1750).

3. Nuisance ⟹78.

In providing measures to protect public health, destruction or summary abatement of nuisances may be ordered.

4. Constitutional law ⟹81.

Health regulations enacted under police power, and providing drastic measures for elimination of disease in general way, are not affected by constitutional provisions.

5. Eminent domain ⟹2(1).

In exercise of police power, use of property may be restricted or it may be destroyed, and no legal liability arise to compensate owner.

6. States ⟹119.

Provision in Bovine Tuberculosis Law for compensation to owners of animals slaughtered does not violate constitutional provision against gift of public money to individual (Bovine Tuberculosis Law, § 10; Const. art. 4, § 31).

7. Animals ⟹29.

Bovine Tuberculosis Law, being for suppression of disease and promotion of health, should be given broad liberal construction to accomplish purpose intended (St. 1929, p. 1750).

8. Constitutional law ⟹70(3).

Determination whether public interest requires legislation against threatened danger from diseased animals and what measures are necessary is province of Legislature, not courts.

9. States ⟹119.

Fundamental test of constitutionality of statute requiring use of public funds is whether statute is designed to promote public interests as opposed to furthering advantage of individuals.

10. States ⟹119.

Statute requiring use of public funds should not be declared unconstitutional, because, incidental to main purpose, there results an advantage to individuals.

In Bank.

Application by A. R. Patrick for writ of mandate prayed to be directed to Ray L. Riley, as State Controller, to compel the drawing of warrants for the value of two cows slaughtered pursuant to Bovine Tuberculosis Law.

Writ granted.

H. C. Nelson, of Eureka, Ralph E. Swing, of San Bernardino, and Frank L. Guerena, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., Alberta Belford, of Los Angeles, and Ralph O. Marron, of San Francisco, for respondent.

WASTE, C. J.

This is an original application for a writ of mandamus to be directed to the respondent as state controller, commanding him to draw two warrants on the state treasurer in the respective sums of $8.46 and $38.28, to which amounts petitioner claims he is entitled by virtue of the provisions of an act of the Legislature referred to as the "Bovine Tuberculosis Law." St. 1929, c. 829, p. 1750.

Section 10 of the above-entitled act authorizes and empowers the director of agriculture to establish and maintain tuberculosis control areas within the state wherein all dairy animals shall be examined and tuberculin tested. Provision is made for the branding, segregating, and slaughtering of all animals reacting positively to the tuberculin test. The section then provides: "* * * In consideration of the fact that the eradication of bovine tuberculosis is beneficial to public health and welfare, that before said animal is branded as provided for in section 9 of this act and/or slaughtered its value shall be determined by appraisement, as provided for herein, * * *; whereupon the owner of said reacting cattle shall be given a written memorandum signed by or under the authority of said director of agriculture in substance and effect, and in behalf of the State of California, promising that the said state will pay said owner in consideration for the slaughter of said reacting animal, the amount of money herein prescribed therefor. * * *"

The petitioner alleges that the director of agriculture, acting under and pursuant to the terms and provisions of section 10, supra, established a tuberculosis control area in the city and county of San Francisco; that the petitioner was the owner of two grade dairy cows located within said area; that on October 16, 1929, the director of agriculture caused said two animals to be examined and tuberculin tested, and each reacted positively to the

tuberculin test; that they were thereupon branded, appraised, and slaughtered; that the director of agriculture thereafter delivered to the petitioner two certain memoranda, as provided in the section, each of which read substantially as follows: "The State of California, by and through the Director of Agriculture of said state, in consideration of the slaughter, * * * pursuant to the terms of Section 10 of the Bovine Tuberculosis Law of California, * * * of one grade dairy animal * * * owned on said date by A. R. Patrick, hereby promises to pay to said owner the sum of [$8.46 and $38.28, respectively]"; that petitioner thereupon, and in form and manner prescribed by law for the presentation, audit, and payment of claims against the state, presented the said two claims evidenced by these memoranda to the respondent, as state controller; and that respondent disapproved each of said claims, and refused, and still refuses, to draw his warrants therefor.

[1-6] The refusal of the respondent to draw his warrants in favor of the petitioner is based entirely upon the claim that section 10 of the act, in so far as it authorizes the payment of compensation to the owners of animals slaughtered under its provisions is in violation of section 31 of article 4 of the Constitution, which, so far as material here, declares that the Legislature shall not "make any gift or authorize the making of any gift, of any public money or thing of value to any individual. * * *" Respondent's position, more specifically stated, is that the Legislature might have directed the slaughter of tubercular animals without any compensation under the police power, and that the provision in section 10 of the act for the payment to the owners of certain sums on account of the destruction of their stock is, therefore, a pure gratuity or "gift," within the meaning of the constitutional inhibition. He asserts it to be the settled law of this state that "an appropriation of public moneys to meet other than a *legal obligation* is violative of section 31, article 4, of the Constitution." In support of his contention, respondent quotes the following portion of the decision in Conlin v. Board of Supervisors, 99 Cal. 17, 21, 33 P. 753, 754, 21 L. R. A. 474, 37 Am. St. Rep. 17: "The 'gift' which the legislature is prohibited from making is not limited to a mere voluntary transfer of personal property, without consideration, which the Civil Code, § 1146, gives as the definition of a 'gift;' but the term, as used in the constitution, includes all appropriations of public money, for which there is no authority or enforceable claim, or which rest upon some moral or equitable obligation, which, in the mind of a generous or even a just, individual, dealing with his own moneys, might prompt him to recognize as worthy of some reward. The legislature is to be regarded as holding the public moneys in trust for public purposes, and this limitation of the constitution is directed against its disposal of these funds except in accordance with such purposes. * * * An appropriation of money by the legislature for the relief of one who has no legal claim therefor must be regarded as a 'gift,' within the meaning of that term, as used in this section; and it is none the less a gift that a sufficient motive appears for its appropriation, if the motive does not rest upon a valid consideration."

It is a well-recognized principle that it is one of the first duties of a state to take all necessary steps for the promotion and protection of the health and comfort of its inhabitants. The preservation of the public health is universally conceded to be one of the duties devolving upon the state as a sovereignty, and whatever reasonably tends to preserve the public health is a subject upon which the Legislature, within its police power, may take action. That tuberculosis is a dangerous and infectious disease which attacks both human beings and domestic animals, that it is prevalent throughout the state among both human beings and domestic animals, and that it is communicated to human beings, especially to children, by milk and other food products from infected animals, stand undisputed. It cannot be doubted, therefore, that the primal object of the statute here involved is to promote and preserve the public health by providing a means for the control and suppression of this disease among cattle. In providing measures for the protection of public health, the destruction or summary abatement of public nuisances inimical to the public health may be ordered, for all property is held in subordination to the right of its reasonable regulation by the government clearly necessary to preserve the health, safety, or morals of the people. Kroplin v. Truax, 119 Ohio St. 610, 620–623, 165 N. E. 498, 501–502; Appeal of White, 287 Pa. 259, 134 A. 409, 53 A. L. R. 1215. In other words, health regulations enacted by a state under its police power and providing even drastic measures for the elimination of disease, whether in human beings, crops, or cattle, in a general way are not affected by constitutional provisions, either of the state or national government. Lausen v. Board of Supervisors, 204 Iowa, 30, 33, 214 N. W. 682, 684. In the exercise of the right of eminent domain, private property may not be taken without compensation therefor, whereas, in the exercise of the police power, the use of property may be restricted or it may even be destroyed, and no legal liability arise to compensate the owner therefor. Gray v. Reclamation Dist., 174 Cal. 622, 638, 163 P. 1024, 1031; Houston v. State, 98 Wis. 481, 486, 74 N. W. 111, 113, 42 L. R. A. 39; City of New Orleans v. Charouleau, 121 La. 890, 46 So. 911, 912, 18 L. R. A. (N. S.) 368, 126 Am. St. Rep. 332, 15 Ann. Cas. 46.

In keeping with this doctrine, the case of Knox County v. Kreis, 145 Tenn. 340, 343, 236 S. W. 1, 2, declares that any provision for the payment to the owner of certain sums on account of the destruction of diseased stock is a pure "gratuity," for "the Legislature might have directed the destruction of such animals without any compensation under the police power." See, also, State v. Heldt, 115 Neb. 435, 213 N. W. 578; Ryder v. Pyrke, 130 Misc. Rep. 505, 508, 224 N. Y. S. 289, 294; Cory v. Graybill, 96 Kan. 20, 26, 149 P. 417, 419.

While we agree with respondent's premise that the Legislature, in the proper exercise of the police power, might have authorized the destruction of tubercular cattle without making any provision for compensating the owner for the loss thereby incurred, we cannot accept his conclusion, based on these decisions, that a provision for such compensation must therefore necessarily fall within the constitutional inhibition against gifts of public moneys because of the absence of any "legal obligation" requiring that such reimbursement be made. The case of Conlin v. Board of Supervisors, supra, so strongly relied on by respondent, presents nothing that is opposed to our conclusion in this regard. That case had to do with an appropriation of public moneys for a purely *private* purpose, to wit, payment by the city of San Francisco for street work illegally done, and for which no "legal obligation" had theretofore existed. In City of Oakland v. Garrison, 194 Cal. 298, 301–302, 228 P. 433, 434, this court had occasion to consider the Conlin Case, and, after pointing out that the statement of the law therein appearing was sufficiently accurate and comprehensive for all the purposes of the case which was then before the court for consideration, concluded that: "That case involved the single question of the power of the Legislature to authorize and direct a municipality to make a payment of public moneys from the city treasury to a private individual who had no valid or enforceable claim against the city therefor. There was no claim or suggestion that the moneys so directed to be paid were to be devoted to any public purpose. On the contrary, it was contemplated and intended that they should be paid to the private individual for his sole use and benefit. There was not and could not be in that case any question whether the proposed appropriation of public funds was for a private or public purpose. The purpose thereof was necessarily and admittedly private and this court held that such a use of public funds would constitute a gift such as is prohibited by the Constitution. In other decisions, both prior and subsequent to the Conlin Case, supra, this court has pointed out that, where the question arises as to whether or not a proposed application of public funds is to be deemed a gift within the meaning of that term as used in the Constitution, the primary and fundamental subject of inquiry is as to whether the money is to be used for a public or a private purpose. If it is for a public purpose within the jurisdiction of the appropriating board or body, it is not, generally speaking, to be regarded as a gift. * * *"

[7, 8] That the act here in question was enacted for a public purpose is beyond question, and, being a law for the suppression of disease and the promotion of the public health, it should be given a broad and liberal construction that it may accomplish the purpose intended in enacting it. Schulte v. Fitch, 162 Minn. 184, 188–191, 202 N. W. 719, 721, 722; Lausen v. Board of Supervisors, supra. In construing such an act, the courts must presume that the Legislature has carefully investigated and has properly determined that the interests of the public require legislation that will insure the public safety and the public health against threatened danger from diseased animals. The determination of that fact is the province of the Legislature, and not of the courts. It is also the province of the Legislature, in the exercise of a sound discretion, to determine what measures are necessary for the protection of such interests. Application of Miller, 162 Cal. 687, 696, 124 P. 427, 429; 5 Cal. Jur. 719, § 122; Durand v. Dyson, 271 Ill. 382, 391, 111 N. E. 143, 146, Ann. Cas. 1917D, 84; Lausen v. Board of Supervisors, supra; State v. Heldt, supra. We are not prepared to say that the Legislature in this act has abused its discretion, or that the measures it has adopted, including the provision for compensation, to prevent the spread of tuberculosis among cattle, are unnecessary and unreasonable or in violation of section 31 of article 4 of the Constitution.

[9, 10] The question of policy which, no doubt, animated the Legislature, is discussed in 2 Tiedeman on State and Federal Control of Persons and Property, where, at page 828, it is said: "The power of the state to destroy property, in order to prevent the spread of disease, has been most actively resisted in the case of diseased animals. This determined resistance to such regulations may be occasioned, either by the greater value of the property so destroyed, or by the absence of a popular conviction that the destruction of the diseased animals is necessary to the preservation of the public health. * * * Many owners of such herds of cattle, perhaps the majority of them, blinded by their own pecuniary loss, when for this cause and reason their valuable cattle are destroyed, repudiate the medical theories upon which the act of destruction is based, and by which it is justified, and consider it a wanton and unjustifiable taking of private property. * * *" It is not unreasonable to conclude that a provision looking to the compensation of the owners of cattle slaughtered under the police power will accomplish much in the way of

precluding or dissipating their opposition and resistance to the proper and immediate enforcement of such legislation, thereby directly tending to foster and promote the public purpose for which it was enacted. The question whether the public interests of the state would be at all advanced by compensating the owners of cattle destroyed under the provisions of the "Bovine Tuberculosis Law" was an appropriate one for discussion and determination by the Legislature before its enactment. As indicated in the case of City of Oakland v. Garrison, supra, at page 302 of 194 Cal., 228 P. 433, the fundamental test of the constitutionality of a statute requiring the use of public funds is whether the statute is designed to promote the public interests, as opposed to the furtherance of the advantage of individuals; and such a statute should not be declared unconstitutional because of the fact that, incidental to the main purpose, there results an advantage to individuals. Veterans' Welfare Board v. Jordan, 189 Cal. 124, 140, 141, 208 P. 284, 291, 293, 22 A. L. R. 1515.

It is our conclusion, therefore, that, while the Legislature, in the exercise of the police power, might have directed the slaughter of diseased cattle without making any provision for compensation to the owners, it did not violate section 31 of article 4 of the Constitution by refusing to exert the full measure of its might. "Necessity alone is not the test by which the limits of state authority in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people." Stephens v. Chambers, 34 Cal. App. 660, 668, 669, 168 P. 595, 598, 599. In the case of Chambers v. Gilbert, 17 Tex. Civ. App. 106, 42 S. W. 630, the court had under consideration an act of the Legislature providing, among other things, compensation from county funds for the slaughter of diseased animals. Section 52 of article 3 of the Constitution of Texas provided: "The Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the state, to lend its credit or to *grant public money* or thing of value in aid of, or to, any individual. * * *" After declaring that the Legislature, in the exercise of the police power, might well provide for the condemnation and destruction of diseased animals, the court concluded that there was nothing in section 52 of article 3 of the Constitution of that state which prohibited the Legislature from providing for the payment of compensation from county funds. The payment of such compensation was, in effect, held not to constitute a gift or "grant" of public moneys to an individual. See, also, the later case of Kilpatrick v. Compensation Claim Board (Tex. Civ. App.) 259 S. W. 164, 167.

This court has, upon other occasions, sustained the constitutionality of legislation involving the expenditure of public funds because of the public purpose thereby subserved, and this despite the fact that such expenditures tended to the incidental advantage of individuals to whom the state was under no "legal obligation" to do benefit. By way of illustration, we refer to the cases of Macmillan Co. v. Clarke, 184 Cal. 491, 194 P. 1030, 17 A. L. R. 288 (providing for the furnishing of free text-books to high school pupils); Pasadena High School Dist. v. Upjohn (Cal. Sup.) 276 P. 341, 344, 63 A. L. R. 408 (providing free transportation for high school pupils); Allied Architects' Ass'n v. Payne, 192 Cal. 431, 221 P. 209, 30 A. L. R. 1029 (providing for a memorial hall for the use of veteran soldiers and sailors); Veterans' Welfare Board v. Jordan, supra (providing for a bond issue to carry out the provisions of the Veterans' Farm and Home Purchase Act, etc.). Respondent attempts to distinguish the present case from those above enumerated upon the ground that the public purpose involved in each of the cited cases was furthered by the expenditure of public funds, whereas, in the present case, the public purpose will not in any manner be "effected, aided or furthered by an expenditure of public moneys." We have already indicated that the determination of this question was within the legislative province, and its solution thereof, which cannot be said to be unreasonable or illusory, tends to refute the respondent's argument. There would, perhaps, be merit in respondent's point if this were a case where the Legislature had undertaken to vote compensation retrospectively to the owners of diseased cattle destroyed prior to the enactment of the statute.

In passing, it should be said that many, if not the majority, of the statutes we have examined providing for the destruction of diseased cattle contain provisions for the compensation of the owners of animals destroyed thereunder. This is true of the acts considered in Cory v. Graybill, supra; Knox County v. Kreis, supra; Chambers v. Gilbert, supra; Durand v. Dyson, supra; State v. Jones, 196 Wis. 464, 220 N. W. 373; Albright v. Board of Commissioners, 108 Kan. 184, 194 P. 913; Peverill v. Board of Supervisors, 201 Iowa, 1050, 1057, 205 N. W. 543, 546; Kroplin v. Truax, supra, and State v. Splittgerber (Neb.) 229 N. W. 332.

We have experienced no embarrassment in arriving at the conclusion herein announced, because of the fact that the Legislature, apparently out of an abundance of caution, saw fit to propose to the people the addition of a new section to article 4 of the Constitution, to be numbered 31a, and to read: "No provi-

sion of this constitution shall be construed as a limitation upon the power of the Legislature to provide by general law, from public moneys or funds, for the indemnification of the owners of livestock taken, slaughtered or otherwise disposed of pursuant to law to prevent the spread of a contagious or infectious disease; provided, the amount paid in any case for such animal or animals shall not exceed the value of such animal or animals." St. 1929, p. 2176. The proposed constitutional amendment has not, as yet, been voted upon by the people. This court, in the absence of a constitutional amendment authorizing the furnishing of free text-books to high school pupils, sustained the constitutionality of a legislative enactment so providing (Macmillan Co. v. Clarke, supra), even though a constitutional amendment adopted in 1912 expressly provided for the furnishing of such books to the pupils of the *elementary* schools only.

For the foregoing reasons, the respondent's demurrer to the petition is overruled, and the writ is made peremptory.

We concur: SHENK, J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.

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209 Cal. 421

COHN et al. v. KLEIN et al.★

L. A. 9845.

Supreme Court of California.

April 29, 1930.

Rehearing Denied May 29, 1930.

1. Quieting title ⟹10(1).

In action to quiet title, plaintiff must prevail on strength of his own title.

2. Pleading ⟹345(2).

Motion by plaintiffs in action to quiet title for judgment on pleadings *held* improper, in view of general allegations of ownership by plaintiffs and general denial thereof by defendants.

3. Quieting title ⟹10(1).

Rule plaintiff in action to quiet title must prevail on strength of his title *held* inapplicable. where both plaintiffs and defendants relied for title on same grantor.

4. Quieting title ⟹10(2).

In action to quiet title, necessity for proof by plaintiffs deraigning title *held* unnecessary, where both plaintiffs and defendants relied for title on same grantor.

5. Pleading ⟹36(5).

In action to quiet title, defendants, by failing to deny allegations setting up instrument as sole source of defendants' claims, reduced general denial of ownership to conclusion instrument vested title in defendants.

6. Wills ⟹88(2).

Instrument using words appropriate for warranty deed, but providing it should not take effect until grantor's death, *held* not deed.

The instrument granted, transferred, and conveyed unto grantee absolutely and forever, as her sole and separate property, certain property, or, in case same was disposed of before grantor's death, then valuation of such properties in place of same, such valuation to be taken as of the time of grantor's death and to be replaced by other property belonging to grantor, and providing that instrument was to take effect only at grantor's death.

7. Deeds ⟹15.

No consideration is required to support warranty deed.

In Bank.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by Levi Cohn and another, special administrators of the estate of Charles Cohn, deceased, against E. A. Klein and another. From a judgment for plaintiffs on pleadings and an order denying defendants' motion for judgment on pleading, defendants appeal.

Affirmed.

Superseding opinion in 284 P. 967.

Emmons, Aldrich & Mack and Emmon & Aldrich, all of Bakersfield, and Bruns & Mooney and W. W. Kaye, all of Los Angeles, for appellants.

F. E. Borton and James Petrini, both of Bakersfield, for respondents.

PRESTON, J.

The sole question for consideration upon this appeal is the validity on its face of an instrument in writing in words and figures following, to wit:

"This agreement, made this 2nd day of August, 1923, by and between Charles Cohn, of Bakersfield, Kern County, California, party of the first part, and E. A. Klein, of the same place, party of the second part, witnesseth: Whereas, the party of the first part has become cognizant of the many charities and good works of Ethel Klein, wife of the party of the second part, and also work done by the party of the second part for many persons without charge therefor, and realizing that it is only a question of a few short years at most that he will have to depart from this life, and knowing that any property turned

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied.

over to either the party of the second part or his wife would be used not exclusively for their benefit, but for the benefit of humanity also, and it being his desire to do something substantial for them and for charity so that they or either of them shall have extra means to do good works, I hereby grant, transfer and convey to said Ethel Klein absolutely and forever as her sole and separate property, free and clear of any and all claims and incumbrances of any kind whatsoever the properties now belonging to me and known as the Midland and Vernon Hotels, on 19th street, in the city of Bakersfield, Kern County, California, or in case same is disposed of by me before my death then the valuation of such properties in place of same, such valuation to be taken as of the time of my death and to be replaced by other property belonging to me at the time of my death of the same valuation, free and clear also, or cash in lieu thereof at the option of the said Ethel Klein (To take effect only at my death). I am not taking anything away from those who might be considered as objects of my bounty, for the reason that some of them do not care for me but only for my property.

"The party of the second part hereby agrees that he will see to it that the ideas of the party of the first part are carried out.

"Dated as aforesaid.

"C. Cohn.
"E. A. Klein."

(Certificate of notary public attached.)

(Indorsements): "Interlineation be. line 21 and 22 inserted before signature at suggestion of Cohn as his idea is to give it only when he is dead. E. A. K. Aug. 2/23." (Recorded June 25, 1926, Bk. 124, p. 53, Official Records of Kern county.)

To be more specific, the question presented is: Does this instrument show a vesting of a present estate to be enjoyed in the future, or does it show simply an abortive testamentary act?

Plaintiffs, as special administrators of the estate of Charles Cohn, deceased, clothed with the proper authority by order of court, instituted this proceeding on August 10, 1926, against the defendants, to have the above instrument signed by the decedent declared void and canceled and removed as a cloud upon the title to the real property therein referred to, to enjoin and restrain defendants from interfering with the possession of said premises by plaintiffs and for general relief.

The complaint contained the following further allegations: "That the said Ethel Klein and the said E. A. Klein have not, nor has either of them, any other, further or different claim upon or against the said properties, or any part thereof, than such as arises by and through the said instrument so recorded as aforesaid."

Defendants filed an answer and amended answer, which contain a general denial of ownership in plaintiffs' intestate of the property involved, but fail wholly to deny the above-quoted allegations of the complaint as to the sole source of their claim. On the contrary, defendants themselves set up said written instrument as a special defense to said action, claiming the said instrument on its face to be a conveyance of the property to the defendant Ethel Klein, in all respects valid.

Motions were made by both parties for judgment upon the pleadings. The motion of defendants was denied, and that of plaintiffs granted, followed by a judgment in their favor upon the pleadings, from which defendants have prosecuted this appeal.

[1-5] A word should here be said respecting the propriety of a motion by plaintiffs for judgment on the pleadings. This is called for by reason of the general rule that in an action to quiet title a plaintiff must prevail upon the strength of his own title and not upon the weakness of the title of his adversary. Patchett v. Webber, 198 Cal. 440, 451, 245 P. 422, and other cases. In view of the general allegations of ownership by plaintiffs and the general denial thereof by defendants, it may be said that a motion by plaintiffs for judgment on the pleadings is improper, as such a motion is in the nature of a demurrer to the answer, and, where the answer raises a material issue, no such motion can be allowed to prevail. Cass v. Rochester, 174 Cal. 358, 163 P. 212; Neale v. Morrow, 174 Cal. 49, 161 P. 1165. But if it be assumed that we have an action to quiet title before us, the above rules are without application, for both plaintiffs and defendants rely for title upon the same grantor. The necessity for proof by plaintiffs deraigning title is therefore unnecessary. Thiele v. Security T., etc., Co., 202 Cal. 758, 262 P. 308. Moreover, defendants, by failing to deny the allegations of plaintiffs' complaint, setting up said instrument as the sole source of their claims, thereby reduced the said general denial of ownership to nothing more than a conclusion of law that the instrument in question on its face vests title to the property involved in them. A kindred principle to this holding is announced in Morel v. Morel, 203 Cal. 417, 264 P. 760.

[6] We thus pass to a consideration of the validity on its face of said instrument. The situation of one set of parties claiming an instrument to be a deed and another claiming it to be a valid testamentary act presents nothing new, as the decisions of all our courts are replete with cases of this character. Indeed, the rule to be applied in such case is not in dispute, for it is everywhere agreed upon, but its application under varying states of fact causes the contrariety of legal pronouncements found. The rule, as set forth in

Nichols v. Emery, 109 Cal. 323, 329–330, 41 P. 1089, 1091, 50 Am. St. Rep. 43, is as follows:

"The essential characteristic of an instrument testamentary in its nature is that it operates only upon, and by reason of, the death of the maker. Up to that time it is ambulatory. By its execution the maker has parted with no rights, and divested himself of no modicum of his estate; and, per contra, no rights have accrued to, and no estate has vested in, any other person. The death of the maker establishes for the first time the character of the instrument. It at once ceases to be ambulatory. It acquires a fixed status, and operates as a conveyance of title. Its admission to probate is merely a judicial declaration of that status.

"Upon the other hand, to the creation of a valid express trust it is essential that some estate or interest should be conveyed to the trustee; and, when the instrument creating the trust is other than a will, that estate or interest must pass immediately. Perry, Trusts, § 92. By such a trust, therefore, something of the settler's estate has passed from him, and into the trustee, for the benefit of the cestui; and this transfer of interest is a present one, and in no wise dependent upon the settler's death. But it is important to note the distinction between the interest transferred and the enjoyment of that interest. The enjoyment of the cestui may be made to commence in the future, and to depend for its commencement upon the termination of an existing life or lives, or an intermediate estate."

The above doctrine made applicable to a conveyance in trust is, of course, equally applicable to a conveyance of any other estate in property, which was the case in Tennant v. John Tennant Memorial Home, 167 Cal. 570, 577, 140 P. 242, where we find the above-mentioned rule specially approved.

[7] A survey of the instrument in question shows that it partakes of the nature of a covenant, also of a conveyance, and also of a testament. The question in its last analysis is, What was the intent of the decedent in executing it? Did he intend thereby to convey an interest in præsenti in said real property? It is true that he used appropriate words of grant followed by language commonly found in what is known as a warranty deed. It is also true that no consideration is required to support such a document, if otherwise valid and delivered. But following the granting clause, we find that decedent reserved the right to dispose of said property prior to his death, and that in such case the property so conveyed was to be valued as of the date of his death, and other property clear of all incumbrances owned by him at such time was likewise to be valued and used to replace said property conveyed, or, at the option of said defendant Ethel Klein, cash might be received in lieu of the full value at the time of death of such property. So much of the instrument as is last referred to contains language not inappropriate as part of a conveyance under the doctrine of the Tennant Case, supra, but such language is equally, if not more, appropriate as a testamentary act. But we find that decedent, prior to the execution of said instrument, caused to be inserted therein, the following words: "To take effect only at my death." The document was then indorsed by the party of the second part in these words: "Interlineation * * * inserted before signature at suggestion of Cohn as his idea is to give it only when he is dead."

This language shows unmistakably in our opinion that it was the intent of the decedent that no present estate should be transferred, and that said instrument should take effect only at the time of his death and should convey no estate prior thereto. We think to the point is the case of Niccolls v. Niccolls, 168 Cal. 444, 143 P. 712, 713, where a conveyance in trust was under review which contained the following language: "That the said trustors by these presents, to take effect only upon the death of said Robert Niccolls, one of said trustors, sell, assign, transfer and confirm unto the said trustees, in joint tenancy, and to the survivor of them and their successors and assigns, all our property of every kind and nature, both real and personal, that we may have and own at the time of the death of the said Robert Niccolls, one of said trustors, to have and to hold the same. * * *" In said case it was held that no present interest in the property of the trustors was thereby conveyed.

We realize, as above intimated, that almost innumerable cases may be found in other jurisdictions, some to one effect and some to the opposite, upon the question here involved, and it is therefore useless to undertake to discuss authorities upon it, but we have found the recent case of Nobell v. Town of Beaver, 133 Okl. 247, 271 P. 420, where an instrument in the form of a deed was executed which just prior to the habendum clause contained the following recital: "The conditions of this instrument are such that it is to be void and without effect until on and after the death of the said John R. Thomas, when it shall then come into full force and effect." The above language, to our mind, carries little, if any, different meaning from that inserted in the instrument before us, "to take effect only at my death." The Oklahoma court summed up the situation as follows: "There is no dispute between the parties as to the law. The dispute arises only in its application to the facts. The adjudicated cases furnish little, if any, assistance in construing the instrument in question. Numerous cases may be found from practically every state in the Union in which the courts have been called upon to construe language used in instruments of this char-

acter, and in many of the cases practically the same language has been differently construed by different courts. We have examined many cases in which the question here involved is discussed, but, in our opinion, it would serve no useful purpose to enter into an extended discussion thereof. The only conclusion to be reached from the mass of decided cases is that each case must be governed and decided according to the particular facts of the individual case."

In concluding that the instrument did not convey any present estate, the court said: "Applying, then, the above rules, does the instrument in question convey a present interest in the land? We think not. The instrument is executed on the express condition that the same should be void and of no effect until after the death of the grantor. If the deed be void until after the grantor's death, certainly no interest in the land can pass until such death. This being true, the instrument cannot be said to be a deed, but is an instrument attempting to make a testamentary disposition of the land, and void because not executed and attested in accordance with the law relating to wills."

It is only fair to counsel to say also that we have found a second case by the Supreme Court of Georgia, Montgomery v. Reeves, 167 Ga. 623, 146 S. E. 311, where similar language appears to have been given an opposite construction from that quoted above. But in viewing the instrument before us as a whole, we are satisfied that the decedent never intended thereby to convey unto the defendant Ethel Klein any present estate whatsoever in said property, and that it was his intention that the instrument take effect only as a testamentary act. Having in that regard failed to comply with the requirements of the statute as to execution, it follows that the document as a testament is inoperative.

The action of the court below in declaring the instrument invalid and ordering the same canceled was, therefore, proper, and the judgment is hereby affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.

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209 Cal. 372

RINALDI v. BARASCH et al.

S. F. 13865.

Supreme Court of California.

April 22, 1930.

Brokers ⚷4.

Transactions between purchaser and broker *held* to show broker's receipt of money in course of "real estate transaction," rendering surety liable (Real Estate Broker's Act).

Third person, in answer to advertisement of broker acting for owner, offered to purchase business advertised for sale, but, before receiving transfer and after paying price, demanded return of money. Broker, over purchaser's protest, and in fraud of his right to return of money, transferred to him interest in real estate partnership in lieu of money, but purchaser insisted on money and issued warrant for broker's arrest, whereupon part of money was returned and a note given for part of balance, and broker took back a retransfer of interest in his business. Question presented was whether broker obtained purchaser's money during course of real estate transaction so as to render broker's surety liable under Real Estate Broker's Act (St. 1919, p. 1252, as amended).

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Matthew Rinaldi against Harry D. Barasch and others for money had and received. From the judgment rendered, plaintiff appeals.

Judgment in favor of defendant American Surety Company of New York reversed.

Superseding opinion 284 P. 948.

E. B. Mering and A. M. More, both of San Francisco, for appellant.

Bertrand A. Bley and Joseph G. De Forest, both of San Francisco, for respondents.

PER CURIAM.

This is an appeal by the plaintiff from a judgment in favor of the defendant American Surety Company of New York. Briefly stated, the facts are: The defendants Barasch and Baldocchi were real estate brokers, and the American Surety Company of New York was the surety upon the bond of Barasch. The brokers inserted an advertisement in an Italian newspaper, offering to sell an interest in a manufacturing business, the purchaser to work in the business and to receive $40 a week and profits, and to invest $1,500. Plaintiff, who could not read nor write, and had never been to school, according to his own testimony, which appears uncontradicted in the record, called in response to this advertisement. Barasch took him to a "shack" used for a furniture factory, and told him that a profitable business was being operated there. Barasch sold plaintiff an interest in this "shack," lot, and business, and assured him that, if the business did not pay, he might have his money returned to him. The testimony of the plain-

tiff was: "He (Barasch) said, 'This place don't look good, and that is the price, but you see yourself, the house is not worth much, it is an old house, but it make good business, and then you see yourself,' and we went to see, and I didn't believe the business was good—the house was nothing—the money buys a lot and a shack and everything." A man named Stone was the owner of the business, and Barasch was selling as his agent.

Plaintiff paid the $1,500 and received a receipt therefor. Before receiving a transfer of the property, and a day or so after paying his money, plaintiff testified that Barasch told him that the business and property was not a good purchase; that he (Barasch) could not recommend it. Plaintiff, therefore, said he would not buy it, and demanded the return of his money. Barasch would not return it. Upon repeated demands for his money by plaintiff, Barasch insisted upon transferring to plaintiff in lieu of his money a one-sixth interest in the real estate business which was operated and owned by him. Plaintiff protested, and said he wanted his money, and Barasch told him, if he wanted his money, he could sell the one-sixth interest in the real estate business. Plaintiff insisted upon his money, saying that he knew nothing of the real estate business, and could not read nor write. Barasch, however, transferred to plaintiff this interest in the real estate business instead of returning his money as demanded by the plaintiff, and this transfer and the retransfer by plaintiff to Barasch, hereinafter mentioned, is the evidence relied upon in the case to show that the transaction was one between plaintiff and Barasch individually, and not between plaintiff and said defendant, as agent for another.

Later, plaintiff had a warrant issued for Barasch's arrest, and Barasch gave plaintiff $600 in cash and a note for $600, taking back a retransfer of the interest in the real estate business and a release of all liability, conditioned, however, upon payment of the note. The note was never paid, and Barasch did not appear to defend this action brought against him as a joint defendant. Plaintiff sued upon the broker's bond, and the trial court found that the transaction involved the sale of the broker's own property, and was not a transaction as a real estate broker. Such a finding, in view of the express provisions of the Real Estate Broker's Act (St. 1919, p. 1252, as amended), necessitated a judgment exonerating the surety.

However, we feel that a broad view of all the facts is opposed to this finding of the trial court. The uncontradicted testimony is that the transaction through which the broker obtained the plaintiff's money was one in which Barasch acted as a broker for Stone; it was the sale of the furniture business, lot, building, and good will for $1,500. The plaintiff explained why he took the instrument transferring him a one-sixth interest in the real estate business, and that testimony is uncontradicted in the record. He shows that Barasch wrongfully retained plaintiff's money and refused to return it after repeated demands, and insisted upon transferring to him instead this interest in the real estate business. This transfer was made over the plaintiff's protests that he did not want this business; that he could not read nor write; that he wanted his money. Barasch insisted that the way to get the money back was for plaintiff to sell this one-sixth interest in the real estate business. The trial court appropriately characterized the transaction as "bunk, fraud, almost highway robbery." It is plain the parties were dealing on an unequal footing, and that the contract for the purchase of the real estate business was forced upon the plaintiff through duress, fraud, and against his will. This made it a voidable transaction, and the plaintiff has returned the consideration received, having restored to Barasch the one-sixth interest in the real estate business, and elects to avoid the transaction.

That leaves the original transaction standing, whereby the broker received the plaintiff's money in the course of a real estate transaction and has given no consideration therefor, has retained $900 of the amount received, and refuses to account therefor. This clearly brings the matter within the Real Estate Broker's Act, and fixes the liability of the defendant surety.

The surety has been compensated for its services, and its bond enabled the broker to act as such in a transaction in which the plaintiff was defrauded. Under the circumstances, the foregoing view of the facts seems the only equitable one.

The judgment in favor of the defendant American Surety Company of New York is reversed.

209 Cal. 429

BARBIERI v. LAW.★

S. F. 13289.

Supreme Court of California.

April 29, 1930.

Rehearing Denied May 29, 1930.

1. Negligence ⟹45.

Building owner owed scavenger using sidewalk elevator in collecting refuse only duty to exercise ordinary care for his safety.

2. Negligence ⟹136(23).

Where scavenger using sidewalk elevator in collecting refuse was crushed between elevator floor and sidewalk doors while attempting to unlatch doors, negligence of building owner *held* for jury.

The evidence disclosed that the scavenger stepped on elevator, which was raised slightly above basement floor, and attempted to unlatch sidewalk doors, and that while so doing the elevator started up, crushing scavenger, and that safety device which would have prevented elevator from operating while sidewalk doors were closed was not on elevator and in working order.

3. Negligence ⟹111(1).

Complaint alleging negligence in general terms, in action for injuries to one crushed by sidewalk elevator, *held* sufficient.

4. Negligence ⟹121(3).

Res ipsa loquitur doctrine *held* inapplicable where scavenger using sidewalk elevator collecting refuse was crushed between elevator floor and sidewalk doors while trying to unlatch doors.

The doctrine of res ipsa loquitur was inapplicable, since the instrumentality which caused the injury was at time within scavenger's power to operate.

5. Appeal and error ⟹999(3).

Implied finding that absence of device which would have prevented sidewalk elevator from ascending before scavenger had sidewalk doors unlatched was proximate cause of injury to scavenger *held* binding.

6. Negligence ⟹136(26).

Contributory negligence of scavenger injured when sidewalk elevator ascended while he was attempting to unlatch sidewalk doors crushing him *held* for jury.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Frank B. Barbieri against Herbert E. Law. Judgment for plaintiff, and defendant appeals.

Affirmed.

Barry J. Colding, Theodore Hale, and Pillsbury, Madison & Sutro, all of San Francisco (Carroll B. Crawford, of San Francisco, of counsel), for appellant.

Alvin Gerlack and Wayne R. Millington, both of San Francisco (Bronson, Bronson & Slaven, of San Francisco, of counsel), for respondent.

PRESTON, J.

The judgment rendered in favor of plaintiff in this action for damages for personal injuries alleged to have been received by him while using a sidewalk elevator or hoist is hereby affirmed.

For about two years prior to the accident it had been the custom of plaintiff, a twenty-eight year old Italian, knowing little English, in the employ of a scavenger company, to make regular calls at the Monadnock building, which extends from Market to Stevenson street in San Francisco, for the purpose of collecting refuse from the basement thereof. The building, which was owned by appellant, had no rear entrance except through a sidewalk elevator, or hoist, which dropped some eight feet from sidewalk level to floor of basement. It was customary for the building night watchman to leave unlocked for plaintiff the sidewalk doors giving access to said elevator. Plaintiff would then open them, pull a chain from the sidewalk to raise the elevator, descend on it with sack or blanket in which to carry the rubbish, load it, ascend with it to the sidewalk, and then place it on the scavenger truck. At times, however, the watchman had neglected to unlock said sidewalk doors, which unlatched only from underneath.

The morning of the accident, which occurred on February 3, 1926, at about 5 o'clock a. m., was one of these occasions. Plaintiff called as usual, but found the two iron sidewalk doors locked. He therefore went around the corner to the front entrance of the building and rang for the night watchman, who answered and took him down into the basement by one of the building's front passenger elevators. Said watchman, remaining in the front elevator, then directed plaintiff to go to the rear of the basement and take the sidewalk elevator himself.

Plaintiff testified that said elevator had been stopped so that its floor was about a foot and a half above the level of the basement floor. The basement was dimly lighted. He stepped up on the elevator and, raising on his toes, reached up to unlatch the sidewalk doors, steadying himself by placing his right

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied.

hand on the side of elevator shaft. While he was in that position (evidently because he was inadvertently pressing upon the operating lever), the elevator started up and he was crushed between the floor thereof and said sidewalk doors. A policeman and several pressmen on duty in the vicinity heard him scream, rushed up the street, forced open the iron doors, extricated him, and aided in rushing him to the hospital.

He sustained a profound nervous shock, numerous bruises, a severe fracture of the left femur or thigh bone of the left leg, with severe laceration of the muscles and tendons thereof, together with internal injuries to his head, shoulders, chest, and body, a twisting of the knee and ankle joints of both legs and left pelvis, and wrenching of ligaments of the lower spine. He was first confined to the hospital for about eleven weeks and later for a period of about twenty-three weeks. The injury to his leg, it was testified, would cause him some degree of permanent disability.

Said hoist was the usual hydraulic type of sidewalk elevator, operated by a starting lever or control chain with two rings. Pursuant to safety orders of the Industrial Accident Commission, it had been equipped with an iron rod safety device, which, when in place, prevented its operation while the sidewalk doors were closed. The engineer of the Monadnock building, a witness for plaintiff, testified that at the time he made his customary daily inspection, late in the afternoon preceding the accident, the safety device was intact and working properly. An elevator inspector for the Industrial Accident Commission, however, testified that said engineer told him after the accident that shortly prior thereto he had taken the device off to make repairs and had not replaced it. This statement, in turn, was discredited by other witnesses, who testified that the engineer had referred to the removal of a bumper or stop and not to the safety device. Other testimony showed that the device was found, after the accident, lying near the elevator. Whatever the facts of the matter may be, certain it is that the device was not on the elevator and in working order at the time plaintiff stepped on it, for, if it had been, the elevator would not have ascended until after the sidewalk doors had been opened.

In this state of the case the court refused to direct a verdict for defendant; the jury, upon the conflicting evidence, brought in a verdict for $11,000 for plaintiff and judgment in his favor followed. No claim is or under the evidence could be made that the amount awarded was excessive, but upon other grounds hereinafter set forth, defendant has prosecuted this appeal. In our opinion the matters urged by him all involve questions properly submitted to the jury, upon which their action is conclusive.

[1, 2] First, appellant urges, the verdict is not justified by the evidence, in that he claims that the testimony of his own witnesses and the witnesses for plaintiff alike established his freedom from any degree of negligence whatsoever. In this respect, he states he owed respondent only the duty to exercise ordinary care for his safety, which care was fully accorded him. This is unquestionable, and in fact it is conceded by respondent that the degree of care which appellant was required to exercise with relation to the maintenance of said elevator and respondent's use thereof in the manner stated, was no more than reasonable and ordinary care to assure his safety. Blanco v. Marian Realty Co., 204 Cal. 145, 266 P. 798. But here can it be said that substantial evidence was lacking to warrant the jury in concluding that appellant failed to exercise such reasonable or ordinary care? We think not. Respondent, instead of finding the doors unlocked and ready for him to open from the sidewalk above, was forced at 5 o'clock on the winter morning in question to descend to a dimly lighted basement and take over the elevator from which, without warning or knowledge on his part, the very device which would have assured his safety was missing. If such evidence was not sufficient to justify the action of the jury, we know of none that would.

[3, 4] The criticism directed against the wording of the complaint is not well founded, as negligence is therein sufficiently alleged in general terms. McKeon v. Lissner, 193 Cal. 297, 309, 223 P. 965, and cases therein cited; Champagne v. A. Hamburger & Sons, 169 Cal. 683, 147 P. 954; 19 Cal. Jur. § 96, p. 671. But we do agree with appellant that this is not a case where the facts warrant application of the doctrine of res ipsa loquitur, for the instrumentality which caused the injury was at the time within respondent's power to operate. See 19 Cal. Jur. p. 708, § 125 et seq., and many cases cited in note. In fact, respondent admits that as a matter of law he is in no position to rely upon the claim that the elevator ascended automatically, in an unexplained manner, when he stepped upon it, in the face of the proof that the starting mechanism and all the other mechanical parts thereof, aside from said safety device and bumpers, were in good repair and working perfectly at said time. He further admits that, far from being unexplained, the obvious and reasonable explanation of said accident is that in endeavoring to steady himself in reaching up toward the doors, he must have unconsciously and involuntarily pressed upon the starting lever and, because said safety device was not in place, the platform ascended, thus causing his injuries in the manner aforesaid. In other words, there was a substantial conflict in the evidence bearing upon the question of appellant's negligence, and this conflict the jury were entitled to and did resolve

in respondent's favor. From the above it follows that there was no error on the part of the court below in refusing to direct a verdict for appellant.

[5] Appellant, however, further contends that the absence of the safety device was a mere mechanical condition, without causal power, and therefore it could not have been the proximate or efficient cause of respondent's injuries. In other words, although the evidence shows that the very purpose of said safety device was to prevent an accident of this character and in removing it or in allowing respondent to take the elevator when it was not in working order, appellant should have foreseen the possible consequences of such conduct, yet he urges that there was an intervening affirmative act on the part of respondent, to wit, pressing upon the starting lever, and such intervening act was the proximate cause of the injury. Intervening impulsive acts, however, do not necessarily break a chain of causation (Champagne v. A. Hamburger & Sons, supra), and, under the evidence, we cannot say that said alleged intervening act on the part of respondent was so disconnected in time and nature as to make it plain that the injury was in no way a natural or probable consequence of appellant's original wrongful act of omission, thus constituting the proximate cause by displacing the original cause of the accident. Upon this issue we also consider the implied finding of the jury binding See Merrill v. Los Angeles, etc., Co., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134.

[6] Lastly, appellant contends, respondent was as a matter of law guilty of contributory negligence, for he claims that, as no proof of actionable negligence on his part was produced and respondent could not invoke the doctrine of res ipsa loquitur, it therefore follows that respondent's injuries, if negligently incurred, were the result of his own negligence proximately causing or contributing thereto; that is, respondent's act in consciously or unconsciously depressing said control lever before he unlatched the doors, appellant claims, constituted contributory negligence as a matter of law. The answer to this contention is: First, that proof was offered of actionable negligence on the part of appellant, as above set forth; and, second, the circumstances of the accident presented a question for the jury as to respondent's contributory negligence, if any. Full and ample instructions were furnished them bearing upon this issue, and it is evident that they believed that respondent did not knowingly or intentionally apply the power to start said elevator. In other words, if respondent's said act did contribute to his injury, it was not by his own fault that it so contributed, which latter element is essential to render the plea available. 19 Cal. Jur. p. 647, § 76.

The resolution by the jury of the numerous issues presented in respondent's favor is, in our opinion, abundantly supported by the record. This fact, and the views above set forth, compel an affirmance of the judgment rendered by the court below, as first hereinabove ordered.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

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209 Cal. 375

RISPAUD et al. v. RISPAUD et al.★

S. F. 13175.

Supreme Court of California.

April 22, 1930.

As Modified on Denial of Rehearing May 22, 1930.

1. Estoppel ⟹83(1).

Estoppel does not exist, in absence of misrepresentation direct or indirect.

2. Estoppel ⟹37.

Deeds of joint owners partitioning lands described as entire half section not entirely owned *held* not to include other portion afterwards acquired.

3. Abatement and revival ⟹8(2), 9.

Defense that another action to quiet title was pending involving same rights *held* unavailable, because of variant parties and issues.

Circumstances disclosed that the pending action was between other parties than those of record in the quiet title action, that the parties in the pending action did not occupy the same relative positions as those of the quiet title action, in that they were not in privity with all the parties in the quiet title action, and that the issues in the two cases were not identical.

In Bank.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Jules Rispaud and others against Renee Rispaud and another. From an adverse judgment, the defendants appeal.

Affirmed.

Owen D. Richardson, of San Jose, for appellants.

D. M. Burnett and John M. Burnett, both of San Jose, for respondents.

LANGDON, J.

This is an appeal from a judgment quieting the title of each of four plaintiffs to an undi-

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied.

vided one-fifth interest in forty acres of land in Santa Clara county, Cal., described as the southwest quarter of the northwest quarter of section 10, township 8 south, range 2 west, M. D. M., hereinafter referred to as parcel "A." It is contended by the defendants upon this appeal that the evidence is insufficient to support the findings, and that the trial court erred in not ruling that another action was pending at the commencement of this action, and that this action should therefore have abated.

The facts necessary for an understanding of the relationship of the various parties are disclosed by documentary evidence, from which it appears:

By December 30, 1878, Joseph Rispaud and Marius Garcin had acquired, jointly, the following described parcels of real property: South half of the southwest quarter, and the northeast quarter of the southwest quarter, and the southeast quarter of the northwest quarter of section 10, township 8 south, range 2 west, M. D. M., and also the northwest quarter of the southwest quarter of section 10.

These parties were therefore the joint owners, on the date mentioned, of the entire southwest quarter of section 10, and also the joint owners of the southeast quarter of the northwest quarter of the same section. This entire tract will be referred to as parcel "B."

On this date, that is, December 30, 1878, neither Garcin nor Rispaud, jointly or severally, owned any interest in the land involved in this case, that is parcel "A"; that parcel still being vested in the government.

On June 11, 1885, Garcin and Rispaud were still the joint owners of parcel B, and had not acquired any other land, jointly or severally, in that section. On the last-mentioned date they partitioned their joint holdings. This was done, as disclosed by the record, by two deeds: One from Joseph Rispaud to Marius Garcin conveying all of the west half of section 10, township 8 south, range 2 west, lying north of the Saratoga Turnpike road, and one from Marius Garcin to Joseph Rispaud conveying all of the west half of section 10, township 8 south, range 2 west, M. D. M., lying south of the Saratoga Turnpike road. From an examination of the map found in the record, it is to be seen that the Saratoga Turnpike road roughly bisects parcel B; the larger portion being south of the road. It is to be noted that at that time the two parties did not own the entire west half of section 10, although both deeds executed in connection with the partition use that general description. It was the obvious intent and purpose of the parties to divide up their joint interest in parcel B. Neither party, at that time, owned or claimed any interest in parcel A, although it is part of the west half of section 10 and lies north of the Saratoga Turnpike road.

[1, 2] On February 25, 1902, the state of California patented to Joseph Rispaud the land described above as parcel A. As heretofore stated, parcel A is part of the west half of section 10, and lies north of the Saratoga Turnpike road. The defendants, claiming through Garcin, among other things, claim that the deed of 1885 served to pass this after-acquired property to them. It is clear, in our opinion, that the doctrine that after-acquired title inures to the benefit of the grantee has no application to such a case. The basis of that doctrine is estoppel, and, when the facts clearly show that there was no misrepresentation, directly or indirectly, then there is nothing for the estoppel to act upon. The partition deeds used a very general description—the first time in the whole chain of title that that description was used. It seems perfectly obvious, that it was not the intention of the parties to the partition deeds to include parcel A in the deeds, even though it is covered in a general way by the description used. In other words, the trial court read the description in this partition deed as being qualified by the holdings of the parties at its date.

It is true the record contains other evidence relied upon by appellants to show a contrary intention of the parties to the partition deeds, such as mortgages, etc., executed later by the successors of Garcin, in which the same general description is given, which was copied, evidently, from the deed in partition given by Rispaud to Garcin, but the most that can be said of this evidence is that the trial court might have resolved the doubt in favor of defendants as there were facts and circumstances in evidence which would have warranted a different conclusion from the one reached. However, we cannot say that the conclusion reached was an improper or unreasonable one from the record.

The court also found in favor of plaintiffs upon the issue of adverse possession, but it is not necessary to discuss this additional reason for the judgment entered.

[3] As to the defense that another action was pending between the same parties, involving the same rights, the judgment roll in the other action relied upon shows that said action was between other parties than those of record in the instant case; nor do the parties in the prior case occupy the same relative positions as those in the instant case, that is to say, the parties in the prior case are not in privity with all the parties herein; also, the issues in the two cases are not identical. In the former action, the predecessor in interest of defendants (Henry Rispaud) was a party plaintiff, whereas the successors in interest of Henry Rispaud are now made defendants by those who joined with him in bringing the former action. Furthermore, the former action was brought by a number of plaintiffs

who claimed to own all the land involved in the present action, against four defendants, three of whom disclaimed any right in the land, and the fourth answered, setting up that he held the record title to the land, and wished to have it adjudged that he was the owner of a right of way across it, which seems to have been the extent of the claim of the predecessor in title of the defendants in the instant case, while in the instant case the defendants claim to own the legal and equitable title in fee to the land. The ruling of the court, therefore, upon this question was correct. 1 Cal. Jur. 31, § 11 et seq.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.

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209 Cal. 394

MARYLAND CASUALTY CO. v. STATE INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 13213.

Supreme Court of California.

April 24, 1930.

1. Insurance ⚷150.

Rule that rider prevails in case of ambiguity between rider and policy provision applies only where ambiguity in fact exists.

2. Insurance ⚷146(1).

Insurance contract, in absence of ambiguity, is construed according to intention of parties.

3. Insurance ⚷437.

Workmen's compensation insurance policy was not ambiguous in respect to exclusion of those illegally employed (Workmen's Compensation Act 1917, § 8a).

Although there was attached to the policy an indorsement headed "California Compensation Endorsement," providing that provisions of California Workmen's Compensation Law was the Workmen's Compensation Law within meaning of policy provision, it was nevertheless expressly limited to injuries sustained by employee or employees legally employed by the employer, so that obviously the only purpose of the rider was to insert name of California act to supplement printed portion of policy, particularly in view of provision that rider was subject to terms, limits, and conditions of policy.

In Bank.

Proceeding under the Workmen's Compensation Act by Tony Mazzina, a minor, by William Mazzina, his guardian ad litem, opposed by Alfred Michelotti, employer, and the Maryland Casualty Company, insurer. To review an award of the Industrial Accident Commission, the insurer brings certiorari.

Award annulled.

Superseding opinion, 280 P. 690.

W. G. McKeen and R. P. Wisecarver, both of San Francisco, for petitioner.

Daniel W. Burbank and C. F. Laumeister, both of San Francisco, for amicus curiæ State Compensation Insurance Fund.

Edward O. Allen, of San Francisco, for respondents.

Orrick, Palmer & Dahlquist, of San Francisco, for amicus curiæ California Inspection Rating Bureau.

PER CURIAM.

Respondent Tony Mazzina, a youth twelve years of age, was employed in a butcher shop by his co-respondent Alfred Michelotti at his place of business located at Los Banos, Cal. In the course of his employment he sustained the loss of portions of three fingers of the left hand while operating a meat cutter. No question is or could be made as to the liability of the employer. At the time of the injury petitioner was the insurance carrier of respondent Michelotti. The Industrial Accident Commission made an award in favor of the employee.

By a decision of this court the award of the Industrial Accident Commission was annulled. The petition for a rehearing having been granted, the cause is again before us for decision. Respondents, in their petition for a rehearing, complained that the question which said respondent Industrial Accident Commission sought to reopen for further consideration was whether the policy of insurance, considered as a whole, actually did, in effect, exclude employees illegally employed by the insured, Alfred Michelotti.

The policy of insurance by which the rights of the respective parties thereto are to be measured, in part, provides:

"VII. **Employees Covered** [in bold-face type]. This policy shall cover such injuries including death resulting therefrom, sustained by any employee or employees *legally* employed by this employer. * * *" (Italics ours.)

It is admitted that the injured employee was illegally employed by reason of his youth. Obviously the above paragraph excludes any liability on the part of the carrier unless other clauses of the policy include such employment.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

The clauses upon which respondents rely are as follows:

"Compensation I. [The Company agrees.] To pay to the person and in the manner provided therein, any sum due or to become due from this Employer because of any such injuries, including death resulting therefrom, under certain statutes cited and described in endorsements attached to this Policy, each of which Statutes is herein referred to as the Workmen's Compensation Law. It is agreed that all of the provisions of each Workmen's Compensation Law cited and described in endorsements attached to this Policy shall be and remain a part of this contract, as fully and completely as though written herein, so far as they apply to compensation while this Policy shall remain in force. * * *"

Attached to the policy is an indorsement headed "California Compensation Endorsement," dated March 4, 1927, providing in part:

"It is hereby understood and agreed, that the California Workmen's Compensation Law and all additions thereto and amendments thereof, is a Workmen's Compensation Law within the meaning of Insurance Clause One of the Policy to which this Endorsement is attached."

Section 8(a) of the Workmen's Compensation Act (St. 1917, p. 835) provides:

"The term 'employee' as used in sections six to thirty-one, inclusive, of this act shall be construed to mean: Every person in the service of an employer as defined by section seven hereof under any * * * contract of hire * * * including minors, whether lawfully or unlawfully employed. * * *"

[1, 2] Respondents contend that in reading these various clauses together an ambiguity is created which under rules of construction must be determined in favor of the insured and against the carrier. In a former decision of this court some of the issues here presented were determined adversely to respondent. In Maryland Casualty Co. v. Industrial Accident Commission, 179 Cal. 716, 178 P. 858, the same type of policy was involved, containing a clause identical with the one here involved, excluding those illegally employed. This court held that such a clause released the carrier from liability. Subsequent to that case section 8(a) of the act was enacted defining employee as one "lawfully or unlawfully employed." Respondents contend that since 1917 those unlawfully employed are now covered on the theory that, where there is ambiguity between a rider and a proviso in the policy, the rider prevails. Royal Insurance Co. v. Caledonian Ins. Co., 182 Cal. 219, 223, 187 P. 748. But that rule only applies where an ambiguity in fact exists. Where there is no ambiguity, a contract of insurance, like any other contract, is construed according to the intention of the parties. Rankin v. Amazon Ins. Co., 89 Cal. 203, 26 P. 872, 23 Am. St. Rep. 460; Finkbohner v. Glens Falls Ins. Co., 6 Cal. App. 379, 92 P. 318. As stated in 14 Cal. Jur. 446:

"The rule that a policy should be construed in favor of the insured applies only to resolve an uncertainty or ambiguity in his favor; it may not be invoked to change the nature of the contract, or to nullify an express and unequivocal agreement. Where the terms are plain and explicit and the meaning clear, courts indulge in no forced construction in order to cast a liability upon the insurer which it has not assumed."

Obviously, the only purpose of the clause in the rider above set forth was to insert the name of the California act to supplement the printed portion of the policy. This is made clear by the provisions of paragraph I of the policy, supra. This interpretation becomes increasingly clear because at the end of the so-called "rider" is this clause: "Subject to the terms, limits and conditions of the Policy."

[3] Thus the policy is intended to cover all employees of the insured except those specifically excluded in the policy, to wit, those illegally employed. We can find no ambiguity in the policy.

The conclusion above reached is in conformity with, and necessarily follows from, two other decisions of this court recently rendered—Zurich General Accident, etc., Co. v. Stadelman, 280 P. 687, and Ocean Accident & Guarantee Corporation Ltd. v. Industrial Accident Commission, 280 P. 690, in both of which, by implication, the above result was reached. In those cases both employees were legally employed, but within an excluded group, and this court held that the carrier was released. To hold otherwise in this case, as petitioner suggests, would be to put those unlawfully employed in a better position than those lawfully employed. If those lawfully employed may be excluded, certainly there is no reason why those unlawfully employed may not also be excluded.

The above interpretation is further strengthened by the familiar rule of construction that, when general and particular provisions of a contract deal with the same subject-matter, the specific provisions are of controlling force. Civ. Code, § 3534; 6 Cal. Jur. 282, and cases there cited.

We are further of the opinion that the view which we take of the matter is in accord with the spirit which prompted the amendment of section 31a by the Legislature of 1929.

The award is annulled.

SMITH et al. v. LEWIS et al.★

S. F. 13124.

Supreme Court of California.

April 28, 1930.

Rehearing Granted May 27, 1930

1. Corporations ⟹630(6).

Judgment for or against domestic corporation delinquent in paying license is void and may be attacked for court's lack of jurisdiction (St. 1917, p. 371).

St. 1917, p. 371, requires corporation to pay corporate license tax.

2. Corporations ⟹630(1).

Court had no jurisdiction of action by minority stockholder for corporation delinquent for nonpayment of license (St. 1917, p. 377, § 11).

St. 1917, p. 377, § 11, provides that corporation, if not paying license tax, shall after certain designated time have all its corporate rights suspended.

3. Judgment ⟹448.

Defendant directors, not pleading court lacked jurisdiction of action by minority stockholder for corporation because corporation was delinquent in paying license, did not waive right thereafter in a direct proceeding to attack judgment as void (St. 1917, p. 377, § 11).

4. Judgment ⟹418.

Court in judgment debtors' suit could enjoin enforcement of judgment by minority stockholder suing for benefit of corporation delinquent in payment of license tax (St. 1917, p. 377, § 11).

PRESTON, J., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Suit by O. F. Smith and others against Millie C. Lewis and another. From an adverse judgment, the defendants appeal.

Affirmed.

Milton S. Hamilton, of Oakland, for appellants.

Donahue, Hynes & Hamlin and A. R. Rowell, all of Oakland (Mark Averill, of Oakland, of counsel), for respondents.

RICHARDS, J.

This appeal is prosecuted by the defendants and each of them from a judgment in the plaintiffs' favor in an action brought by them to obtain an injunction restraining the defendants from further proceeding with the enforcement of a judgment which the defendant Millie C. Lewis had previously obtained against the plaintiffs in an action instituted by her as a minority stockholder of a certain corporation known as the Borch Radio Corporation, and in which action she purported to act for and on behalf of said corporation in seeking a recovery against the defendants in that action and the plaintiffs herein, whom she alleged to have been directors of said corporation, and to have in that capacity caused the withdrawal and payment to another stockholder of certain of its assets, contrary to the provisions of section 309 of the Civil Code. The prayer of the plaintiff in that action was that the defendants therein be directed to repay to said corporation the sum of $9,500, being the amount of the alleged illegal withdrawal of its assets. The plaintiff in that action, after a trial therein, obtained a judgment in said amount and to that effect, which judgment having become final a writ of execution was issued to the sheriff of the county of Alameda, who has been made a codefendant in the present action, directing him to take into his possession by virtue of said writ certain property and assets of the defendants in said former action. Upon the attempted levy of such writ of execution the judgment debtors in said former action instituted the present suit in equity, alleging that the judgment thus sought to be enforced was void for the reason that at the time of the institution of said action the Borch Radio Corporation was in a state of suspension by reason of its failure to pay its corporate license tax for the year 1923, as provided in the Corporation License Tax Act then in force. St. 1917, pp. 371, 377. The defendants and appellants in this latter action pleaded in their answer therein that the plaintiffs were not entitled to assert in this action the matters upon which they depended in support of their claim that the former judgment obtained against them was void, for the reason that they had failed to plead such facts in said former action and by so doing had waived the objection that the Borch Radio Corporation was in the aforesaid state of suspension at the time of the institution of said action. The trial court in this latter action decided that the former judgment was void for the reasons asserted by the plaintiffs herein and issued said injunction, and from the judgment to that effect the defendants have prosecuted this appeal.

Upon the threshold of our consideration of the main question presented upon this appeal, it may be stated as an admitted fact that Millie C. Lewis, who brought the former action in her capacity as a minority stockholder of the Borch Radio Corporation, had no greater right to institute and maintain said action than the corporation itself possessed or could have exercised at the time of the institution of the same, and that had the

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing granted. 295 P. 37.

defendants in said action pleaded and proved that the Borch Radio Corporation was in a state of suspension at the time of the institution of the same, such plea and proof would have operated to deprive the trial court of jurisdiction to make or enter a judgment therein. The appellants, however, contend that the failure of the plaintiffs and respondents herein to plead and prove in said former action that said corporation was in a state of suspension at the time of the institution thereof operated as a waiver of their right to make such objection to the judgment rendered therein as they are now seeking to enforce against said judgment in the instant case. The basis of the appellants' contention in that regard has its foundation in sections 430 et seq. of the Code of Civil Procedure, relating to the objection that a party plaintiff has not the legal capacity to sue. Section 430 of said Code provides as a ground of demurrer to a complaint in any action: "2. That the plaintiff has not legal capacity to sue."

Section 433 thereof provides that: "When any of the matters enumerated in section four hundred and thirty do not appear upon the face of the complaint, the objection may be taken by answer." Section 434 thereof provides that: "If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

The appellants in support of their assertion that the foregoing sections of the Code of Civil Procedure have direct application to the instant case cite a number of authorities having relation chiefly to the right of partnerships and like associations to maintain or defend actions when it is made to appear that while doing business under a fictitious name they have not filed the certificate required by the provisions of sections 2466 et seq. of the Civil Code. It is the contention of the respondents, however, that the sections of the Code of Civil Procedure above referred to have no application to a case wherein the powers and activities of a corporation have been either forfeited or suspended because of its failure to pay its license tax. The statute of 1917 relating to the payment or failure to make payment by domestic corporations of the license tax imposed by the terms of said act reads in part as follows: "After six o'clock p. m. of the Saturday preceding the first Monday in March in any year, the corporate rights, privileges and powers of every domestic corporation which has failed to pay the tax and money penalty for nonpayment thereof imposed by this act shall, from and after said hour of said day, be suspended, and incapable of being exercised for any purpose or in any manner, except to execute and deliver deeds to real property in pursuance of contracts therefor made prior to such time, and to defend in court any action brought against such corporation, until said tax with all accrued penalties, taxes and charges due to the state under this act and subdivision (d) of section fourteen, article thirteen of the constitution are paid as hereinafter provided * * * after said hour of said day and until such taxes, penalties and charges are paid, every person who attempts or purports to exercise any of the rights, privileges or powers of any delinquent domestic corporation except as permitted by this act * * * shall be guilty of a misdemeanor." St. 1917, p. 377, § 11.

[1] The foregoing provisions of the statute of 1917 modify somewhat the provisions of earlier statutes upon the same subject, by the terms of which the charters of domestic corporations failing to pay their license tax were declared to be forfeited, while in the provisions of the statute of 1917, above quoted, the rights, privileges, and powers of such defaulting corporations are merely suspended by their delinquency in the payment of their license tax. The provisions of these several statutes are, however, identical in so far as they relate to the exercise of any of the rights, privileges or powers of such delinquent corporations from and after the date of forfeiture under the earlier, or of suspension under the later, acts. In the latter respect it has been decided by this court that there is no material difference between these several statutes as to the effect of delinquency in the payment of license taxes, but that during the time such taxes remained unpaid the delinquent corporation was shorn of all rights save those expressly reserved by the statute, and that "the right to institute or maintain actions is not involved in this reservation but is denied to corporations as a part of the penalty"; and it was accordingly held that an attempted notice of intention to move for a new trial in an action pending against such a corporation was void as the attempted exercise of a suspended power. It was further held that the subsequent revival of the corporate rights, powers, and privileges did not have the effect of validating acts attempted to be done during the period of suspension. Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 205 P. 446. In the case of Van Landingham v. United Tuna Packers, 189 Cal. 353, 369, 208 P. 973, the provisions of the several statutes relating to the penalty to be imposed upon domestic corporations failing to pay their license tax were exhaustively reviewed, and it was held that the provisions of the act of 1917 above quoted relating to the suspension of the powers of delinquent corporations were for all practical purposes similar in effect to those provisions of the earlier statutes which provided for the forfeiture of the charter of such corporations, and the language which is above quoted from

Ransome-Crummey Co. v. Superior Court was expressly approved. In the case of Panzer-Hamilton Co. v. Bray, 96 Cal. App. 460, 274 P. 769, 771, it was held that: "With reference to the status of the judgment recovered by the corporation after its existence had been legally terminated the case of Crossman v. Vivienda Water Co., 150 Cal. 575, 89 P. 335, is authority to the effect that the trial court was without jurisdiction to render the judgment and that such judgment was subject to collateral attack." In the case of Newhall v. Western Zinc Mining Co., 164 Cal. 380, 128 P. 1040, it was held that a judgment obtained against a corporation, the charter of which had been forfeited for noncompliance with the act of March 20, 1905, requiring the payment of an annual license tax, was void and could be impeached at the instance of a stockholder of such corporation who intervened in the action in which the judgment was rendered for the purpose of expunging it from the record. In the case of Sharp v. Eagle Lake Lumber Co., 60 Cal. App. 386, 212 P. 933, 934, which arose upon an appeal by a stockholder from an order denying his motion to vacate a judgment against a corporate defendant of which he was such stockholder and which had forfeited its charter for failure to pay its license tax under the statutes of 1915, the appellate court was of the opinion that the motion should have been granted, holding "that when a corporation has been dissolved according to the provisions or mandates of the law, or its charter has been legally revoked * * * such corporation no longer exists as a legal entity, it is then legally dead, and it is no more capable of suing or being sued or of transacting any other business in its corporate name than is a natural person after passing from this life; that a judgment entered in an action instituted against a corporation after it has become defunct, and which is still nonexistent at the time of the trial of the action * * * may be impeached as void and its invalidity shown by any one interested." It was further stated in that case that the party entitled to attack such judgment, whether void upon its face or not, might either proceed by an independent suit in equity to set it aside or prevent the party in whose favor the judgment had been procured from enforcing the same, or might move in the action in which such judgment had been entered to procure its vacation on the ground that it was void for the reason stated, and that either form of relief was a direct attack upon the judgment. The effect of these several decisions bearing upon the rights, privileges, and powers of domestic corporations which, under the several statutes above referred to, have become delinquent in the payment of their license taxes, is clearly that of determining that any judgment which may be obtained either by or on behalf of or against such defaulting corporation during the period of its delinquency is utterly void and may be attacked in any appropriate proceeding upon the ground of a want of jurisdiction in the court to render or enter such judgment. The distinction between the foregoing cases and the cases upon which the appellants herein chiefly rely is obvious, since the latter in the main relate to the application of sections 430 et seq. of the Code of Civil Procedure with relation to the dilatory plea of want of capacity in a plaintiff to sue for the reason that such plaintiff has not complied with the provisions of section 2466 et seq. of the Civil Code relating to the transaction of business under a fictitious name. In such a case the person, partnership, or association failing to file the certificate required by the foregoing sections of the Civil Code retains, notwithstanding such failure, full power to engage in any or all kinds of business, subject only to the limitation as to the maintenance of actions under such fictitious name, until the required certificate has been filed and published as provided in the foregoing sections of the Civil Code. In the case of delinquent corporations having defaulted in the payment of their license tax, the entire powers, rights, and privileges of such corporations are, under the provisions of the statute of 1917 above quoted, in a state of suspension and "incapable of being exercised for any purpose or in any manner," except for the very limited purposes therein defined. To permit such corporation during the period of such delinquency to institute as plaintiff or to have instituted on its behalf civil actions, would be clearly contrary to public policy as in violation of the express provision of said statute to the effect that "every person who attempts or purports to exercise any of the rights, privileges or powers of any delinquent domestic corporation except as permitted by this act * * * shall be guilty of a misdemeanor."

The appellants herein have directed our attention to two cases decided by the District Court of Appeal, which it is claimed sustain their aforesaid contention. These are the cases of Kehrlein-Swinerton Con. Co. v. Rapken, 30 Cal. App. 11, 156 P. 972, and H. D. Haley & Co. v. McVay, 70 Cal. App. 438, 233 P. 409. In the first of these cases the question chiefly involved was that of the right of the appellant in an action brought by a defunct corporation after the forfeiture of its charter under the provisions of the statute of 1908 to move the court for an order substituting the names of the directors of such corporation as parties plaintiff in the action. The court held that it was not an abuse of discretion to permit such substitution in view of the fact that the statute there under review permitted the directors of a corporation at the time of its default to wind up the affairs of the corporation and, for that limited purpose, to commence and maintain actions in their capacity as trustees of the defunct corporation. This case is not authority for the proposition that in the absence of such substitution a judg-

ment obtained in the name or on behalf of the defunct corporation would not be void. The other case above cited and relied upon by the appellants relates to the power of a foreign corporation to maintain and prosecute an action to judgment in the absence of affirmative pleadings and proof that such corporation had not obtained from the secretary of state the required certificate authorizing it to do business in this state. It was held in that case that, in the entire absence of an affirmative showing that such certificate had not been obtained, a presumption arose that the corporation had complied with the law giving it authority to enter into the contract upon which the action was brought. This case, also, cannot be held to be authority for the proposition that a judgment obtained by a corporation, the powers of which had been wholly suspended during the period of its delinquency in the payment of its license tax, may not be made the subject of a direct attack based upon the affirmative showing of such suspension at the time of the institution of the action. The appellants further contend that the decision of this court in the case of Perkins Mfg. Co. v. Jordan, 200 Cal. 668, 254 P. 551, wherein it was held that the provisions of the several statutes, including the act of 1917, in so far as these related to the imposition of a license tax upon foreign corporations, were unconstitutional, has application in principle to the imposition of license taxes upon domestic corporations, and hence that the attempted suspension of the powers of the Borch Radio Corporation under the provisions of the act of 1917 was abortive. An examination of this case, however, discloses that the basis upon which the court rendered its decision that the provisions of said act having relation to foreign corporations were void consisted in the fact that such provisions were violative of the provisions of the Interstate Commerce Law and the Fourteenth Amendment of the federal Constitution, which prevented a state from denying to persons or foreign corporations coming within its jurisdiction the equal protection of the laws, by requiring such person or corporation, as a condition of the right to engage in local business within the state, to submit to a tax on its interstate business or on its property outside the state. The decision above referred to holds that the provisions of said act, in so far as they relate to foreign corporations, are severable from the provisions thereof relating to the imposition of license taxes upon domestic corporations, and it would seem to be clear that the principles invoked in that case as applicable to foreign corporations could have no application to corporations organized and existing under the laws of the State of California.

[2-4] In the light of the foregoing reasoning and authorities, we are of the opinion that the former action instituted by the appellant Millie C. Lewis, acting on behalf of the Borch Radio Corporation, then delinquent for the nonpayment of its license taxes, was an action which the court in which the same was commenced and sought to be prosecuted had no jurisdiction to entertain; that the defendants in said action cannot, by virtue of their failure to plead such want of jurisdiction, be held to have waived their right thereafter and in a direct proceeding to attack such judgment as void; that the instant case was such a proceeding; and that the trial court was justified upon the facts as therein shown in rendering and entering its judgment enjoining the defendants and appellants herein from further proceeding with the enforcement of such void judgment.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.

PRESTON, J.

I dissent. I think my associates by the pronouncement in the majority opinion have made unwarranted strictures upon the strength, virility, and elasticity of the powers of a court of equity.

Those who read the majority opinion will observe that the appeal turns upon the right of plaintiffs in the present action to assert alleged illegality and infirmity in a former judgment in another action to which they were party defendants. Without a further statement of the facts, I shall pass directly to a consideration of the law points involved.

The first erroneous assumption in the majority opinion is that the right of plaintiff here is no greater than the right of the corporation itself, and that inasmuch as the corporation was without life, plaintiff was without right. The facts are that plaintiff sues in her individual capacity, as a stockholder, and also for and on behalf of all other stockholders, to have the defendants, as individuals, restore to the corporation the funds that they had illegally expended. The complaint uses these words: "And to that end institutes this action for and on behalf of said corporation and all stockholders thereof." In this connection it should be further noted that the corporation itself was made a defendant with the additional allegation that the individual defendants were in charge of it and it would be useless and futile to make a demand upon the corporation to sue for the return of the assets. The prayer of the complaint is simply that the defendants be directed to pay to defendant corporation the amount claimed. The judgment substantially followed this prayer and, while it is true that language in the judgment is found to the effect that the "corporation have judgment against the defendants," still this provision may be treated as surplusage and there remains a perfectly good suit by the beneficiary of a trust against the trustees,

holding them personally responsible for a dissipation of the trust assets. If the corporation is in default, the individual directors are trustees of its assets, and no rule of equity is better settled or more favored than one allowing a beneficiary either to follow the trust property or hold the trustees liable for its dissipation. This principle is so familiar that authorities need not be collated to support it.

A second fundamental error lies in assuming that the said judgment was void upon its face. The validity of a judgment on its face is determined by an inspection of the judgment roll. So far as the facts are shown by this record, there is nothing whatever to indicate in either the complaint, answer, findings, or judgment, any lack of capacity on the part of said corporation. The judgment is therefore not void upon its face and is not subject to collateral attack.

The further observation should be made that it was the duty of defendant directors to see that the corporate license tax was paid and the corporate powers preserved. Now to allow these directors affirmative relief in a court of equity under such circumstances is to do violence to another of the oldest and most respected rules we have, to wit, that a litigant coming into a court of equity must have clean hands. Authorities need not be cited to support this equitable principle.

We have not dwelt upon another phase of the matter which we think also controlling, and that is that inasmuch as the infirmity does not appear upon the face of the proceedings in question, the failure of defendants in said action to plead the want of corporate power in their answer is a waiver of the right to rely upon such defense. Sections 430, 433, 434, Code Civ. Proc. See also Kehrlein-Swinerton Con. Co. v. Rapken, 30 Cal. App. 11, 156 P. 972; Haley & Co. v. McVay, 70 Cal. App. 438, 233 P. 409.

For the failure to observe these equitable principles and others, I think the present judgment should be reversed.

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209 Cal. 408

BUCHANAN v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 13494.

Supreme Court of California.

April 28, 1930.

1. Insane persons ⚷33(1).

Failure of court orders to name incompetent, served with citation, as person who should be and was notified of hearing, did not invalidate guardianship proceedings (Code Civ. Proc. § 1763).

Code Civ. Proc. § 1763, requires that clerk of court cause notice of time and place of hearing to be given supposed insane or incompetent person.

2. Insane persons ⚷33(2).

Supreme Court presumes on certiorari that evidence not before it clearly showed incompetent's inability to attend hearing in guardianship proceeding.

3. Insane persons ⚷33(1).

Certificate of hospital medical superintendent that alleged incompetent, not patient therein, could not attend hearing, was not pertinent to guardianship proceeding.

In Bank.

Application by Findley Buchanan, by his guardian ad litem, Thomas D. Aitken, for a writ of certiorari to review an order of the Superior Court in and for the City and County of San Francisco, Frank H. Dunne, Judge, declaring petitioner incompetent and appointing a guardian.

Order affirmed, and writ discharged.

Superseding opinion, 279 P. 1004.

Aitken & Aitken and Frank W. Aitken, Jr., all of San Francisco, for petitioner.

Robert McMahon and Dion Holm, Asst. City Atty., both of San Francisco, for respondents.

SEAWELL, J.

Petitioner Findley Buchanan, by his guardian ad litem, attempts by certiorari to annul the proceedings had in the superior court appointing the brother of the alleged incompetent, to wit, William Buchanan, his guardian. The petition for letters of guardianship alleged that said alleged incompetent was about 73 years of age and was in ill health, and his mind was so impaired that he had become mentally incompetent to manage his affairs and property, which consisted of stocks and bonds, cash deposited with several banks, and real property. The value of his estate approximates $50,000. From all that appears from the record the petitioner for letters, being the only brother, is the proper person to be appointed guardian of said Findley Buchanan, as he is the only relative of said Findley Buchanan residing in the city and county of San Francisco. The merits of the case, considered wholly apart from the controversy as to procedure, seem to preponderate in favor of the petitioner for letters of guardianship, who is the respondent herein.

[1] The argument which petitioner brings to bear most earnestly upon the proceeding is the failure of the court to specifically name the incompetent as one of the persons to whom notice of the hearing should be given.

The order appointing the day for hearing the petition for guardianship and directing notice to be given recites the fact that William Buchanan had filed a petition to be appointed guardian of the person and estate of said Findley Buchanan, an incompetent person, and upon those recitals notice of the hearing is directed to be served upon Patrick Flannery, a person having the care of said Findley Buchanan, and upon said William Buchanan. Notwithstanding the fact that Findley Buchanan's name was not among others in the order fixing a day for hearing the petition, a citation in the usual form and under the seal of the court was issued to, and served upon, said Findley Buchanan. The obvious purpose of the statute in requiring such order is to make certain that the alleged incompetent, who, in the instant case, was within the jurisdiction of the court, was served with citation. The object of the law was accomplished.

By the amendment of 1929 to section 1763, Code of Civil Procedure, the clerk of the court must cause the notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, thus, making definite that the clerk, being a part of the machinery of the court in such matters, may act for the court in obedience to statutory requirements which are merely procedural in nature and do not, in a strict sense, involve the exercise of judicial functions.

Petitioner attacks the order appointing the guardian as being insufficient in that it does not specifically or by reference name the incompetent as one of the persons to whom notice was given pursuant to order of court, but refers to relatives and the person, without mentioning his name, under whose care the said Findley Buchanan was at the time of, and prior to, said hearing. Said order appointing the guardian does find, however, that said matter came "regularly" before the court for hearing, and the fact that it referred in general terms to relatives and the person in charge of the incompetent would not of itself be conclusive of the fact that the incompetent was not included in an order directing notice, etc. But we can see no good reason for invalidating these proceedings, even though the alleged incompetent was not named as a person to be cited if, as a matter of fact, a citation was issued, as in this matter, by the clerk under the seal of the court and the alleged incompetent was served. The court throughout the proceedings treated the clerk's action as originating with the court, and no injury in the circumstances of the proceeding could have come to the alleged incompetent from the order appointing his brother guardian.

[2] A medical certificate in the form of an affidavit, prepared by Alex Raymond, M. D., in which he averred that Findley Buchanan was then under his care and his physical and mental condition was such as to render it impossible for him to attend the hearing of said matter, is included in the return to the writ. Whether this certificate should be regarded as sufficient to excuse the presence of said alleged incompetent at the hearing is not important, as the evidence adduced at the hearing is not before us and it will, therefore, be presumed that the evidence, independent of the medical certificate, clearly showed that the alleged incompetent was unable to attend the hearing. As a matter of record, however, it does not appear that said incompetent was not present at said hearing.

[3] The alleged incompetent not being a patient at a state hospital, no certificate from the medical superintendent of such a hospital that he was unable to attend the hearing was pertinent to the proceeding.

At the time this cause was set for hearing the counsel for respondent called to the attention of this court that the incompetent was in court accompanied by his brother, respondent, and challenged any assertion that the person under guardianship was dissatisfied with the order of the trial court. No protest was heard.

Numerous citations have been made to Grinbaum v. Superior Court, 192 Cal. 528, 221 P. 635. That case was decided on a state of facts widely differing in important respects from the case here presented. We feel that no injustice has been done by the proceedings taken.

The order is affirmed and the writ is discharged.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; RICHARDS, J.

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209 Cal. 105

CITY OF SAN DIEGO v. CUYAMACA WATER CO. et al. (CITY OF EL CAJON et al., Interveners).★

L. A. 10171.

Supreme Court of California.
March 21, 1930.

Rehearing Denied April 17, 1930.

1. Municipal corporations ⟹8—Use of term "presidio" instead of "pueblo" in act incorporating city of San Diego held misnomer.

Use of term "presidio" instead of "pueblo" in the act incorporating the city of San Diego *held* merely a misnomer, and that it was intention of act of incorporation to impose civil and political rights under new dominion on the area

★Rehearing denied.

which was already, by virtue of its pueblo origin, in the enjoyment of certain civil and political rights under the old dominion.

2. Courts ⟹93(1)—Right of pueblos and successors to use waters of rivers and streams cannot, under rule of stare decisis, be disturbed.

Under rule of stare decisis, the prior and paramount right of pueblos and successors to use of waters of rivers and streams passing through and over or under surface of allotted lands in so far as necessary for inhabitants and for ordinary municipal purposes, being rule of property, cannot be disturbed.

3. Waters and water courses ⟹140—Purported grant of water right to Mission of San Diego did not create right prior to that of pueblo.

Purported grant by viceroy of Spain to Mission of San Diego of right to use and benefits of waters of San Diego river *held* insufficient to create a right prior or paramount to right to use thereof by the pueblo of San Diego in so far as necessary for inhabitants and for ordinary municipal purposes.

4. Evidence ⟹11—Judicial notice is taken of public history.

The Supreme Court takes judicial notice of public history.

5. Army and navy ⟹28—"Presidios" were purely military foundations to be occupied by soldiers for establishment of order and protection of pueblo and mission foundations.

"Presidios," considered both historically and in the light of the Spanish and Mexican laws and regulations, were purely military foundations to be occupied by soldiers, and to exist for establishment of order and for protection of pueblo and mission foundations.

6. Municipal corporations ⟹1—"Pueblos" were purely civil and political foundations, being equivalent to English word town and signifying civic body corporate and politic.

"Pueblos," considered historically and in light of Spanish and Mexican laws and regulations, were purely civil and political foundations as the term itself implies, being equivalent to the English word town and signifying a civic body corporate and politic.

[Ed. Note.—For other definitions of "Pueblo," see Words and Phrases.]

7. Religious societies ⟹1—"Mission settlements" were purely ecclesiastical foundations in Alta California, by monks or padres of Franciscan Order.

"Mission settlements" were purely ecclesiastical foundations made or to be made in Alta California, by monks or padres of the Franciscan Order, and existing or being conducted by these for sole purpose of bringing blessings and fruits of Christian civilization to Indian population theretofore in state of barbarism.

8. Waters and water courses ⟹140—Pueblo of San Diego on its establishment became invested with land and water rights, regardless of rights of mission.

Pueblo of San Diego upon its establishment became invested with whatever land and water rights it was entitled to under the laws, institutions, and regulations of Spain and Mexico, regardless of purported right to use of waters of San Diego river by the Mission of San Diego, which at that time either had ceased or would presently cease to be.

9. Public lands ⟹224½—Any claim of title to mission lands ceased to exist on failure to present claim to land commissioners, as required by statute (Act Cong. March 3, 1851 [9 Stat. 631]).

Any claim of title to mission lands, whether derived from foundation of mission itself and its occupancy of lands or from concession, ceased to exist by reason of failure to present claim to board of land commissioners, as required by Act Cong. March 3, 1851 (9 Stat. 631).

10. Public lands ⟹224½—Waters and water courses ⟹140—Right in lands and water under private grant subsequent to establishment of pueblo was subject to right of pueblo thereto.

Any right in lands and water under private grant made subsequent to establishment of pueblo of San Diego was necessarily subject to right and title of pueblo to lands and water embraced within its allotted area.

11. Waters and water courses ⟹142—Rights of pueblo and successor to waters required for needs were essentially governmental in character.

Rights of pueblo and its successor, the city of San Diego, to whatever waters of San Diego river were from time to time required for needs of pueblo and of city and of inhabitants of each were rights which were essentially governmental in character.

12. Waters and water courses ⟹140—Permissive grants to private persons over public lands along upper reaches of San Diego river were subordinate to vested rights of city of San Diego (Act Cong. July 26, 1866, 14 Stat. 253, c. 262, § 9; Act Cong. Jan. 12, 1891, 26 Stat. 714, c. 65, § 8).

Whatever permissive grants of rights of way to private persons over public lands lying along the upper reaches of San Diego river were made by virtue of Congressional Act July 26, 1866, 14 Stat. 253, c. 262, § 9, and supplemen-

tary Act Jan. 12, 1891, 26 Stat. 714, c. 65, § 8, were subordinate and not superior to the already vested rights of city of San Diego derived from its succession to pueblo.

13. Waters and water courses ⟹138—Right to waters of stream by prescription requires adverse use under claim of right acquiesced in by those otherwise entitled thereto.

Nature of right claimed to have been acquired in waters of flowing stream by prescription rests as prime essential on adverse use thereof by claimant under claim of right which has, to extent thereof and for required term of years, been acquiesced in by person or persons otherwise entitled to ownership and enjoyment of such waters.

14. Waters and water courses ⟹138—City's failure to object to use of waters which at time of diversion did not interfere with present use did not create right by prescription.

Failure of city to object to use of waters of stream at time diversion thereof constituted no interference with right of city to use thereof did not operate so as to create a right by prescription or in favor of those using waters, the right of city being always uncertain and conjectural, depending upon particular needs of city or its inhabitants at each particular stage of its development as a municipality.

15. Waters and water courses ⟹138—Exercise of riparian right is not hostile to land below.

Exercise of mere riparian right can never be hostile to land below.

16. Waters and water courses ⟹138—Exercise of riparian right under claim of right against lower riparian owners may ripen into prescriptive title.

Exercise of riparian right under circumstances as are adverse and under a claim of right asserted against lower riparian owners may ripen into prescriptive title.

17. Adverse possession ⟹7(1)—Generally, no invasion of rights of property held in perpetual trust for public uses can furnish basis of defense based solely on prescription.

Generally, no invasion of rights of property which are held by public or municipal corporation in perpetual trust for public uses can be held sufficient to furnish basis of defense based solely on prescription.

18. Waters and water courses ⟹152(2)—City's failure to object to use of river waters not interfering with own use did not defeat its right thereto on ground of laches.

Right of city of San Diego to use of waters of San Diego river was not defeated on ground of laches by reason of failure to object to use of waters by others at time diversion constituted no interference with present use.

19. Waters and water courses ⟹127, 152(2)—City's right to use waters of river was public right as respected prescription and laches.

Right of city of San Diego to use waters of the San Diego river constituted a public right as respected prescription and laches urged by others making use of waters of stream.

20. Estoppel ⟹52—Defense of estoppel rests on doctrine that party cannot assert defense because of certain facts and conditions rendering its assertion inequitable.

Defense of estoppel rests upon doctrine that a right conceded for purposes of such defense to exist in party, he shall not be permitted to assert against another to the latter's injury because of the existence and proof of certain facts and conditions which would render its assertion inequitable.

21. Estoppel ⟹62(8)—City was not estopped to assert prior right to waters of river because of failure to object to prior diversion.

Where diversion and use of waters of San Diego river did not at time of diversion interfere with any of the uses which the city of San Diego was making of the waters thereof, the city was not estopped to assert its prior right to use of waters by reason of its failure to object to use at time of diversion.

22. Waters and water courses ⟹140—Those diverting waters of river must be held to have known as matter of law of existence of city's preferential right thereto.

Those appropriating and diverting waters along upper reaches of San Diego river and its tributaries must be held to have known as a matter of law of the existence in the city of San Diego of a prior and preferential right to use of waters and to the assertion thereof whenever expanding needs of city or its inhabitants required it.

23. Territories ⟹6—United States in taking over Alta California did not adopt statutes of limitation as applicable to public lands or waters.

United States in taking over territory known as Alta California under the treaty of Guadalupe-Hidalgo did not also take over and agree to adopt the statutes of limitation of either Spain or Mexico as applicable to lands or waters diverted to public use.

24. Estoppel ⟹121—Findings held to establish that city was not estopped to assert prior right to use of river waters (Code Civ. Proc. § 1962, subd. 3).

Findings of trial court *held* to establish that city of San Diego was not estopped, under Code Civ. Proc. § 1962, subd. 3, from asserting prior and preferential right to use of waters in San Diego river in so far as necessary for inhabitants and ordinary municipal purposes.

25. Waters and water courses ⟹140—Disturbing and disastrous consequences to others furnish no right to deprive city of prior and paramount right to river waters.

That prior and paramount right of city of San Diego to use of waters of San Diego river may be fraught with disturbing and even disastrous consequences affecting other users furnishes no reason for a deprival of the city of its prior and paramount right to use thereof.

26. Action ⟹6—Trial court's attempt in declaratory action to give determination further effect than that of declaratory judgment was erroneous.

Where city bringing declaratory action for purpose of having its prior and paramount right to use of waters of river established neither pleaded nor attempted to prove any facts entitling it to other or affirmative relief, an attempt of trial court to give determination any other or further effect than that of declaratory judgment was erroneous.

In Bank.

Appeal from Superior Court, San Diego County; M. W. Conkling, Judge.

Action by the City of San Diego against the Cuyamaca Water Company and others, wherein the City of El Cajon and others intervened, and wherein defendants filed a cross-complaint. From the judgment, all parties to the action appeal.

Modified.

Superseding opinion in 278 P. 840.

Shelly J. Higgins and Arthur F. H. Wright, both of San Diego, Hunsaker, Britt & Cosgrove, of Los Angeles, and Harry G. Clark and James E. O'Keefe, both of San Diego, for City of San Diego.

Crouch & Sanders, Hugh A. Sanders, and Sweet, Stearns & Forward, all of San Diego, Philip Storer Thacher, of El Cajon, and E. V. Winnek, of San Diego, for Cuyamaca Water Co.

Stearns, Luce & Forward, of San Diego, and O'Melveny, Tuller & Myers, of Los Angeles, for La Mesa Lemon Grove and Spring Valley Irr. Dist.

W. A. Sloane, of San Bernardino, and Sloane & Sloane, of San Diego, for Ed. Fletcher.

RICHARDS, J.

A rehearing was granted herein after the decision of this cause by the court in bank, in order that an even more full and careful consideration might be given to the important questions involved in this appeal. Upon such consideration we have concluded to reaffirm the conclusions arrived at in our former decision, and to adopt the language of such decision, with such emendations as may be required in view of the further light which has been shed upon the subject by former and further counsel for the respective parties, as well as by the briefs of amici curiæ filed herein.

This action was instituted by the city of San Diego, a municipal corporation, having for its purpose the determination of the question of its title to certain rights in and to the waters of the San Diego river to which the original defendants in said action were asserting and exercising certain adverse claims. The precise nature of this action was aptly described in certain earlier appeals to this court. In the case of Cuyamaca Water Co. v. Superior Court, 193 Cal. 584, 588, 226 P. 604, 605, 33 A. L. R. 1316, it was thus stated: "In the pending quiet title action it will not, of course, be determined that the city is or is not entitled to any particular quantity of water. If the litigation terminates favorably to the plaintiff, the only right which will be established and determined to be vested in the city will be a right to the water and the use thereof prior and paramount to the defendant's rights therein, and then only to the extent necessary for the needs of the city and its inhabitants. The amount needed is necessarily uncertain and conjectural and dependent upon conditions such as rainfall and other established sources of supply. The subject-matter of the action is the establishment of the priority of right, and not the quantity of water to be taken." In the case of City of San Diego v. Andrews et al., 195 Cal. 111, 231 P. 726, which was a proceeding in mandamus to compel the respondent judge of the superior court of the county of San Diego to proceed to hear and determine the present cause, this court restated in substance the purpose of the instant case. The importance of the foregoing clear concept of the nature and purpose of the present action will appear as we proceed with the consideration of the several issues involved therein. The original defendants in this action were Cuyamaca Water Company, a corporation, Cuyamaca Water Company, a copartnership, and certain individuals and the survivors and personal representatives of the members of said copartnership. The action was commenced in the early part of the year 1923, the amended complaint therein being served and filed on June 9, 1923. The defendants united in filing their demurrer to said amended complaint on June 18, 1923, said demurrer being both general and special and being based upon thirteen alleged grounds of demurrer. The demurrer was upon hearing overruled; whereupon and in December, 1923, said defendants served and filed their answer, embracing seventeen separate defenses presented by the defendants jointly, and also a number of special defenses urged on the part of certain

of said defendants individually. The defendants also presented and filed at the same time their cross-complaint, wherein they asserted affirmatively the particular foundation of their adverse claims to certain portions of the waters of the San Diego river over which the plaintiff was undertaking to have established its alleged prior and preferential right. To the defendants' answers and cross-complaint the plaintiff on December 21, 1923, served and filed its demurrer upon forty-two specified grounds. Thereafter and while said demurrer was pending and undisposed of, certain other parties appeared separately in the action with applications for leave to intervene. These were one Carroll H. Smith, who in his proffered complaint in intervention alleged himself to be a resident, citizen, and taxpayer of the city of La Mesa in the county of San Diego, and also an owner of property within the La Mesa Lemon Grove & Spring Valley Irrigation District in said county, which said city and said irrigation district had for the sole source of water supply of each the waters of the San Diego river, which said waters they and each of them were receiving under and by virtue of an agreement with the defendant Cuyamaca Water Company, a copartnership, with which copartnership and the surviving members thereof the said petitioner wished to join in resisting the claim of prior and preferential right thereto asserted by said plaintiff. The said Carroll H. Smith also alleged himself to be the owner of certain lands within the so-called Ex-Mission Rancho and to be thereby entitled to certain paramount and exclusive rights to the use of the waters of said river derived from grants of said rancho to his predecessors made by and under the Spanish crown. The La Mesa Lemon Grove & Spring Valley Irrigation District also and at the same time presented its application for leave to intervene in the action, basing its alleged right so to do upon its proffered complaint in intervention, wherein were set forth substantially the same averments as were embodied in the complaint in intervention of said Smith. In addition to these, the city of El Cajon, a municipal corporation, situate in the county of San Diego, also petitioned for leave to intervene, making substantially the same allegations as to the source and right of water supply from the waters of the San Diego river as were set forth by said other applicants for leave to intervene. The court upon a hearing permitted the several parties to file their respective complaints in intervention, and in due course the plaintiff, city of San Diego, presented and filed its several demurrers thereto. Thereafter the demurrers of the plaintiff to the answer and cross-complaint of the original defendants and also to the complaints in intervention of said several interveners were submitted to the trial court for decision; and the court in ruling thereon sustained the said plaintiff's demurrer to certain specified portions of the original defendants' answer and cross-complaint without leave to amend, and also sustained the demurrer of the plaintiff to certain other specified portions of said defendants' answer and cross-complaint with leave to amend. The trial court also at the same time overruled the plaintiff's demurrers to the several complaints in intervention. The effect of these several rulings by the trial court was that of determining as a matter of law that the city of San Diego had by virtue of its incorporation and right of succession become the successor and owner of those certain prior and preferential rights to the waters of the San Diego river with which, from its inception, the pueblo of San Diego, as established in the year 1834, had become invested by virtue of its formation under the laws of Spain and Mexico. The question as to whether as a matter of law the plaintiff, city of San Diego, had originally become invested with these prior and preferential rights in and to the waters of the San Diego river by virtue of its succession to whatever rights of that nature existed in the pueblo of San Diego, is thus presented upon this appeal, involving as it does the correctness of the aforesaid rulings of the trial court touching that point upon demurrer. As to the issues presented by those other specified portions of the original defendants' answer and cross-complaint, and which involve the question as to whether the plaintiff had lost its original superior right to the waters of the San Diego river, derived from said source by prescription, or by laches or by estoppel operating in favor of some or all of said defendants and their successors in interest, the trial court permitted said defendants to present amended pleadings, and upon their doing so overruled the plaintiff's later demurrers thereto; and having already overruled the plaintiff's demurrers to the several complaints in intervention, and the interveners having also amended their pleadings so as to embrace and conform to the defendants' amended answer and cross-complaint, and the plaintiff having answered the interveners' complaints and the amended cross-complaint of the defendants, the cause was thus brought to issue and proceeded to trial upon the disputed questions of fact thus presented. The cause was tried without a jury; a large mass of evidence was presented involving the testimony of many witnesses and the introduction of numerous exhibits, thus creating a record of unusual proportions, upon which were superimposed briefs and arguments of counsel evincing extraordinary effort, diligence and research. The cause was finally submitted to the trial court for its decision, and in due course the findings and conclusions of law of the trial court were filed, the correctness and sufficiency of which furnish the weighty burden laid upon this

court in its determination of the merits of the several appeals, which have been taken and are being prosecuted by all of the parties to this action.

[1] At the outset of our re-examination of the questions thus submitted to our determination, it has been strenuously insisted by counsel for certain of the interveners herein that the city of San Diego did not, by the terms of its incorporation under the new dominion, become the successor to the rights of the former pueblo of San Diego, for the reason, as urged by counsel, that by the first act of its incorporation, adopted by the Legislature of California in the year 1850, it was only "the Presidio of San Diego" which was purported to be thereby incorporated and known as "the City of San Diego." It is true that in the body of said act of incorporation the area to be covered thereby is described as being "known as the Presidio of San Diego." But it is also true that the area to be included within such incorporation embraced those lands which were "included in the survey made by Lieutenant Cave J. Couts, First Dragoons, U. S. A., for the ayuntamiento," and which embraced an area of ten square miles. It is a series of significant facts that said area included the then existing pueblo of San Diego, of which the ayuntamiento referred to therein was the ayuntamiento, or in other words the town council composed of the alcaldes, the regidores, and certain other municipal officers which were strictly the officers of the pueblo, and none of whom were officers of a presidio, which was purely a military, as distinguished from a civil, foundation. The act further provided that in limiting the area to be known as the city of San Diego to ten square miles it was not to be construed so as "to divest or in any manner prejudice any rights or privileges which the presidio may hold to any land beyond the limits of the charter," and it was further provided that the corporation created by this act "shall succeed to all the legal rights and claims of the Presidio of San Diego and shall be subject to all the liabilities incurred and the obligations created by the ayuntamiento of said Presidio." These references should make it sufficiently plain that the use of the term presidio instead of pueblo in said act of incorporation was a misnomer, and that it was the intention of the act of incorporation to impose certain civil and political rights under the new dominion upon the area which was already, by virtue of its pueblo origin, in the enjoyment of certain civil and political rights under the old dominion. It may be fairly surmised that this blunder in the way of designation was presently discovered and was promptly sought to be remedied, since we find that the act of incorporation above referred to was repealed by the Legislature in 1852 (Stats. 1852, p. 223), and that by said act another form of incorporation was provided, to be known as "the Trustees of the City of San Diego"; and that by an act of the same Legislature (Stats. 1852, p. 225) the said "Trustees of the City of San Diego" were declared to be a body corporate under the style of "The President and Trustees of the City of San Diego," and were authorized and directed by such corporate name and style to "present before the board of land commissioners created by act of congress for the settlement of land titles in this state, or any court before which it may be necessary to appear for the purpose of prosecuting or defending the right or claim which the City or Pueblo of San Diego may have to land known as the common lands of San Diego." It further appears that, pursuant to such direction, the aforesaid officials of the city of San Diego, purporting to represent it in its capacity as the successor of the pueblo of San Diego, did duly present before the aforesaid congressional commission the claim of said city for the confirmation of its title "to the pueblo lands of San Diego" and that, according to the recitals of the certified copy of the patent to the city of San Diego presented in evidence herein (Plaintiff's Exhibit No. 7), it was adjudged, in the course of the proceedings before said commission, "that the claim of said petitioner is valid and it is, therefore, decreed that the same be confirmed. The land of which confirmation is made is situated in the county of San Diego and is known as the pueblo or town lands of San Diego." It further appears from the record herein that the state Legislature from time to time adopted certain special acts authorizing the board of trustees of the city of San Diego to deal in different ways with the pueblo lands of said city (Stats. 1855, p. 206; Stats. 1861, p. 270; Stats. 1867–68, p. 8), and it still further appears that the Legislature in 1870 re-established the boundaries and areas of the city of San Diego as comprising "all that tract of land known as the Pueblo of San Diego," etc., and that in the same year the Legislature adopted "An act to legalize, ratify and confirm deeds of conveyance and grants of land within the pueblo lands of San Diego." And it yet further appears that upon several occasions, from the year 1872 on, the state Legislature has adopted successive acts reincorporating the city of San Diego, in each of which it is expressly stated that "all that tract of land known as the Pueblo of San Diego * * * shall henceforth be known as the City of San Diego." Stats. 1871–72, p. 285; Stats. 1875–76, p. 806; Stats. 1889, p. 302. It would seem to sufficiently appear from the foregoing statements of both law and fact that the findings and conclusions of law of the trial court were supported by an amplitude of evidence, wherein it expressly found and determined:

"That about the year 1834 there was founded, and until about the year 1850 there continued to exist upon what is now the site of

The City of San Diego, a certain Mexican pueblo then designated as the Pueblo of San Diego; that the location and site of said Mexican Pueblo of San Diego at the time the same was founded, was, ever since has been, and now is, situated and located upon the banks of a certain unnavigable river or stream, then, ever since and now known as the San Diego River; that said stream at the time of the organization of said Pueblo of San Diego and at all times thereafter during its existence flowed into and through said pueblo, and the banks and bed of said stream from the mouth to the easterly territorial limits of said pueblo a distance of approximately five miles, were located and lay entirely within the territorial limits and formed a part of the lands and waters of said Pueblo of San Diego.

"That said Pueblo of San Diego and the inhabitants thereof from its organization during the entire term of its existence, enjoyed, asserted and exercised a preference or prior right to the use of the waters of said San Diego River for the benefit of said pueblo and the inhabitants thereof.

"That said preference or prior right of said pueblo and of the inhabitants thereof to the use of all the waters of said river necessary to supply the domestic wants of the inhabitants of said pueblo, to irrigate the lands thereof, and for other municipal purposes within the general limits of said pueblo, was a right, and the distribution of said waters for such purposes by the pueblo authorities was a trust created, imposed and recognized by the laws, orders and decrees of the government of the Kingdom of Spain and the Republic of Mexico.

"That the plaintiff herein, The City of San Diego, was incorporated on or about March 27, 1850, and thereupon became the successor and even since has been the successor of said Mexican Pueblo of San Diego, and as such successor to said Mexican Pueblo succeeded to and acquired all the rights and privileges theretofore held or exercised by said Pueblo of San Diego and in particular as the successor of said Mexican Pueblo of San Diego The City of San Diego succeeded to and acquired all the rights and privileges theretofore enjoyed, asserted and exercised by said Pueblo of San Diego in and to the waters of said San Diego River; that since said incorporation said The City of San Diego, as the successor to said Mexican Pueblo, has at all times enjoyed, asserted and exercised a right of priority in and to the use of all the waters of said San Diego River necessary or convenient for the use of said The City of San Diego and the inhabitants thereof, and has not in any manner, nor to any extent, surrendered, forfeited or abandoned said rights, save and except in the manner and to the extent hereinafter found and declared.

"That the San Diego River is an unnavigable natural stream of water located wholly within the county of San Diego, state of California, and takes its rise in the Cuyamaca Mountains in said county on the southerly and westerly slopes thereof, and flows in a southwesterly direction approximately fifty miles from its source until it reaches the easterly boundary of The City of San Diego, formerly the easterly boundary of said Pueblo of San Diego, from which point said river flows westerly through said The City of San Diego a distance of approximately five miles, discharging its waters into the Pacific Ocean through Mission Bay in said city and county."

It will thus indisputably appear that by the foregoing findings of the trial court, supported by sufficient evidence, the city of San Diego was as to all of its property rights and powers placed within the same category as the other several cities of California which were founded upon the sites of the former pueblos thereof, and which, by virtue of their said foundation, became and have since remained the successors of those property rights and powers with relation thereto which were possessed by said pueblos. The appellants, however, undertake to argue that the trial court was in error in holding as a matter of law that the pueblo of San Diego, by virtue of its organization as such, became entitled, under the Spanish and Mexican laws, to any prior or preferential right to the waters of the San Diego river passing above and underground through the allotted leagues which were to constitute the area of the pueblo lands.

In support of this argument counsel for said appellants would have us go back even prior to the Christian era and consider in our review the history of civilization in so far as the same relates to the slow, involved, and obscure development of the civil and religious institutions of ancient and medieval Spain. If for the first time in the history of our California jurisprudence such a review was being asked, or such an elaborate argument as these appellants now urge was being presented, we might be disposed to consider as persuasively as we have now read interestingly the pages upon pages of Spanish history collated in that behalf. But the difficulty with the situation which appellants' diligent counsel now seek to have us reconsider is that the same question has already on several occasions, early and late, been presented to and passed upon by this court in decisions which are uniformly adverse to the appellants' present contention. While there were other and earlier cases in the courts of this state and even in the Supreme Court of the United States which touched upon the subject of the formation of pueblos under the laws, institutions, and regulations of Spain applicable to the settlement and development of lands in what had become known as "New Spain and

the Indies," the great leading case upon the subject applying these laws, institutions, and regulations particularly to those pueblos which had come into existence in California under both the Spanish and Mexican dominion, is the case of Hart v. Burnett, 15 Cal. 530 to 624, wherein Mr. Justice Baldwin, Mr. Chief Justice Stephen J. Field concurring, discussed at great length and with much learning the nature and extent of the rights which inhered in such pueblos by virtue of their foundation in those lands which lay within their immediate vicinage and beyond this to the extent of the additional four leagues of surrounding lands allotted to such pueblos as a result of their formal establishment as civil governments or quasi-municipalities. It is not necessary to further refer to this leading case in other terms than those in which it has been referred to and commented upon by later decisions of the courts of this state and of the United States. In the case of Townsend v. Greeley, 5 Wall. 326, 336, 18 L. Ed. 547, the effect of that earlier decision was briefly but clearly stated by Mr. Justice Field, who wrote the latter decision; and his language as used therein was quoted approvingly by this court in the case of Hale v. Akers, 69 Cal. 160, 166, 10 P. 385, which was presently to hand down its decision in the case of Lux v. Haggin in the following month of the same year and which is reported in 69 Cal. 255, 454, 4 P. 919, 10 P. 674, 715. In this latter decision, which is the longest and most exhaustively treated cause in the history of California jurisprudence, Mr. Justice McKinstry, who wrote the opinion, went over the entire ground of the land and water rights of the owners of each in California whose title thereto looked for their derivation to the laws, institutions, and regulations of Spain and Mexico. In the course of his most learned and comprehensive dissertation he referred approvingly to the decision in Hart v. Burnett, supra, as to the right and title which the pueblo had to land within its general limits. The court then proceeded to say: "By analogy, and in conformity with the principles of that decision, we hold the pueblos had a species of property in the flowing waters within their limits, or 'a certain right or title' in their use, in trust, to be distributed to the common lands, and the lands originally set apart to the settlers, or subsequently granted by the municipal authorities. It may be conceded that such authorities were not authorized to make concessions to individuals of the perpetual and exclusive use of portions of the waters, without reference to the needs of the other inhabitants, or that such concessions would be an abuse of the trust. But they had a species of right or title in the waters and their use, subject to the public trust of continuously distributing the use in just proportion. * * * Each pueblo was quasi a public corporation. By the scheme of the Mexican law it was treated as an entity or person, having a right as such, and, by reason of its title to the four leagues of land, to the use of the waters of the river on which it was situated, while, as a political body, it was vested with power, by ordinance, to provide for a distribution of the waters to those for whose benefit the right and power were conferred." After quoting certain passages from Escriche, an eminent Spanish authority upon the subject, the court further proceeded to say: "From the foregoing it appears that the riparian proprietor could not appropriate water in such manner as should interfere with the common use or destiny which a pueblo on the stream should have given to the waters; and, semble, that the pueblos had a preference or prior right to consume the waters, even as against an upper riparian proprietor." The court, however, suggested that it "is not necessary here to decide that the pueblos had the preference above suggested; nor is it necessary here to speak of the relative rights of two or more municipalites on the same stream." In the next and later case of Vernon Irrigation Co. v. Los Angeles, 106 Cal. 237, 251, 39 P. 762, the question directly arose. In that case the Vernon Irrigation Company, a corporation, owned a tract of land riparian to the upper reaches of the Los Angeles river, and commenced its action to enjoin the city of Los Angeles, which was and is the successor of the pueblo of Los Angeles, and certain other defendants, from so diverting the waters of the Los Angeles river as to interfere with the plaintiff's riparian right therein. The city of Los Angeles by its answer put forth the claim that by virtue of its succession to the rights of the pueblo of Los Angeles, founded in 1786, it possessed the prior and preferential right to take all of the waters of the Los Angeles river. The trial was prolonged and the findings of the trial court voluminous, in the course of which it was found and decreed that the city of Los Angeles, by virtue of its succession to the rights of said pueblo, was the absolute owner of all of the water flowing in the Los Angeles river for the use of its inhabitants and for all other municipal purposes. From the judgment in its favor based upon this finding, the plaintiff took an appeal and thus presented to this tribunal for determination the correctness of the aforesaid finding of the trial court. This court, Mr. Justice Temple writing the opinion, gave its most careful and exhaustive consideration to the determination of this question, in the course of which he quoted exhaustively from the Spanish and Mexican laws, approving the principles enunciated in the case of Hart v. Burnett, supra, and which were adopted by this court in Lux v. Haggin, supra, and quoted also with approval the language of the latter case above referred to and wherein it had been suggested, though not in that case found necessary to be decided, that the pueblos had a

preferred right to the waters of rivers flowing through their lands, which could be asserted to the extent needed to supply the wants of their inhabitants. There were other questions presented in that case not necessary to be here considered, but it must be conceded that the question as to the prior and preferential right of a pueblo to the waters of a river passing through it to the extent above indicated was therein squarely presented and fully upheld by the terms and scope of that decision, and that the later formed municipality organized as the successor of the pueblo fully succeeded to these rights to which the pueblo had become entitled by virtue of its creation under the Spanish and Mexican laws.

The next case wherein this question arose was that of City of Los Angeles v. Pomeroy, 124 Cal. 597, 650, 57 P. 585, which was an action in which the city of Los Angeles undertook to condemn certain lands lying in the San Fernando valley along the Los Angeles river and to which stream said lands were riparian, for the purpose of utilizing the same in collecting and conserving the waters of said stream for delivery to the main supply pipe and distributing system of said city. The plaintiff based its claim of right to condemn the land in question for the utilization of its asserted right to the waters of said river, in part at least, upon the averments of its amended complaint to the effect that the city, as the successor of the pueblo, was the exclusive owner of all of the waters of said river for the purpose of supplying water for the irrigation of the irrigable lands embraced in the four square leagues of the pueblo, and for other municipal uses. These averments were traversed by the defendants. The cause was tried before a jury, to which the court gave the following instruction: "The city of Los Angeles is situated on the river below these lands, and is the owner of the right to take from the Los Angeles river all the water that is reasonably necessary to give an ample supply for the use of its inhabitants and for all municipal uses and purposes for which the city may require water. This right is measured by the necessity, and if the needs increase in the future the right will expand to include all that the needs require. This right of the city is paramount and superior to the rights of the defendants in the waters of the river." This court, upon appeal, Mr. Chief Justice Beatty writing the opinion, fully sustained said instruction in so far as it correctly stated the paramount and superior rights of the city to whatever expanding uses of the waters of said river the pueblo by virtue of its formation possessed, and in so doing expressly approved in principle the case of Vernon Irrigation Co. v. Los Angeles, supra; the court, however, held that the instruction was erroneous in according to the city of Los Angeles greater rights to the waters of said river than those which, as the successor of the pueblo, it had received from it, the area of the modern city having expanded so as to embrace territory not within that of the pueblo lands. The next case in which the same question controversially arose was that of City of Los Angeles v. Los Angeles Farming & Milling Co., 152 Cal. 645, 93 P. 869, 871, 1135, wherein the city of Los Angeles asserted its prior and paramount ownership of the use of the waters of the Los Angeles river from its source to the city and from the surface to bedrock in so far as it was necessary to supply water for the use of its inhabitants, by virtue of its successorship to the pueblo and against the asserted riparian rights of the defendant, based upon its ownership of riparian lands lying along said river some ten miles above said city. The trial court accorded the plaintiff such right, and upon appeal this court, Mr. Justice McFarland writing the opinion, after stating that the only question in the case was as to whether "under the general law of the locality the old pueblo of Los Angeles, and the respondent herein, as its successor, had and have, as against appellant, the prior and paramount ownership of the use of so much of the water of the Los Angeles river as is necessary for its inhabitants and for general municipal purposes," proceeded to state that "this question need not be discussed as an original one, for it has been answered in the affirmative by former decisions of this court." The cases which are above referred to are there reviewed at length and expressly approved, and after such review and approval it is said: "The foregoing decisions are determinative of the prior and paramount right of the pueblo, and of plaintiff as a successor, to the use of the water of the river necessary for its inhabitants and for ordinary municipal purposes. The questions as to what extent this right goes, a question somewhat considered in the Pomeroy Case—that is, for the use of the inhabitants of what territory, and for what municipal purposes can the water be taken as against a riparian owner—does not arise, and need not be considered in the case at bar." Neither, it may be said, does this latter question arise in the present case. The law and the attitude of this court toward the law upon this subject stood as above stated during the twenty years which preceded the presentation of the same question to this court in the case of Cuyamaca Water Co. v. Superior Court, supra, which was a prior proceeding in the instant case, and in which the issues primarily involved were those quoted from that decision in the earlier stages of the present opinion.

[2, 3] The appellants herein contended in the trial court, and here contend, that they were and are entitled to have reconsidered and relitigated the question as to whether or not a Spanish or Mexican pueblo organized in California under the laws, institutions, and regulations of Spain or Mexico during their

successive governments thereof, became possessed by virtue of such laws, institutions and regulations of a prior and paramount right to the use of the waters of rivers or streams passing through and over or under the surface of their allotted lands so far as may be or become necessary for the pueblo and its inhabitants, and as to whether or not a municipality organized under American rule as the successor of such pueblo succeeded to such pueblo rights. We are of the opinion that by virtue of the foregoing long line of cases, and particularly of the decision of this court in the case of the City of Los Angeles v. Los Angeles Farming & Milling Co., supra, wherein the cases preceding it were specifically reviewed and held to be determinative of this question, the subject is no longer an open one for further consideration and review before this court, and that by said decisions, so long and uniformly followed and adhered to, the proposition that the prior and paramount right of such pueblos and their successors to the use of the waters of such rivers and streams necessary for their inhabitants and for ordinary municipal purposes, has long since become a rule of property in this state, which at this late date in the history and development of those municipalities which became the successors of such pueblos we are not permitted, under the rule of stare decisis, to disturb. We are not unmindful of the contention elaborately presented and argued by counsel for appellants that the pueblo of San Diego, even if conceded to have been regularly established as such in the year 1834, never became entitled to any prior, preferential, or other rights in or to the waters of the San Diego river, for the reason that long prior to the alleged establishment of said pueblo the entire and exclusive right to the use and benefit of the waters of said river had been granted by the viceroy of Spain to the Mission of San Diego. In support of this contention the appellants introduced in evidence before the trial court and have here presented for our inspection and interpretation a photostatic copy of such purported grant. It bears the date, according to the translation thereof with which we have been kindly furnished, of the 17th of December, 1773, and the signature, by secretary, of Bucarely, the then viceroy of the King of Spain over Mexico. It purports to approve the removal of the Mission of San Diego from its former location near the Presidio on the shore of the bay of San Diego to a new site several miles up the arroyo, and in order to facilitate such removal and the development of the then small and in a sense still speculative and quite problematical success of the first mission established in Alta California, it proceeded to suggest the cultivation of its surrounding lands through the use of water from the stream, and for that purpose directs the "Reverend Fathers of the Mission to acquire and administer this concession and Royal grant (privilegio) to the waters of this arroyo referred to for the common benefit of all the nation, whether Gentile or converted, who dwell today or in the future in the province of the Mission of San Diego de Acala. This concession and the fruits also shall be held (ser tener) as to these children and their children and successors forever." The document proceeds to state in immediate connection with the foregoing that "Although a Presidio is thus placed near to the entrance of this stream near to the Port of San Diego there can be no prejudice in this respect because there is always sufficient water for the service of the soldiers, and in the topography and report of Sr. Don Miguel Castro there is evident to the south of this place a worthy river and a torrent smaller in flow and some smaller arroyos from which to drain (disaguas) the Rancho del Rey where their cattle may wander under the vigilant eye of the herdsmen." We are loathe to believe that the viceroy of Mexico, framing this document in the then far-distant capital of New Spain, ever intended by its terms to confer upon this primitive and as yet largely experimental mission settlement any such enlarged, prior, paramount, or exclusive rights in and to the waters of the San Diego river as the appellants herein claim for it. Its language does not so import and it may be said to be doubtful, to say the least of it, whether even the viceroy of the Kingdom of Spain in making such a concession would not have done violence to those laws, institutions, and regulations of Spain which provided for the establishment of civil governments of the sort known as pueblos in new lands so as to take away from these the whole of those water rights in rivers traversing their allotment of land which would be essential to the cultivation of such lands when occupied by civil settlement.

[4-8] We learn from public history, of which we take judicial notice, that the civil settlement of Alta California was coequally contemplated by those who were officially in charge of the primary expedition which only four years before this purported grant had been put forth and provisioned for the discovery and occupancy of Alta California through the joint effort of Padre Junipero Serra and of Jose de Galvez, visitor-general of New Spain. In the broad and detailed plans and express decrees of the latter, precise provision was made for the foundation and development of presidios, pueblos, and missions in the as yet unknown region, and these three forms of occupation were expected, as nearly as possible, to proceed simultaneously as a result of the joint military, civil, and religious expedition then about to set forth. It may be fairly assumed that these joint settlements designed to be established simultaneously were also intended to function harmoniously and not to become involved in disputes over

the respective jurisdiction and property rights of each.

This will appear to be plain when the nature, functions, and purposes of each of these foundations is considered both historically and in the light of the Spanish and Mexican laws, and regulations relative to each. Presidios were purely military foundations to be occupied by soldiers, and to exist for the establishment of order and for the protection of the pueblo and mission foundations. The pueblos, on the other hand, were purely civil and political foundations, as the term itself implies, being equivalent to the English word "town" and signifying a civic body corporate and politic, and intended, through the cultivation of the lands with which under the Spanish and Mexican laws it was by virtue of its foundation to be invested, to furnish sustenance for its own inhabitants and for the presidios. Mission settlements, on the contrary, were purely ecclesiastical foundations made or to be made in Alta California by monks or padres of the Franciscan Order, and existing and being conducted by these for the sole purpose of bringing the blessings and fruits of Christian civilization to the Indian population of Alta California, theretofore in a state of barbarism. A mission foundation in its inception possessed and exercised none of the ordinary forms or properties of civil government, but was, and was for a time at least, to be purely paternal in character, with such material possessions as were required for the maintenance and exercise of its ecclesiastical development. The lands which were to be occupied by the missions were to be held in possession by the priests for the purpose of carrying forward the main object of the mission foundation, but these lands were to be possessed, occupied, and cultivated only by permission, and were to be and remain the property of the nation and to be subject at all times to grants under the laws of Spain and Mexico relating to colonization. So said the Supreme Court of the United States in the case of United States v. Ritchie, 17 How. 525, 540, 15 L. Ed. 236. It was thus upon this theory and assumption that the so-called secularization of the missions of Alta California by officials of the Mexican government, to which we shall presently refer, was ordered and carried forward to its disastrous conclusion. We are referred upon this subject, by counsel representing both sides of the instant controversy as an authority, to the very interesting pamphlet entitled "The Colonial History of San Francisco," and embracing the argument of John W. Dwinelle, Esq., in the case of the City of San Francisco v. United States in the District Court of the United States for the Northern District of California. We do not, however, in this case find it necessary to finally determine the scope and intent of Bucarely's concession to the Mission San Diego in respect to its new location. The reason we are not called upon to do so is that according to evidence educed herein the Mission of San Diego was in or about the year 1834 secularized by Governor Figueroa of Alta California and his official coadjutors purporting or pretending to act in so doing under decrees of the Mexican government enacted in the preceding year. It is not necessary for us to herein determine whether or not the secularization of the Mission San Diego, put into effective operation in that and the following year or two, was in all or in any of its aspects lawful. It is sufficient to note that by the consensus of both the civil and ecclesiastical historians of the time and event it was successful and that within a very few years at most the spoliation of the mission was so far completed that its productive activities had ceased, its Indians and its priesthood had departed, the former to relapse into their aboriginal condition and the latter to seek and find other fields of labor. The mission life in fact was destroyed and the mission lands which by virtue of its secularization were to become part of the public domain were within a decade thereafter conveyed by private land grant executed by Governor Pico to one Santiago Arguello, whose grant of the same was subsequently confirmed by the board of commissioners for the settlement of private land claims created by the United States government in 1851, and a patent therefor issued to said grantee a few years later. It has not been seriously, as it could not be successfully, contended herein that any of the original rights of the mission or of its founders or their successors derived from Bucarely's concession either survived the secularization of the mission or passed to Arguello or his successors by virtue of his private land grant and the confirmation thereof by the government of the United States. It follows necessarily that upon the establishment of the pueblo of San Diego in the year 1834 as found by the trial court it became invested with whatever land and water rights it was entitled to under the laws, institutions, and regulations of Spain and Mexico and that in the possession and continued exercise of those rights it was nowise impeded or impaired by the existence of any similar or even superior rights in the Mission of San Diego which either had ceased or would presently cease to be. There is therefore no merit in the contention of the defendants herein that they or any of them by virtue of their occupancy of the former mission lands are to be held the successors of whatever rights the mission had, since the entire right and title of the present occupants of such lands relate as to their origin solely to the Arguello grant.

[9] As to the claim of title to the so-called mission lands, whether derived from the

foundation of the mission itself and its occupancy of said lands, or from the Bucarely concession, it is clear that such rights, if any existed, either prior or subsequent to the secularization of the mission, ceased to exist for the additional reason that such claim was never presented to the board of land commissioners, as required by the Act of Congress of March 3, 1851 (9 Stat. 631), and therefore lapsed and ceased to exist, under the authority of Hihn v. Santa Cruz, 170 Cal. 436, 444, 150 P. 62, and Botiller v. Dominguez, 130 U. S. 238, 9 S. Ct. 525, 32 L. Ed. 926.

[10] As to the Arguello grant, which was, as we have seen, confirmed, it stood upon no other footing as to the rights in the lands and water within its area than that of the several thousand other private land grants in California and, having been made subsequent to the establishment of the Pueblo of San Diego and to its right and title to the lands and waters embraced within its allotted area, and which were also confirmed, was necessarily subject thereto, and hence in no way available in aid of the contention of the appellants and interveners herein.

We have thus, we think, disposed of every vital question presented by the defendants as appellants affecting that portion of the judgment of the trial court as to which the plaintiff herein is the respondent, and it only remains for us to consider and dispose of those portions of said judgment as to which all of the parties herein have presented their separate appeals. In that portion of the findings of the trial court which are quoted in the earlier passages of this opinion, it will be seen that the prior and preferential rights of the city of San Diego as the successor of the pueblo were made subject to certain exceptions to be in said findings subsequently set forth. In these, its later findings, the trial court deals with those special defenses of said defendants and also of said interveners wherein it is pleaded and sought to be proven that, whatever prior or preferential rights in and to the waters of the San Diego river the city of San Diego had or acquired by virtue of its succession to the pueblo of San Diego, it has subsequently and either wholly or partly lost by prescription or by laches or has become estopped to assert as against these defendants and interveners through certain alleged affirmative action on the part of itself or its authorized officials.

On the threshold of the discussion as to the nature of these several defenses and, if available at all to the defendants, the extent to which they or any of them should be given application to the instant case, it will be well to recur to the statement made by this court upon the former hearing in Cuyamaca Water Co. v. Superior Court, 193 Cal. 584, 588, 226 P. 604, 33 A. L. R. 1316, and which is quoted in the early pages of the present opinion, and from which it will appear that the plaintiff herein is not seeking by this action to have it determined that it is entitled to any particular quantity of water, based upon its prior or present use of the waters of the San Diego river, to the extent of its asserted prior and paramount rights therein. The plaintiff in its pleadings asserts no such use of said waters in the past by either its predecessor the pueblo or itself, further than such use thereof under such claim of right as was from time to time necessary for the needs of the pueblo and its successor the city. On the other hand, the defendants and interveners herein have both by their pleadings, their proofs, and their argument, asserted and shown that neither the pueblo nor the city of San Diego ever did, prior to the institution of the present action, make actual use of any considerable amount of the waters of the San Diego river for any public or municipal or other purpose whatever, and that during the entire history of both pueblo and city the larger part of the waters of the San Diego river, except for the uses thereof undertaken by the defendants and interveners herein, would have flowed through and past said plaintiff and gone unused to the sea. In the findings of the trial court no finding is made and no estimate given as to the quantity of the waters of said river which the plaintiff or its predecessor had made use of, or could have made use of to the full extent necessary for the needs of the city or its inhabitants from time to time in the course of the development and growth of the pueblo and the city's civic life, nor is there to be found in the findings of the court or in the evidence in the case anything tending to establish that whatever actual uses or diversions of the waters of said river the defendants and interveners herein, or any of them, are shown to have made, ever resulted in a diminution in any appreciable degree of the amount of flow of the waters of said river which the plaintiff herein or its inhabitants were from time to time putting to actual use under or in pursuance of the exercise of the city's aforesaid prior and preferential right to the waters of said river.

On the contrary, the undisputed evidence in this case discloses the following facts with relation to the uses heretofore made of the waters of the San Diego river by the respective parties hereto: The maximum amount of water which the city of San Diego has annually required in order to fully supply its public needs and the needs of its inhabitants between the year 1890 and the year 1921 is disclosed by an exhibit (No. 22) introduced by the defendants herein, showing the total amount of water delivered to the city of San Diego from all sources during the aforesaid series of years, from which it appears that during the year 1918 there was so delivered to said city a total of 3,634,205,-

289 gallons of water. This amount appears to denote the peak of the city's requirement for all of its aforesaid needs during the years immediately preceding the institution of the present action, and it may fairly be taken, therefore, to exemplify the full amount which the city of San Diego would have required to fully satisfy its prior and preferential right to the waters of the San Diego river to annually supply its aforesaid needs and uses, and hence the full amount of the waters of the San Diego river to which, under its prior and preferential right, it would have been entitled at and during the several years prior to the institution of this action. The evidence herein further discloses, according to a report which the Cuyamaca Water Company made and filed with the railroad commission, purporting to show the amount of water which it had sold and delivered to its consumers between the years 1913 and 1921, that the total amount of the waters of the San Diego river extracted therefrom and actually applied by it to such uses amounted during the year 1921 to 1,762,435,542 gallons. There is not to be found in the record herein any definite statement or evidence showing, with any degree of accuracy, the total annual outflow of water from the San Diego river; but that it is from year to year far in excess of the amount which would be represented in the aggregate of the foregoing figures would seem to have been made sufficiently plain during the long controversy between the parties hereto over the use of said waters. Counsel for the defendants and appellants herein have presented to this court, in support of their plea of estoppel, an interesting document in the form of a resolution adopted by the common council of the city of San Diego on August 30, 1918, in response to an anxious inquiry from the city of La Mesa, and which will be more particularly adverted to hereafter, and from which resolution it is made to appear that "during the past twenty years eighty-four per cent of the water of said San Diego river has gone to waste into the Pacific ocean," and, further, "that the undeveloped waters of the San Diego river would, if impounded, prove entirely adequate to meet all present and reasonably probable future demands of the city of San Diego and of the neighboring communities adjacent to the San Diego river watershed." It is important that the foregoing facts relative to the volume and use of the waters of the San Diego river should be borne in mind in dealing with the questions which we are about to consider, touching the respective rights of the parties hereto to the waters of said river, as affected by the defenses of prescription, laches, and estoppel, urged by the defendants and appellants herein. In dealing with these defenses it is also important to bear in mind the nature of each and the differences, if any, between them.

[11] It should at the outset be understood and stated that the pueblo rights, and hence the rights of its successor, the city of San Diego, to whatever of the waters of the San Diego river were from time to time required for the needs of the pueblo and of the city and of the inhabitants of each, were rights which were essentially "governmental" in character, as much so in fact as were the rights of the ancient pueblo and modern city to the public squares or streets, and that the term "proprietary," as employed with reference to certain commercialized uses made by municipalities and other public bodies, of water, light, and power, for example, has no application to the fundamental rights of the plaintiff herein to its ownership of its foregoing classes of property dedicated and devoted to public uses. Ames v. City of San Diego, 101 Cal. 390, 394, 35 P. 1005. It should also be noted upon the threshold of the impending discussion that the questions which might arise upon any attempted use of the waters of the San Diego river by the plaintiff herein for the supply thereof to the inhabitants of areas outside of the corporate limits of the original pueblo, whether such areas were or were not within the four league square allotment of lands to said pueblo, are not presented or presentable in the instant case, and hence that whatever authorities may have been cited bearing upon such questions are inapplicable, since, as was aptly stated in our earlier decision (193 Cal. 584, 226 P. 604, 605, 33 A. L. R. 1316) "the subject-matter of the action is the establishment of the priority of right, and not the quantity of water to be taken."

[12] It should also be noted at this stage of the discussion that whatever rights the original defendants herein are entitled to claim and assert in the waters of the San Diego river, or any portion thereof, are rights and claims which rest for their support upon the several appropriations made of such waters by the Cuyamaca Water Company, a copartnership, or by the members thereof, and by the San Diego Flume Company, their predecessor and original appropriator of such waters, to the extent of the use thereof. We hold to be without merit the contention of these defendants that they derive their rights to such waters from a higher source, viz.: From certain rights acquired by them, or certain of them, under the Congressional Act of July 26, 1866 (14 Stat. 253, c. 262, § 9), and the supplementary act of January 12, 1891 (26 Stat. 714, c. 65, § 8), and that such rights derived from such source are superior to any right whatever in the waters of said river held by the city of San Diego, as the successor of such pueblo. We find from an examination of these Congressional Acts, without going into further detail, that they consisted in certain action taken by the United States government at a time subsequent to the vest-

ing in the city of San Diego of whatever rights it possessed and still possesses in the waters of San Diego river by virtue of its successorship to the rights and interests of such pueblo, and which were confirmed by the action of the aforesaid commission, and that whatever permissive grants of rights of way to private persons over public lands lying along the upper reaches of the San Diego river were made were subordinate and not superior to the already vested rights of the plaintiff herein, derived from its succession to the pueblo. Los Angeles Farming & Milling Co. v. City of Los Angeles, 217 U. S. 217, 30 S. Ct. 452, 54 L. Ed. 736, and cases cited. With these preliminary observations we pass to a discussion of the remaining questions presented for our determination by the original defendants and by their successors in interest, the interveners herein.

The first of these questions relates to the defense of prescription.

[13, 14] The nature of the right claimed to have been acquired in the waters of a flowing stream by prescription rests as a prime essential upon an adverse use thereof by the claimant under a claim of right which has, to the extent thereof and for the required term of years, been acquiesced in by the person or persons otherwise entitled to the ownership and enjoyment of the waters thus adversely abstracted from said stream and to enforce those rights by appropriate action. It is needless to cite authorities to a proposition thus deeply grounded in the law of waters; but there are certain instructive cases which bear directly upon the situation of the parties to this action as disclosed by the record herein. The first of these is that of Anaheim Water Co. et al. v. Semi-Tropic Water Co., 64 Cal. 185, 30 P. 623. This was a case which involved certain alleged conflicting riparian rights to the diversion of the waters of the Santa Ana river, which formed the dividing line between two ranchos, from the owners of one of which the plaintiffs had derived by grant the right to use a certain definite amount of the waters of said river, to which the lands of the grantors were riparian, and of the other of which the defendant was the owner and was entitled to all of the riparian rights incident to such owner unless the same or some portion thereof had been lost by prescription. The trial court found that the plaintiffs for many years had openly, notoriously, and continuously appropriated and used the waters of said river to the full capacity of their ditch, claiming the right so to do adversely to all the world; but the court also found that prior to a year or so before the commencement of the action such diversion and use on the part of the plaintiffs, even though thus claimed to have been done adversely, had never interfered with the use which the defendant during the same time was making of said waters, and that with the exception of the aforesaid brief time before the commencement of the action there had at all other times been sufficient water flowing in the river to supply the wants and demands of all of the parties to the action. In dealing with that situation this court (page 192 of 64 Cal., 30 P. 623, 625) said: "In the face of such facts as these, how can we be expected to hold that, as against the owners of the Santiago rancho, the plaintiffs have established any prescriptive right? In order to establish a right by prescription, the acts by which it is sought to establish it must operate as an invasion of the right of the party against whom it is set up. The enjoyment relied upon must be of such a character as to afford ground for an action by the other party. This is thoroughly settled. Now, it is very clear that, while there was sufficient water flowing in the river to supply the wants and demands of all the parties, its use by one would not be an invasion of any right of any other; and as the court below found, as a fact, that, until within a year or two prior to the commencement of the action, there was sufficient water flowing in the river to supply the wants and demands of all the parties, it is plain that the plaintiffs, as against the owners of the Santiago rancho have acquired no right by prescription." The next case to which we would refer is that of Faulkner v. Rondoni, 104 Cal. 147, 37 P. 883, wherein (without stating the facts of the case) we find that the doctrine above announced was expressly approved; the trial court having found that during the period claimed to have given rise to the prescription there had been sufficient water in the stream for the uses of all of the parties to the action and that therefore there had been no such invasion of the rights of one which could form the basis of a prescriptive right in the other. In the quite recent case of Pabst v. Finmand, 190 Cal. 128, 211 P. 11, 13, the doctrine above quoted from Anaheim Water Co. v. Semi-Tropic Water Co., supra, was again approved; the court saying that the use by the adverse claimant "was not hostile unless there was an actual clash between the rights of the respective owners. While there was sufficient water flowing down the stream to supply the wants of all parties, its use by one was not an invasion of the rights of the other."

[15, 16] It is also true, as stated in the concluding paragraph of Pabst v. Finmand, supra, that "the exercise of the mere riparian right can never be hostile to the land below. Where, however, the use is under such circumstances as to be adverse and under a claim of right asserted against lower riparian owners, it may ripen into prescriptive title." For the most recent statement of this principle see Scott v. Fruit Growers' Supply Co., 202 Cal. 47, 258 P. 1095, where the same principle is enunciated. It is contended by the

appellants and interveners herein, however, that the foregoing several cases and the principles decided therein have no application to the contentions of the respective parties in the instant case, for the reason that each and all of these cases relate to the respective rights of riparian owners in the several streams to which they refer, and that said rights differ essentially from those which are asserted by the respective parties in the instant case. It is true that as between contesting riparian owners, and even as between riparian owners and upper appropriators, the rights of each to the proportion to which each is entitled in the waters of the particular stream differ materially from the rights which the parties to this action assert or deny. But, conceding this to be true, the misconception of the appellants herein consists in emphasizing these differences and in losing sight of the uniformity of application of the principles upon which prescription rests and which, as we have seen, require, both in the cases cited and in the case at bar, the presence of an adverse use as the essential basis of its assertion. It is for this reason that the principle enunciated in the foregoing cases has direct application to the situation presented in the case at bar. The city of San Diego, by virtue of that prior and preferential right which it derived from the pueblo "to the use of all of the waters of the San Diego river necessary to supply the domestic wants of the inhabitants of said pueblo, to irrigate the lands thereof and for other municipal purposes within the general limits of said pueblo," has never thus far in its history possessed and is not now asserting any right of action to prevent the actual diversion of any quantity of the waters along the upper reaches of the San Diego river or its tributaries, whether undertaken by the defendants and interveners herein or their predecessors, or any other persons whatever, which has not at any particular time interfered with such exercise of its aforesaid rights in the waters of said river as from time to time in the course of its growth and history as a municipality it became possessed of. The right of said city was thus always "uncertain and conjectural," depending upon the particular needs of the city or its inhabitants at each particular stage in its development as a municipality, and it would be the height of unreason to hold that the pueblo in its primitive beginnings and the city in the infancy of its corporate life should have been bound to be continually taking arms against users of the upper waters of the stream to an extent which constituted no interference with its present use or right to use such waters at the time of such diversion. It follows that for this reason also no right by prescription exists or has ever existed in favor of these defendants and interveners or either or any of them arising out of their asserted adverse use of the waters of the San Diego river. The city is not in this action asserting a present right to any such remedy, but, on the contrary, and in the language of our earlier opinion, "the subject of the action is the establishment of the priority of right and not the quantity of water to be taken." It thus appears that the present action is not in any sense remedial but is purely declaratory in its nature and in the relief which, in so far as the plaintiff is concerned, is sought thereby.

[17] Finally, and with direct reference to the defense of prescription, it may be stated as a general rule that no invasion of the rights of property which are held by a public or municipal corporation in perpetual trust for public uses can be held sufficient to furnish the basis of a defense based solely upon prescription. The cases fully supporting this general principle have already been cited, but will be further referred to in considering the subjects of laches and estoppel, to which we shall now address ourselves.

[18, 19] With respect to the defense of laches which the defendants and interveners present and urge little need be said, since what has immediately heretofore been stated fully applies to such defense. The city of San Diego and its officials could not in reason be charged with laches in the assertion of something with respect to which no right of assertion existed and with respect to which no adverse invasion has thus far occurred. There would seem to be another and all-sufficient reason why the defense of prescription and of laches ought not to be available to the defendants as against the plaintiff in the present action. The right which the pueblo of San Diego and the plaintiff herein as its successor acquired in the waters of San Diego river by virtue of the pueblo foundation was essentially a public right and, to employ the language of the findings of the trial court, "was a right and the distribution of such waters by the pueblo authorities was a trust created, imposed and recognized by the laws, orders and decrees of the Kingdom of Spain and the Republic of Mexico." In the case of Cuyamaca Water Co. v. Superior Court, supra, this court adopted the language upon this subject in Lux v. Haggin, supra, wherein it was stated that: "The occupants of lands within the city, the pueblo's successor, are beneficiaries only to the extent that they are entitled to the use of such water, and at such times, as accords with the laws regulating the public and municipal trust." In the case of Vernon Irrigation Co. v. Los Angeles (106 Cal. 237, 39 P. 762, 765), supra, it was stated, with special reference to the rights to the waters of the Los Angeles river which the city had derived from the pueblo of Los Angeles, that "the waters of all rivers were, under the Spanish and Mexican rule, public property * * * for the use of the inhabitants."

If this be true, it follows necessarily that the public right and public trust which the pueblo and its successor, the city of San Diego, had in these waters in no respect differed from those other public rights and properties which the state and its various subdivisions and agencies possess and administer; and it has been uniformly held that such public rights cannot be lost nor the public trust as to their administration and exercise be destroyed either by adverse possession or by laches or other negligence on the part of the agents of the state or municipality who may from time to time be invested with the duty of their protection and administration. People v. Kerber, 152 Cal. 731–733, 93 P. 878, 125 Am. St. Rep. 93, and cases cited. The case of Ames v. City of San Diego, 101 Cal. 390–392, 35 P. 1005, will, when carefully examined, be found to fully uphold this view. We are therefore of the opinion that for the above additional reason the defenses of prescription and laches urged by the defendants and interveners herein cannot be upheld.

[20-22] The defense of estoppel, however, rests upon an entirely different foundation in both law and fact from that underlying the foregoing two defenses. The defense of estoppel rests upon the doctrine that a right conceded for the purpose of such defense to exist in a party, he shall not be permitted to assert against another to the latter's injury because of the existence and proof of certain facts and conditions which would render its assertion inequitable. The question as to the application of this well-defined legal proposition as between the parties to an action in the nature of things depends upon the facts of each particular case. Whether the facts of this particular case are such as to permit the application of this doctrine to the plaintiff in its capacity as a municipal corporation and with respect to the latter's "prior and preferential right to the waters of the San Diego river," as above defined, is the problem to which we must finally devote our attention. The essential facts as developed in the evidence educed herein, bearing upon this problem, are not, with certain exceptions to be noted, the subject of material dispute. The original defendants in this action were Cuyamaca Water Company, a copartnership, and certain parties alleged to be surviving members or the legal representatives of certain deceased members thereof; also Cuyamaca Water Company, a corporation, which does not seem to have much to do with the case. The evidence in the case, stated as concisely as possible, discloses that in the year 1885 the San Diego Flume Company was organized for the purpose of developing the water supply along the upper reaches of the San Diego river and its tributaries which had theretofore been undeveloped and largely unused, with a view to conserving and utilizing the same upon the region lying between the city of San Diego and the mountains, wherein that stream and its tributaries had their source, and the lands of which region prior to said time being semi-arid, had been but thinly populated and little used. In the course of this development and during the next few years the San Diego Flume Company expended large sums of money, estimated by the trial court to have been in excess of $1,000,000 in the creation of dams, diversion works, pumping plants, ditches, and flumes for the diversion and distribution of said waters to an extent hereinafter to be stated. The Cuyamaca Water Company, a copartnership, ere long succeeded to the rights and property of the San Diego Flume Company, and during the intervening years between 1889 and the date of the institution of this action has augmented the expenditures, continued and extended the activities, and administered the resources thus derived from its predecessor with the resultant effect that within the wide region reached and benefited by the aforesaid development and distribution of the waters of said river, to the extent hereafter to be noted, an extensive productivity has been attained; orchards, vineyards, farms and homes have been created, and cities and towns have been established, such as the city of La Mesa, the city of Lemon Grove, the city of El Cajon, and other growing communities containing as a whole several thousand inhabitants and constituting prosperous centers of civic and community life, and all of which have during all the years of their creation and growth received their water supply from the waters of said river as thus developed and distributed by or through the Cuyamaca Water Company. Of recent years certain irrigation districts have been formed and are being operated within said region and one of these, to wit, the La Mesa, Lemon Grove, and Spring Valley irrigation district, has recently secured an option upon, if not actually acquired, all of the rights and properties of the Cuyamaca Water Company, and has thus become the principal party in interest in the eventuality of the present action in so far as the defendants and interveners are concerned. The legal foundation of the San Diego Flume Company and also of its successor, the Cuyamaca Water Company, rested originally in certain formal appropriations located in due course of the laws permitting the same along the course of said river and its tributaries and to an amount in the volume of water claimed to be as hereinafter stated. In pursuance of these appropriations certain quantities of said waters have been diverted and distributed to an extent also hereinafter to be designated. It would seem also that certain of the defendants put forth certain claims of right herein, depending upon their alleged ownership of certain lands riparian to said stream. Dur-

ing all of the earlier years of the activities of the San Diego Flume Company and of the Cuyamaca Water Company in the appropriation to the extent thereof of the waters of said river and also of the diversion and distribution thereof to the volume and extent thereof, and during all of the earlier years of the settlement, development, and growth of the region and of the several corporate communities therein as a direct result of the application of said waters to said otherwise semiarid region, the city of San Diego regarded quiescently, and in fact it may be said approvingly, the foregoing development of its "back country" through the aforesaid appropriation, diversion, and use of the waters of the San Diego river. It had every reason so to do and it had no reason to do otherwise, since its own advancement, progress, and prosperity in both business and population were being greatly enhanced thereby, and since also its own actual uses of the waters of said river were being in no wise diminished or impaired. It is true, as averred by the defendants and interveners herein and as found by the trial court, that the city of San Diego on various occasions in its municipal history and through its successive legislative bodies has granted certain rights and privileges to private persons and corporations to develop water by wells and works of various kinds within the limits of the former pueblo lands, and has even contracted to purchase such works when constructed and such water when developed for the use and benefit of the inhabitants of said city; but it is also true as found by the trial court that none of these arrangements was made with any predecessor of the defendants or interveners herein so as to entitle the latter to claim that acts and efforts on the part of the city to have developed its own water supply within its limits and for the use of its inhabitants amounted to such an admission of the validity of the appropriation and uses which the defendants and interveners were undertaking upon the upper reaches of the San Diego river as would operate to constitute an estoppel. The essential elements of an estoppel, even as between private persons, were thus far and up to at least the year 1914 entirely lacking. The defendants and their predecessors, the San Diego Flume Company, in entering upon and prosecuting their plans for the appropriation and diversion of the waters along the upper reaches of the San Diego river and its tributaries, cannot lay claim to having been misled as to their rights as a matter of law to thus appropriate and use the waters of said river, since they must be held to have known both as a matter of fact and as a matter of law of the existence in the city of San Diego of the aforesaid prior and preferential right of the city to such waters and to the assertion thereof whenever the expanding needs of the city or its inhabitants required such assertion.

With respect to the knowledge which the predecessor of the defendants and appellants herein—and by which knowledge they are bound—had upon this subject as a matter of fact, the evidence in this case sufficiently shows that the San Diego Flume Company from the date of its organization and first appropriations of the waters of the San Diego river, was fully informed as to the prior and paramount right of the city of San Diego to the use of the waters of the San Diego river, and that upon the advice of its attorneys it caused to be inserted in its contracts with consumers express provisions protecting it, as to its said consumers, against the assertion of such right by said city; and at as early a date as the year 1900, when certain litigation was instituted against the San Diego Flume Company by or on behalf of its consumers to enjoin said company from preferring the city of San Diego pursuant to its said right in the matter of the water supply from said river then being furnished to said city, the San Diego Flume Company expressly pleaded in its answer the existence of the paramount right of said city and the terms of its said consumer's contracts inserted in recognition thereof. The evidence further discloses that, at various times during the decade or more of controversy preceding the institution of the present action, the Cuyamaca Water Company, a copartnership, through its most active and aggressive member, Mr. Fletcher, was fully advised from time to time as to the existence of the aforesaid prior and paramount claim of right on the part of said city. The findings of the trial court based upon the foregoing state of the record herein are full and ample and are as follows:

"It is not true that the plaintiff has been guilty of any carelessness or any culpable negligence resulting in the defendants, or any of them, being misled as to the state of the plaintiff's title as set forth in its amended complaint. Neither is it true that the defendants were at all times ignorant, or were at any time ignorant of the claim of the plaintiff to the prior and paramount right to the use of the water of the San Diego river. Neither is it true that the defendants had no convenient or ready means of acquiring knowledge respecting the prior and paramount right of the plaintiff in and to the waters of the San Diego river, but, on the contrary, it is true that the defendants and their predecessors in interest at all times had convenient and ready means of acquiring knowledge respecting such right, and at all times knew of plaintiff's claim to such right. It is not true that such acts, omissions and declarations of the plaintiff as are herein found to have been performed, were said or done through fraud, and it is not true that any act or omission or declaration of the plaintiff constituted a fraud upon the defendants or any of them, and it is not true that any act or omission or declara-

tion herein found to have been done or declared by the plaintiff has injured the defendants or any of them, or justified the defendants or any of them in believing that the plaintiff did not own or claim to own an estate in the waters of the San Diego river as alleged in said amended complaint; neither is it true that the defendants nor any of them relying or acting upon any belief fraudulently induced by the plaintiff have expended any money in the development of the waters of the San Diego river. Neither is it true that the defendants nor any of them, or their predecessors in interest, relying or acting upon the belief that the City of San Diego did not own the prior and paramount right to the use of the waters of the San Diego river, expended large or any sums of money in developing said waters and acquiring an estate therein."

That said defendants and appellants, as a matter of law, must be held to have had knowledge of the existence in the city of San Diego of its prior and preferential rights in and to varying amounts of water of the San Diego river, according to its expanding needs, may be said to rest not only upon the general proposition that all persons are held to a knowledge of the law, but may be said to also rest upon the fact that this court from a date as early as the decision of the case of Hart v. Burnett, supra, and at intervals during the intervening years between that early time and the institution of the present action was engaged in uniformly upholding the prior and preferential right of cities founded upon a previous pueblo existence to the waters of such streams as flowed through them. The record herein discloses that the San Diego Flume Company was fully advised by astute and able counsel of the existence of such prior rights in the city of San Diego, as a matter of law. In the light of the foregoing findings of the trial court, with respect to the knowledge of the aforesaid rights of the city of San Diego, which these appellants are held to have possessed as a matter of fact, and by which knowledge they must also be held to be bound as a matter of law, and in the light of the further fact of the total absence from this record of any showing on their part that whatever acts of diversion and use of the waters of the San Diego river they or their predecessors therein have thus far engaged in have in any degree constituted an invasion of the vested rights of said city in and to the waters of said river, the following cases are instructive. The first of these is the case of Anaheim Water Co. v. Semi-Tropic Water Co., supra, to which reference has been made with relation to rights to be gained by prescription, and wherein also the subject of estoppel is considered; the court saying: "With respect to the estoppel relied on by the plaintiffs it is sufficient to say that, as the findings of the court below show that there was sufficient water flowing in the river in 1857 and for nearly 20 years thereafter to supply the wants and demands of the owners of each of the ranchos bordering on the stream, the owners of the Santiago rancho were neither called upon to object to the diversion and appropriation by the predecessors of the plaintiffs, nor had they any right to object thereto. No right of theirs was interfered with. Nor does it appear that there was any fraud, misrepresentation, or concealment of any kind practiced upon the predecessors of the plaintiffs by the owners of the Rancho Santiago." In certain cases, hereinafter to be noted, and also in the case just cited, we have had occasion to quote with approval what was held in the case of Biddle Boggs v. Merced Mining Co., 14 Cal. 368: "There must be some degree of turpitude in the conduct of a party before a Court of Equity will estop him from the assertion of his title—the effect of the estoppel being to forfeit his property and transfer its enjoyment to another." It is to be noted in this immediate connection that the claim of estoppel which the upper appropriator of the waters of a stream undertakes to assert against a lower claimant thereto, based upon the latter's acquiescence, must be founded, not upon the amplitude of the former's claim as set forth in his recorded appropriation of such waters, nor by the carrying capacity of his ditches or flumes, but upon the actual diversion and use of said waters and only to the extent thereof. Pabst v. Finmand, 190 Cal. 124, 133, 211 P. 11; Haight v. Constanich, 184 Cal. 426, 194 P. 26; Northern Calif. P. Co. v. Flood, 186 Cal. 301, 199 P. 315. We understand the foregoing authorities to state the settled law as declared in this state touching this subject, notwithstanding the array of authorities presented by the appellants and interveners herein from other jurisdictions apparently laying down a different rule.

[23] Even, however, if it were to be conceded that a right based upon estoppel could arise by virtue of mere acquiescence in its assertion as between private persons, we are satisfied that no such claim of right could come into being as against a municipal corporation, founded upon its mere acquiescence or that of its officials in the diversion by any number of upper appropriators or even of upper riparian owners of the waters of a stream to the use of the waters of which such public or municipal corporation was entitled as a portion of its public rights and properties held in perpetual trust for public use. The general rule upon this subject is stated in volume 10 California Jurisprudence, page 650, and cases cited, as well as certain limited exceptions to the rule. The defendants and interveners, appellants herein, have referred us to no case wherein the mere passive acquiescence of a public corporation or its officials in the invasion of its rights of property, however long continued, has been held to operate

as an estoppel against its assertion of those rights. They have, however, called our attention to certain cases which are claimed to constitute exceptions to the operation of the general rule, and to which we shall presently refer. It is sufficient at this point in the discussion to state that in so far as, prior to the year 1914, the plaintiff herein may have passively acquiesced in the acts of the defendants and interveners in the diversion and use of the upper waters of the San Diego river, no estoppel in pais can be predicated thereon to any extent whatever in favor of the defendants and interveners herein for the several reasons above set forth. The cases above referred to are City of Los Angeles v. Cohn, 101 Cal. 373, 35 P. 1002, wherein the principle of estoppel in pais was given application to an action brought by the city of Los Angeles to recover possession of a small tract of land lying at the intersection of Spring and Main streets in said city, and which was claimed by it to be a part of a public street. That, however, as the court stated in its decision, was an exceptional case from the fact not only that the defendants had been in possession of the property in question adversely and exclusively for almost forty years, during which time they had erected substantial buildings thereon, but that the city, through its officers, had affirmatively and at the time of the erection of such buildings misled the defendants into the belief that the city laid no claim to the premises in question, and that, acting upon such belief and assurance, the defendants had erected their structures upon the property and occupied the same undisturbed for many years. This case bears no similitude to the case at bar. Counsel also direct our attention to the case of Ames v. City of San Diego, 101 Cal. 390, 35 P. 1005; but a reading of that case discloses that a clear distinction was drawn therein between the two classes of pueblo lands which the city of San Diego holds in succession from the former pueblo, namely, those held in trust for a specific public use, such as a park, which cannot be alienated and the title to which cannot be lost by adverse possession; and those lands, such as house lots, which the city, as successor to the pueblo, held and which might be alienated by it, and which it was held for that reason might be lost by adverse possession. There is no comfort for the defendants herein in the decision of this court in that case. Counsel for the defendants and interveners further insist that under the Spanish and Mexican laws pueblo lands might be lost by prescription. It is needless to follow this argument or the authorities cited therein further than to state that the United States in taking over the territory known as Alta California under the treaty of Guadalupe-Hidalgo, agreeing therein to recognize the existence and protect the ownership of certain land titles within said territory, did not also take over and agree to adopt the statutes of limitation of either Spain or Mexico as applicable to lands or waters devoted to a public use.

[24] It may be well, in addition to what has been heretofore stated, to deal, with somewhat more of particularity, with the events transpiring between the years 1914 and the date of the institution of the present action, inclusive, in so far as these affected the relations and respective rights and claims of the original parties to this action in and to the use of the waters of San Diego river. The record herein discloses that in the early part of the year 1914 the city attorney of the city of San Diego, acting in obedience to a resolution theretofore adopted by the common council thereof requesting him to make an investigation of the rights of the city in and to the waters of the San Diego river and submit an opinion thereon, presented to that body a formal report upon that subject, going with much of detail into the history of the pueblo foundation, and citing and quoting at length from the decisions of the state and federal courts touching the nature and extent of the water rights of pueblos in and to the waters of streams passing through them, and making particular application of these decisions to the nature and extent of the water rights of the pueblo and city of San Diego in and to the waters of the San Diego river. This opinion was published in pamphlet form at or shortly after the date of its presentation, and was admittedly brought to the attention of both the defendants and interveners herein about that time. It would seem to follow of necessity that if the asserted rights of the defendants and interveners to whatever extent, if any, we may find them to have been assertable, had not up to that time ripened into rights resting in the doctrine of estoppel, no later assertion of these rights and no later acts in the way of a further appropriation or diversion of said waters could be made the basis for a claim of right which did not then exist, unless they could be held to find their support in some very definite withdrawal of the claim of the city to that prior and preferential right to the use of such waters which was thus definitely set forth by the foregoing report the city attorney made in the month of January, 1914, and then or shortly thereafter brought to the notice and knowledge of the defendants and interveners herein. In the year 1917, however, the city of San Diego took a very definite step in the direction of making available to itself certain of the waters of the San Diego river not as yet conserved or appropriated to any beneficial use. In that year a bill was introduced in the United States Congress at the instance of the city of San Diego purporting by its title "to grant rights-of-way over government lands for reservoir purposes for the conservation and storage of water to be used by the City

of San Diego, California, and adjacent communities." The text of the measure thus presented in Congress had reference to a proposed reservoir to be constructed along the upper reaches of the San Diego river and upon lands which formed a portion of an Indian reservation, the title to which was in the United States. While this measure was pending before certain committees of Congress during that and the following year, the passage thereof was strenuously opposed by certain representatives of the defendants and interveners herein; their contention being that the grant of such reservoir rights, with the resultant construction of the proposed reservoir, would constitute a serious interference with the already vested rights of the defendants and interveners to the beneficial use of the waters of the San Diego river. In furtherance of the urge of these opponents and in an effort to so far limit the scope and purpose of said grant and the exercise of whatever reservoir rights and uses were to be asserted thereunder, it was sought to have the city of San Diego, through its officials then in charge of its municipal affairs, adopt certain resolutions disclaiming any intent on the part of said city to interfere with the uses then being made of the waters of the San Diego river by the defendants and interveners herein, and in pursuance thereof certain resolutions were adopted by the then governing body of said city touching this subject. A considerable portion of the record consists of details of this proceeding in Congress and there is considerable discussion in the brief of counsel with respect to the attitude thus taken by the city of San Diego with relation thereto. It would seem, however, that the trial court fully set forth and adequately and correctly considered and treated this entire episode in its findings of fact herein, and that with particular reference to the resolutions adopted by the governing body of the city of San Diego having reference to the aforesaid controversy correctly stated therein that: "It is not true that by said resolutions, or by any resolution, or act of said common council the plaintiff herein, acting by or through its legislative body, has expressly or impliedly admitted the ownership by the defendants, or any of them, of the right to use and develop the waters or any of the waters of the San Diego river prior, superior or paramount to the rights of the plaintiff." With respect to the action of the Congress of the United States as to the form and scope of said proposed legislation, in view of the developed opposition of the defendants and interveners herein to the passage thereof, the trial court found that: "It is not true that the Public Lands Committee of Congress or any other Congressional body, or any member of Congress, upon receiving or noting the protest of defendants, or any of them, or of any city or community served by Cuyamaca Water Company, or for any other reason, refused to adopt said proposed bill or house resolution unless or excepting this plaintiff admitted either expressly or impliedly an ownership and estate of these defendants, or any of them, in or to the waters or the use of the waters of the San Diego river. On the contrary, it is true that the Congress of the United States and the Public Lands Committee of the Senate, and the House of Representatives, and each of them, and the members thereof, explicitly and unequivocally set forth in said bill, and insisted in setting forth in said bill a provision declaring that nothing therein contained should be construed as affecting or intending to affect or in any way to interfere with the laws of the State of California relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses or any vested rights acquired therein, and that the Secretary of the Interior and The City of San Diego in carrying out the provisions of said Act should proceed in conformity with the laws of said State of California." The foregoing findings of the trial court, based as they are on much probative evidence which fully supports them, would seem to set at rest the question as to whether the plaintiff had lost, by its affirmative action or by way of estoppel, whatever rights we have found it to be possessed of prior to the year 1914, to the assertion of its paramount use whenever required of the waters of the San Diego river. There is, however, the further finding of the trial court already adverted to, which would seem to be conclusive as to the existence of any right whatever resting in estoppel on the part of the defendants and interveners herein to a superior right to that of the plaintiff in the use of the waters of the San Diego river, and which we deem it apt to requote, as follows: "It is not true that the plaintiff has been guilty of any carelessness or any culpable negligence resulting in the defendants, or any of them, being misled as to the state of the plaintiff's title as set forth in its amended complaint. Neither is it true that the defendants were at all times ignorant, or were at any time ignorant of the claim of the plaintiff to the prior and paramount right to the use of the water of the San Diego river. Neither is it true that the defendants had no convenient or ready means of acquiring knowledge respecting the prior and paramount right of the plaintiff in and to the waters of the San Diego river, but, on the contrary, it is true that the defendants and their predecessors in interest at all times had convenient and ready means of acquiring knowledge respecting such right, and at all times knew of plaintiff's claim to such right. It is not true that such acts, omissions and declarations of the plaintiff as are herein found to have been

performed were said or done through fraud, and it is not true that any act or omission or declaration of the plaintiff constituted a fraud upon the defendants, or any of them, and it is not true that any act or omission or declaration herein found to have been done or declared by the plaintiff has injured the defendants, or any of them, or justified the defendants, or any of them, in believing that the plaintiff did not own or claim to own an estate in the waters of the San Diego river as alleged in said amended complaint; neither is it true that the defendants nor any of them relying or acting upon any belief fraudulently induced by the plaintiff have expended any money in the development of the waters of the San Diego river. Neither is it true that the defendants nor any of them, or their predecessors in interest, relying or acting upon the belief that the City of San Diego did not own the prior and paramount right to the use of the waters of the San Diego river, expended large or any sums of money in developing said waters and acquiring an estate therein."

When we come to consider the essential and elementary basis of the doctrine and plea of estoppel in the light of the foregoing facts and findings of the trial court, the conclusion would seem to be inevitable that the elements of estoppel are entirely lacking in this case. These elements of estoppel are all embraced in the definition thereof found in subdivision 3 of section 1962 of the Code of Civil Procedure, which reads as follows: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." This court has frequently been called upon to interpret and apply the foregoing provision of the Code. It is necessary to cite but two of the most recent cases in which it has done so. One of these is Mercantile Trust Co. v. Sunset, etc., Co., 176 Cal. 461, 472, 168 P. 1037, 1041, wherein this court said: "It is of the essence of an estoppel in pais that the party asserting such estoppel should not only have been ignorant of the true state of facts, but that he should have relied upon the representation or admission of the adverse party." The other case is that of Staniford v. Trombly, 181 Cal. 372, 378, 186 P. 599, 601, wherein it was said with reference to the facts of that case: "There was an absence of the essential elements of estoppel, namely, false statements or concealments, or conduct amounting to false statements or concealments, with reference to the boundary made by one having knowledge, actual or virtual, of the facts, to one ignorant of the truth with the intention, resulting in consummation, that he should act upon such false statements or concealments or equivalent conduct."

[25] In the presence of the foregoing findings of fact as made by the trial court, and in the light of the indispensable elements as thus stated by this court essential to be proven in order to the formation of a basis for the defense of estoppel, it is as difficult to understand as it is impossible to uphold the further findings and conclusions of the trial court to the effect that the defendants and interveners are entitled to the benefit of their plea of estoppel to the extent of their diversion and use of the waters of the San Diego river in the amount of twenty-seven cubic feet per second, or in any other amount, and that as against such right resting solely in such use the city of San Diego is estopped to assert its prior and paramount right to the use of the waters of the San Diego river. That this conclusion may be fraught with certain disturbing consequences, affecting chiefly the interveners herein, and which have been insistently and even passionately urged by their counsel in the presentation of this prolonged controversy, can be held to furnish no reason for a deprival of the plaintiff herein of its ancient, prior, and paramount right to the use of the waters of the San Diego river as defined by this court upon the former hearing. If it be true as the trial court expressly found it to be, that the San Diego Flume Company and its successor, the Cuyamaca Water Company, entered upon and prosecuted their plan for the diversion of the waters of the San Diego river with full knowledge as a matter of law, and also with full means of knowledge as a matter of fact, as to the existence of the prior and paramount right of the plaintiff as the successor of the pueblo to the use of the waters of the San Diego river as such right is set forth and defined in our former opinion, and if it be further true, as it must be conceded to be, that the interveners are entitled to assert and insist upon no further rights or equities in respect to the use of said waters than those which were possessed by their predecessor in interest, the Cuyamaca Water Company, we are unable to perceive upon what principle of equitable application the public trust in which the city of San Diego holds its prior and paramount right to the use of the waters of said river to the full extent which the needs of the expanding city from time to time require is to be subverted for the simple and only reason that other persons or other communities along the upper reaches of the river, with full knowledge of the aforesaid prior and paramount rights of the plaintiff, may have undertaken, at a considerable expenditure of money, to make a beneficial and profitable use of such waters.

[26] The only remaining question for our determination upon these appeals relates to that portion of the judgment of the trial court wherein it purported to enjoin the defend-

ants and interveners from the doing of certain constructive work in connection with their conservation and diversion of the waters of the San Diego river except in subordination to the prior and paramount rights of the plaintiff therein, and also purporting to restrain the defendants and interveners from the assertion of any claims of right or title in or to the waters of the San Diego river except in subordination to the paramount rights of the plaintiff therein, and save and except in the amounts and to the extent in said judgment specified. In respect to the aforesaid portions of the judgment it is clear that the trial court has gone beyond the scope and issues of the instant action. This, as we have seen and as this court has already decided upon the former proceeding, is an action purely declaratory in character and is one wherein the plaintiff has neither pleaded nor attempted to prove any facts which would entitle it to any other or affirmative relief beyond that of having its prior and paramount right to the use of the waters of the San Diego river established. This being so, the trial court was in error in attempting to give to its determination of this matter any other or further effect than that of a declaratory judgment.

It follows from the foregoing conclusions that the judgment herein must be and is hereby modified so as to read as follows:

It is adjudged, ordered, and decreed that the plaintiff, the city of San Diego, was at the time of the commencement of this action and now is the owner in fee simple of the prior and paramount right to the use of all the water (surface and underground) of the San Diego river, including its tributaries, from its source to its mouth, for the use of said the city of San Diego and of its inhabitants, for all purposes, and that said defendants, and each of said defendants, said cross-complainants, and each of said cross-complainants, and said interveners, and each of said interveners, have not, and no one or more of them have, any estate, right, title, or interest in or to said waters, or any part thereof, or in or to the use of the same, or any right to take or use said waters, or any part thereof, save in subordination and subject to said prior and paramount right of the plaintiff, the city of San Diego, and that the plaintiff is entitled to no other or further relief herein than that afforded by the remedy of the declaratory judgment above set forth, and that the judgment herein, as thus modified, is affirmed, and that each party hereto shall pay its own costs upon these appeals.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.; PRESTON, J.

CITY OF SAN DIEGO v. CUYAMACA WATER CO. et al. (LA MESA, LEMON GROVE & SPRING VALLEY IRR. DIST. et al., Interveners).★

L. A. 9216.

Supreme Court of California.
March 21, 1930.

Rehearing Denied April 17, 1930.

1. Eminent domain ⚷47(1) — Use of land for supplying water to other municipalities did not prevent condemnation by city without showing inconsistent use (Code Civ. Proc. §§ 1240, 1241, as amended).

City was not prevented by virtue of provisions of Code Civ. Proc. §§ 1240, 1241, as amended, from condemning land lying along course of San Diego river on ground that waters flowing through such lands were appropriated to use of certain cities, towns, and water districts, in absence of showing that lands, if condemned, would be put to uses inconsistent with and injuriously affecting use and right to use waters as to their ownership, distribution, and use.

2. Waters and water courses ⚷140 — City of San Diego has prior and paramount right to use of necessary waters of San Diego river.

City of San Diego, as successor of the pueblo of San Diego, has prior and paramount right to use of waters of San Diego river to extent that needs of city and its inhabitants require such use.

3. Eminent domain ⚷28 — City could not be prevented from exercising right of eminent domain over lands forming portion of water course to render available superior right to waters (Code Civ. Proc. §§ 1240, 1241, as amended).

Those possessing and exercising only a subordinate right to use of waters of San Diego river had no right under Code Civ. Proc. §§ 1240, 1241, as amended, to prevent city of San Diego, in the exercise of its superior right to use of waters, from also exercising right of eminent domain over lands forming portion of water course through which waters flow, in order to render available to city its superior right to use of said waters, according to its needs.

4. Appeal and error ⚷1010(2)—Insufficiency of evidence, to justify appellate court's refusal to accept fact finding, must amount to complete absence of substantial supporting evidence.

Insufficiency of evidence, to justify Court of Appeal in refusing to accept and follow a finding of fact, must amount to complete absence of any substantial evidence in support of finding.

★Rehearing denied.

5. New trial ⚷72—Trial judge must use his own judgment as to whether evidence supports verdict.

Trial judge should not grant a new trial, unless clearly satisfied that the verdict is wrong, but must act on his own judgment as to whether it is supported by evidence.

6. Eminent domain ⚷224—Counsel's expressions of dissatisfaction with, and emphasis of defendants' opposition to, condemnation of land, held to justify new trial of issues as to value thereof.

Numerous expressions of dissatisfaction with court's decision that right to condemn land had been established by defendants' counsel in jury's presence and their endeavor to emphasize and impress on jurors' minds fact that land was being taken against defendants' will *held* to justify order granting plaintiff new trial of issues as to value of land on ground that verdict was influenced by such contentions and excessive.

In Bank.

Appeal from Superior Court, Orange County; M. W. Conkling, Judge.

Action by the City of San Diego against the Cuyamaca Water Company, a corporation, and others, in which the La Mesa, Lemon Grove & Spring Valley Irrigation District and others intervened. From a part of the judgment rendered and an order granting plaintiff's motion for new trial of part of the case, defendants and interveners appeal.

Affirmed.

Superseding opinion of District Court of Appeal, 277 P. 339.

Crouch & Sanders, Sweet, Stearns & Forward, and Stearns, Luce & Forward, all of San Diego, for appellants.

Newman Jones, of Riverside, amicus curiæ for appellant Henry W. Coil.

Shelly J. Higgins and Arthur F. H. Wright, both of San Diego, Hunsaker, Britt & Cosgrove, of Los Angeles, and Harry G. Clark and James E. O'Keefe, both of San Diego, for respondent.

Edwin P. Werner, City Atty., W. B. Mathews and S. B. Robinson, all of Los Angeles, amici curiæ for Department of Water and Power, City of Los Angeles.

RICHARDS, J.

This action was commenced on May 20, 1924, in the county of San Diego, by the plaintiff, a municipal corporation, against Cuyamaca Water Company, a corporation, and Cuyamaca Water Company, a copartnership, and also against Ed Fletcher, as the sole surviving member of said copartnership, and one C. F. Stern, the defendants named in the original complaint therein, the purpose of said action being that of the condemnation of a certain tract of land containing approximately 200 acres lying along the course of the San Diego river, about twenty miles above said city, and just below what is known as the "Capitan Grande Indian Reservation," consisting of approximately 17,000 acres of land, of which about 1,100 acres had theretofore been conveyed to the city of San Diego by an act of Congress for the development of a municipal reservoir for the impounding of the waters of the San Diego river for the municipal uses of said city. The tract of land involved in the present action adjoins the larger tract thus acquired, and is also adjacent to certain other lands secured by said city from private owners; and the particular uses to which said land, in conjunction with the other adjacent lands, are to be applied are those of a dam site upon which it is proposed to erect a structure to be known as "El Capitan dam." The river flows through this dam site partly upon or under the lands thus sought to be condemned, and partly upon or under the lands which are thus already under the control of the city. The defendants appeared in the action by separate demurrers, which, being overruled, they answered, setting up numerous defenses to the action hereinafter to be considered in detail, and also embracing much the same matters in the form of cross-complaints. Subsequent thereto, the plaintiff proffered certain important amendments to their original complaint, and the defendants also presented certain amendments to their answers and cross-complaints. In the meantime and on January 25, 1925, La Mesa Lemon Grove and Spring Valley Irrigation District, a corporation, caused itself to be made a party to the action, alleging that it had acquired an interest in the properties involved in the litigation by virtue of the fact that shortly before the institution of the action it had obtained from the Cuyamaca Water Company, a copartnership, an option to purchase all of the property of said copartnership, including the particular tract of land in controversy, and that subsequent to the date of the institution of this action it had complied with the terms of said option, which had thereby become a contract of purchase and sale of said properties between itself and said copartnership, and was therefore entitled to urge on its own behalf numerous defenses to said action to be hereafter considered. When these various pleadings, original and amended, were finally filed and the issues thus made up, the action was transferred to the county of Orange for trial, and was there brought to trial upon June 15, 1925. The trial court properly considered the issues in the action as of a twofold nature, the first involving questions relative to the right and neces-

sity for the condemnation sought by the municipality, and second as to the damages to which the defendant would be entitled in the event of such condemnation. The first of these issues was to be determined by the court, the second by a jury, which was accordingly impaneled and sworn. In the meantime the trial court proceeded with the trial of the issues to be determined without a jury, and, having determined these issues in the plaintiff's favor, the trial of the cause upon the issues of damages was proceeded with before the jury, which after a long trial lasting until August 9, 1925, returned a verdict in favor of the defendants, fixing the damages which the defendants would sustain as a result of the condemnation of said lands at the sum of $600,000. The findings of fact and conclusions of law of the court were thereupon signed and filed. Thereafter the plaintiff presented a motion for a new trial upon all the statutory grounds, but particularly stressed therein and upon the hearing thereon that the award of damages by the jury was excessive. The trial court granted the plaintiff's motion for a new trial, chiefly upon the foregoing ground; wherefrom the defendants took and perfected an appeal from the order of the trial court granting a new trial; and also took and perfected an appeal from that portion of the judgment of the trial court determining that the plaintiff was entitled to condemn the lands in question or any portion thereof. These appeals are presented to this court upon a bill of exceptions prepared and settled subsequent to the taking thereof. The cause upon these appeals was transferred to the jurisdiction of the District Court of Appeal, and upon the transfer thereof a motion was therein made to dismiss that portion thereof which had relation to the part of the judgment appealed from, and which motion was denied by said court. City of San Diego v. Cuyamaca Water Co. et al., 80 Cal. App. 599, 251 P. 341. Thereafter the cause upon its merits was, after decision in said court, transferred to this court for hearing and determination. We may dispose of the foregoing phase of the case by stating that, whether or not we are in accord with all that is stated by said court in its opinion therein, we agree with its order denying said motion to dismiss said appeals, preferring to decide the matters involved in these appeals upon the merits thereof.

In the determination of these appeals upon their merits we shall first consider and dispose of the appellants' contentions made upon their appeal from the portions of the judgments complained of. In their several answers and affirmative pleadings herein the defendants have consistently asserted that the plaintiff, as a municipal corporation, is not as a matter of law entitled to maintain this or any action for the condemnation of the particular lands and properties sought to be taken and applied to the municipal uses through the medium of a condemnation proceeding, for the reason that there are certain statutory provisions in the codes of this state which have application to the instant situation, and which prohibit the plaintiff from the institution and maintenance of this form of action. In support of this contention the defendants have pleaded and undertaken to establish the fact that the lands affected by this proceeding, including the waters of the San Diego river which flow through said lands, form and have long formed an integral portion of the properties of the Cuyamaca Water Company, and as such have for a long time prior to the inception of this action been and still are actually appropriated to the use of certain cities, towns, and water districts other than the plaintiff herein, and particularly to the use of the La Mesa Lemon Grove and Spring Valley Irrigation District, which, as we have seen, has made itself one of the defendants herein. The statutory provisions upon which these defendants and appellants thus rely are those found in certain amendments to the Code of Civil Procedure adopted in the year 1915, the special provisions of which thus relied upon herein reading as follows: "But property appropriated to the use of any county, city and county, incorporated city or town or municipal water district, may not be taken by any other county, city and county, incorporated city or town, or municipal water district, while such property is so appropriated and used for the public purposes for which it has been so appropriated." Code Civ. Proc. § 1240. Whether or not the defendant herein, Cuyamaca Water Company, a copartnership, or the members thereof, or either or any of them, have ever been or now are entitled to claim and be accorded the benefit and application of the foregoing statutory provision in respect to the appropriation and uses which during past years have been by them or either or any of them made of the waters of the San Diego river, or of lands along its course, depends upon an involved condition of mingled law and fact, fully exploited during the long trial of the cause before the court and the jury. We do not deem it necessary upon the record as presented in these appeals to determine the primary legal problem thus presented and thus insistently urged by the appellants herein, which is as to the right, under the foregoing amendment to the statutory law of eminent domain, possessed by a purely private owner of water, whether static or flowing in a stream, and of the land upon which it stands, as in a reservoir or over or through which it flows, as in a stream, to resist condemnation proceedings undertaken by a municipality or other public body having for their purpose the acquisition and application of such lands or waters for public use, based solely upon the ground that the aforesaid

lands or waters or both have by such private owner been devoted to another public use. We are of the opinion that upon both the facts of this case as developed by the evidence and found by the trial court the foregoing problem is not herein presented for our solution. The facts of this case, as thus shown by the evidence, may be briefly stated as follows: In about the year 1914 the city of San Diego entered definitely upon the project of creating a vast reservoir and sufficient dam for the impounding of the waters of the San Diego river, both normal and torrential, at and above a gorge along the course of said river and being about twenty miles above said city, through the comparatively narrow confines of which the water of the river makes its exit after passing over the lands of El Capitan Grande Indian Reservation. It accordingly in that year made application to Congress for an appropriate grant of about 1,100 acres of the lands of said reservation for use as a municipal reservoir. After prolonged hearings upon such application, which was staunchly, not to say passionately, resisted, by and on behalf of the Cuyamaca Water Company through its most active and aggressive member, Mr. Fletcher, and also by and on behalf of the interveners herein, the United States government finally determined to make said grant, and through its act of Congress authorized the city of San Diego to acquire such lands by a condemnation proceeding against the Indians of such reservation, which proceeding, being instituted in accordance with the terms of said act, resulted in the acquisition by said city of the aforesaid acreage of land within said reservation for the purposes of creating thereon such reservoir. In the meantime the city acquired by purchase from private owners certain other and adjacent lands of such extent and location that shortly before the date of the institution of the present action it had become the owner of all the lands both above and within said gorge necessary to render feasible its proposed creation of said reservoir and dam, excepting only that body of land lying within and about said gorge which was owned by the Cuyamaca Water Company or by Mr. Fletcher, the active and only surviving member of said firm. This body of land, composing several hundred acres, had been acquired by Mr. Fletcher or his company in the year 1914, about the time when the activities of the city of San Diego for the eventual creation of El Capitan reservoir and dam site had their inception. The land in question does not occupy the entire width of the gorge, nor does it completely contain the stream bed of the San Diego river. The consequence of this situation was that neither the city of San Diego nor the Cuyamaca Water Company could construct a dam across said gorge adequate to impound the downflow of said river at that point without the concurrence of the other, or without the exercise of the right of eminent domain on the part of said city over the said lands and properties of the defendant company, or of Mr. Fletcher, if it should appear that he was the individual owner of said tract of land. In the meantime the Cuyamaca Water Company had been making several if not separate uses of said land, the first of which was that in about the year 1914 it had caused the erection of a pumping plant in the bed of said river and upon its said lands and for a time had extracted a considerable amount of water from the stream, which it had poured into its ditches for the supply of its lower consumers, among which were numbered several municipalities and water-using districts, and among the latter the interveners herein. About nine years prior to the commencement of the present action, however, a torrential downflow of the river had destroyed said that portion of the bed of the river been, rebuilt, nor have the waters flowing through pumping plant and the same has never been since the destruction of said plant, extracted or appropriated or applied to the uses of the Cuyamaca Water Company or of its public or private customers occupying lower areas. The second uses which the Cuyamaca Water Company has been making of said tract of land since its acquisition, and is still making of such portion thereof as is required for such uses, is that of conveying across it by means of ditches the waters of the San Diego river and its tributaries which said company has been appropriating and claiming the right to appropriate for a goodly number of years, and in the extraction and impounding of which it has expended large sums of money in a distribution system by means of which it brings such of these waters as it has extracted and impounded from distances many miles up said river down to the gorge, in a portion of which the lands involved in this action are located, and thence across said lands to lower levels in the course of its ministry to the municipalities, water districts, and individual users of water who are its customers therein. When the present action was instituted the plaintiff herein did not in its original complaint take any note or make any provision looking to the continued utilization of said tract of land for the aforesaid purposes; but, in its amended complaint herein, the plaintiff undertook to set forth affirmatively and in detail the particular use which the original defendants herein were making of the portion of said land occupied by its ditches and other appliances for the conveyance of said upper waters across said land, and in so doing so far modified its demand for the condemnation of said land for its own public uses as to concede and in fact establish in the said defendants the full right and easement in and to the use of the portion of said tract then being occupied and util-

ized for the foregoing purposes, the same to be and to remain unaffected by the construction and use of the proposed dam to be placed across said gorge, in the event of such condemnation. It is important to take note of the plaintiff's precise averments in that regard. They read as follows:

"Reserving to the defendants and to their successors in interest the easement and right:

"(1) To conduct over and across said land hereinabove described by means of the flume or conduit now located thereon, which said flume or conduit is located on that particular portion of said land more particularly described as follows: A strip of land twenty (20) feet wide, being ten (10) feet on each side of the following described center line to-wit: [Describing it] any water which said defendants, or either or any of them may now or hereafter be entitled to carry or conduct across said land, together with the right to enlarge and repair said flume or conduit, or to relocate the same in a manner not inconsistent with the use of said lands by plaintiff for reservoir purposes. * * *

"(5) Further reserving to said defendants and to each of said defendants, and their successors in interest, the right of access to said property for all purposes hereinabove stated as reserved to said defendants and to each and every of said defendants."

The evidence introduced upon the trial of the action was such as to fully support the aforesaid averments in the plaintiff's amendment to its complaint and also to fully justify the findings of the trial court precisely defining the aforesaid uses which the defendants have been and are making of that portion of the tract of land to be considered, and not only establishing the same, but also declaring that the taking of said land, subject to such uses and the erection of the proposed dam thereon and upon the lands which are already owned by the plaintiff, will not interfere with nor be in anywise inconsistent with the continuance of such easements and uses. As to the claim of the defendants to the effect that by the construction of the pumping plant already noted in the bed of said river and the extraction thereby of certain quantites of water from the river at said point for allocation to the uses of its lower customers, the trial court made a finding to the effect that the defendants had lost whatever right they might otherwise have gained, through the destruction of said plant by torrential floods and by the abandonment of such use for the period of nine years following such destruction and immediately preceding the date of the institution of the present action. But, even if in this respect the trial court could be held to have been in error, it would seem that whatever remaining rights the defendants may still retain in the matter of the re-establishment of said pumping plant, and in the use thereof, these have been fully protected and reserved to them, and hence also to the interveners herein by the further concessions found in the plaintiff's amended complaint, and wherein the defendants are to retain "the right to withdraw and take from said lands by pumps or otherwise any water which the defendants, or either or any of them, now have the right to withdraw and take from said land." With respect to whatever rights the defendants may have acquired in the waters of the San Diego river by virtue of the diversion thereof at the point where said original pumping plant was located, and by the supply thereof from that source to their municipal and other customers below said point of diversion, and whatever rights they may still retain therein, and whatever basis the possession of such rights and the use of the lands in question for their exercise might furnish for the claim of the defendants and interveners herein for their present claim that the plaintiff is forbidden to condemn said lands under the aforementioned amendment to the eminent domain provisions of the Code of Civil Procedure, will be reserved for discussion at a later stage in the present opinion.

[1] We are thus, as to the facts of this case, brought to the point of considering whether the plaintiff herein, as a municipal corporation, is in either fact or law forbidden to institute and maintain this action for the condemnation for its public uses of the lands sought herein to be condemned by virtue of the provisions of said amendment to the Code of Civil Procedure. The particular lands and the particular portion thereof and the particular rights and uses therein which the plaintiff seeks to acquire by the instant proceeding in eminent domain bear no such relation, under the facts as found by the trial court, to those other lands and properties of the defendants, including water rights they may possess, or claim, or be exercising therein, and in relation to any public or private consumers, as to entitle these defendants to successfully maintain that the lands and properties herein sought to be taken have been or are being "appropriated to the use of any * * * incorporated city or town or municipal water district" so as to be exempted from the exercise of the right of eminent domain over such lands by the plaintiff herein, a municipal corporation, in its effort to so acquire the same for public use. The tract of land embracing about 200 acres, of which the larger portion is sought to be taken, and the remainder of which is sterile, unused, and of little value, is separate and remote from any other lands of these defendants, the main holdings of which lie many miles further up the river and are directly utilized in the appropriation, diversion, storage, and distribution of those waters of the river and its tributaries which these defendants are en-

gaged in transportation and disposing of to its consumers by means of the ditches and appliances above referred to, the only connection by way of either contact or use between these entirely separate land holdings being the long line of said ditch. The only other lands having any proximity to the tract in controversy consists of a body of land lying about five miles down the river, occupied by the El Monte pumping plant, and to which the relation of the defendants herein is that of a riparian owner. This latter tract bears no other relation to the lands to be taken than that the waters of the river which escape from the defendants' upstream appropriations and reach and pass through El Capitan dam site flow down to the El Monte location in the natural downflow of the river. It would seem to be sufficiently obvious that as to the defendants' ditch and appliances across the lands here sought to be taken and as to the waters which flow therein in the course of their distribution to public and private consumers thereof upon the lower levels between these lands and the city of San Diego, neither these defendants nor the said users of said waters can have or claim any right to rely upon the inhibitive provisions of the Code of Civil Procedure, above quoted, for the purpose of defeating the present action, since, as to each and all of them, the taking of the portion of said tract of land herein sought to be condemned, and under the conditions allowing such condemnation, will not in the slightest degree affect or interfere with or in anywise diminish the full use of said waters, and of the ditch or ditches by which they are and are to be delivered to such use, or in any way involve or call in question the asserted right of these defendants, or of their public or private consumers, or of the interveners herein, to the ownership and use of said waters flowing and to flow in said ditch or any part or portion thereof. In the utter absence of any showing herein that said lands, if so condemned, will be put to uses inconsistent with or injuriously affecting the use and right to use the said ditch and the waters flowing therein, as to their ownership, distribution, or use, there can exist no possible ground for the application of the aforesaid provisions of the Code of Civil Procedure to the proposed condemnation of the land in question, in so far as the rights of these defendants and their consumers or the interveners herein to the use of said ditch and of the waters flowing and to flow therein are concerned.

[2, 3] From the foregoing conclusion we pass to a consideration of whatever rights these defendants and these interveners, or either or any of them, claim to possess by reason of whatever uses have in the past been made or are now being made of the waters of the San Diego river which reach and pass over, through, or under the particular lands herein sought to be taken. These waters, as we have seen, are in no way connected with the waters which arrive at and pass over said lands through said ditch, but, on the contrary, are waters which, escaping appropriation on higher levels, flow down the river to the point of their proposed collection and impounding by means of the El Capitan reservoir, to be created by the proposed dam. Assuming for the sake of argument that the question of the defendants' right to resume the extraction and use of these waters as they flow through said gorge by means of pumps or other devices has not been set at rest by the findings of the trial court, relative to their abandonment of such use, or even by the concession of the plaintiff that whatever right these defendants may have to resume such use they may still exercise, notwithstanding the taking and subjection of said lands to dam site uses, there would still remain the question as to what rights, if any, these defendants or their consumers or successors have or could have in these particular waters which is so far superior to the rights of this plaintiff therein as to operate to prevent the condemnation of these lands in order to the utilization of the waters of the San Diego river flowing therein for municipal purposes by the city of San Diego. As to these particular waters, it will be seen that the rights of these defendants, if any, are riparian and are derived solely from their ownership of the land through which they flow. In the case of City of Los Angeles v. Pomeroy, 124 Cal. 597 (57 P. 585, et seq., it was held by this court that the city of Los Angeles, by virtue of its successorship to the rights and properties of the pueblo of Los Angeles, had a prior and paramount right to such of the waters of the Los Angeles river as the expanding needs of such city required, and that the defendants in that action, as riparian owners along the upper course of said stream, could not assert their subordinated riparian rights in and to said waters so as to defeat the right of said city to condemn their lands in order to accomplish the subjection of said waters to the public needs and uses of said city. In the case of City of San Diego v. Cuyamaca Water Co. et al., 287 P. 475, this day decided, this court has given full application of the doctrine announced in that case in so far as it related to the prior and paramount right of a city, deriving its origin from a pueblo, to the waters of a stream flowing through it, according to its growing needs. It follows from the law, as thus declared, that the city of San Diego, as plaintiff herein, as the successor of the pueblo of San Diego, has had at all times and still has a prior and paramount right to the use of the waters of the San Diego river, particularly involved in the present discussion, whenever, and to the extent

that, the needs of the city and its inhabitants require such use. In the instant proceeding the city of San Diego, by the formal resolution of its governing body, declared that the necessity had arrived for the impounding and use of these particular waters through the acquisition of El Capitan reservoir and the condemnation of the lands herein sought for the construction of a retaining dam. The findings of the trial court herein as to the facts support said resolution and reassert the present needs of the city for such waters and for the condemnation of said lands in order to the exercise of the prior and paramount rights of the city to the present use of said waters. In view of the law, as heretofore declared, and again and most recently reasserted, and of the facts as thus found to exist by the trial court, it is impossible to conceive how these defendants, or their successors, or even their consumers, possessing and exercising only a subordinated right to the use of these particular waters, could either possess or, under the aforesaid amendment to the Code of Civil Procedure, be accorded the right to prevent the plaintiff, in the exercise of its superior right to the use of these waters, from also exercising the right of eminent domain over these lands forming, as they do, a portion of the water course through which these waters flow in order to render available to said city its aforesaid superior right to the use of said waters, according to its needs. The foregoing reasoning and conclusions are also susceptible of full application to whatever rights and claims these defendants and their successors assert to that portion of the waters of the San Diego river which, having passed through the gorge wherein lie the lands sought to be taken, flow downward some five miles or so to those lower lands of these parties, upon which is located El Monte pumping plant, the purpose of which is to extract said waters. As to these waters, also, the rights of the defendants and their successors in ownership and use are riparian only, and hence are subject to the same conditions as those already defined affecting these same waters at the proposed dam site. It is obvious that the amended sections of the Code of Civil Procedure were never intended to have application to such a situation as is thus in both instances presented, but that even if given the fullest effect of which the language of said amendment is susceptible could only have been designed to prevent one municipality or water district from seeking to acquire by condemnation and apply to new and other public uses the property of another municipality or water district which had already been appropriated and was being actually put by the latter to a public use, which, in point of right, was equal or prior to that of the municipality or water district seeking such condemnation. The case of Mono Power Co. v. City of Los Angeles (C. C. A.) 284 F. 784, upon which the defendants, and particularly the interveners herein, most strongly rely, is a case to which the foregoing statement as to the proper interpretation of the said amendments to sections 1240 and 1241 of the Code of Civil Procedure has precise application. That was a case wherein the plaintiffs in the court below, city of Los Angeles et al., were seeking to condemn certain land, water rights, and rights of way, of which the Southern Sierras Power Company et al., were the owners, and which lands, water rights, and rights of way were at the time of the institution of said action in the actual use by said defendants of supplying electric energy to certain incorporated cities and towns in the counties of Mono, Inyo, Kern, San Bernardino, Riverside, and Imperial for public or municipal uses. The court in that case held that the city of Los Angeles, in order to install and enter upon a municipal use of its own, was not entitled to condemn and apply to such public use on its own account properties which had already been wholly appropriated to the public use of some other county, municipality, incorporated city and town, and the inhabitants thereof. This, however, is, as we have seen, not such a case, but, on the contrary, is a case to which, under our interpretation of the scope and intent of the aforesaid amendments to the Code of Civil Procedure, that case has no application.

We have thus, we think, disposed of every vital question presented upon the appeal from that portion of the judgment herein from which the appellants have prosecuted a separate appeal. We now address ourselves to their appeal from the order of the trial court granting a new trial, as to the issues which were submitted to a jury, and as to which the jury returned a verdict in the defendants' favor, fixing their damages, by virtue of the taking of the property involved in this condemnation, in round numbers at the sum of $600,000. The trial court set aside this verdict as excessive, and in upholding its order in that regard we cannot do so more aptly than by adopting the language of the District Court of Appeal in and for the Second Appellate District, Division 1, to which these appeals were in the first instance presented, and which court in affirming said order did so in the following appropriate words:

[4-6] "The trial court held, in effect, that the evidence was insufficient to justify the verdict; and more particularly that the verdict was so excessive that it appeared to have been given under the influence of passion and prejudice. Insufficiency of the evidence, before it will justify a court of appeal in refusing to accept and follow a finding of fact, must amount to a complete absence of any substantial evidence in support

of the finding. A common statement of the rule on appeal is that if the evidence is conflicting, the finding will not be disturbed. But it is not so with a trial court in passing upon a motion for a new trial. The trial judge should not grant a new trial unless he is clearly satisfied that the verdict or other decision is wrong. 'But in considering the question upon the motion he must act upon his own judgment as to the effect of the evidence. The parties are entitled to the judgment of the jury in rendering a verdict, in the first instance; but upon a motion for a new trial they are equally entitled to the independent judgment of the judge as to whether such verdict is supported by the evidence.' Green v. Soule, 145 Cal. 96, 103, 78 P. 337, 340. In the case at bar there was a wide diversity of opinion of witnesses concerning the value of the land sought to be taken. The value stated in the verdict, though less than that shown by the testimony of some witnesses, is many times the value given by other witnesses. Counsel for defendants were deeply dissatisfied with the announcement of the intention of the court to decide that the right to condemn the land had been established. To such decision they had the right of exception, and the right to have the matter reviewed upon appeal, but upon that issue they had no right of appeal to the jury. Nevertheless, on numerous occasions, and apparently with a studied intention, they expressed this dissatisfaction in the presence of the jury, and endeavored to emphasize and impress upon the minds of the jurors the fact that the land was being taken away from the defendants against the will and contrary to the desire of the defendants. If this overpressed insistence of the defendants that the court was erroneously permitting their land to be taken away from them caused the jury to increase the amount of the compensation award and to raise it above the value which normally would have resulted from the testimony of the witnesses, this easily might have produced an excessive verdict. For the standard of measurement of value of the land about to be taken did not in any way depend upon the fact that the defendants were objecting to the condemnation. The plaintiff was entitled to have the actual market value established in accordance with law, unaffected by any belief or suggestion that the property was being wrongfully condemned and taken. It is apparent that the court in ruling on the motion for a new trial had reached the conclusion that the jurors, in arriving at the amount of compensation given by their verdict, had improperly allowed themselves to be influenced by these contentions of the defendants, and that the verdict so obtained was excessive. We are of the opinion that the order granting a new trial of the issues tried by jury should be affirmed."

In the determination of these appeals we have given careful consideration to the very elaborate briefs and arguments of counsel for the respective parties and of amici curiæ, and to the many points made and authorities cited therein, and such of these as have not been noted or commented upon in detail in this opinion are, we think, fully covered and disposed of by our discussion herein of the vital points involved in these appeals.

It is ordered that the portion of the judgment appealed from be and the same is hereby affirmed, and that the order of the trial court granting a new trial as to the issues which were committed to the jury is also hereby affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.

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209 Cal. 343

WILLIAMSON v. EGAN et al.★

S. F. 12579.

Supreme Court of California.

April 21, 1930.

Rehearing Denied May 19, 1930.

1. Municipal corporations ⟹348.

Action to recover rental value of horses and mules against surety on public contractor's bond *held* maintainable before expiration of 90 days following filing of claim (Public Works Act 1919, § 2).

Public Works Act (St. 1919, p. 487) requires filing of verified statement of claim against contractor on public works bond, and provides that at any time within 90 days following expiration of period last mentioned claimant may commence action against surety on bond. Surety when sued on bond contended that foregoing section fixes not only a time after which no suit can be brought, but also time before which no action can be maintained.

2. Appeal and error ⟹1041(2).

Error, if any, in permitting amendment to complaint *held* not to affect merits nor warrant reversal, where recovery was allowed under original complaint.

3. Municipal corporations ⟹347(1).

Provisions of public contractor's bond required by statute should be liberally construed to effectuate purpose (Public Works Act 1919).

★Rehearing denied.

4. Municipal corporations ⟹347(1).

Surety on public contractor's bond *held* liable for rental value of mules and horses without reduction for nonuser due to rain or unfavorable conditions (Public Works Act 1919).

Bond covering construction of municipal reservoir given pursuant to Public Works Act (St. 1919, p. 487) obligated surety to pay for labor, materials, etc., used in, upon, for, or about performance of work. Surety contended that it was liable only for rental value of teams and mules during time they were actually used on work of improvement. It was not shown that contract for rental was unreasonable, nor that it did not represent the usual terms and charge for such rental.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by W. L. Williamson against Andrew Egan, doing business under the name and style of the Egan Construction Company, and another. Judgment for plaintiff, and defendants appeal.

Modified and, as modified, affirmed.

H. W. B. Smith, Thomas, Beedy, and Presley & Paramore, all of San Francisco, for appellants.

Sterling Carr and Carr & Guiler, all of San Francisco, for respondent.

LANGDON, J.

This is an appeal by the defendants from a judgment against them in an action to recover rental value of teams of horses and mules used in the construction of certain public work.

The defendant Egan was the contractor, and the United States Fidelity & Guaranty Company was the surety upon his statutory bond.

The findings of fact state the case shown by the record and are, substantially, as follows: That on or about the 24th day of October, 1923, defendant Egan made and entered into a contract with the city of Santa Cruz, by the terms of which said defendant was to construct a reservoir on Bay street in the city of Santa Cruz, state of California; that on the same date the defendant surety company executed and delivered a certain bond in the amount of $73,537 by which it became bound unto all materialmen, etc., and especially to all persons, companies, or corporations renting or hiring teams or implements or machinery, for or contributing to said work to be done and whose claim has not been paid by the contractor, in the amount of the bond. The bond required, as a condition of liability of the surety, that all claims for materials, etc., should be filed as required by the statute in such cases made and provided, and that in the event of action being brought, a reasonable attorneys' fee should be charged as costs.

Between November 2, 1923, and March 28, 1924, inclusive, plaintiff furnished and rented 86 head of mules and horses, with harness and equipment, consisting of enumerated plows and scrapers to defendant Egan and said Egan took and hired said mules, horses, harness, and equipment, all at the special instance and request of said Egan for use in connection with said work and during all of said times said mules, horses, harness, and equipment were used in, on, and about said work; that by the terms of the agreement between plaintiff and the said defendant Egan for the renting of said mules, horses, harness, and equipment, there became due the plaintiff the following sums for the following periods and the following items:

For the period November 3, 1923, to December 3, 1923, for mules, horses and harness hired, $507.50.

For the same period, rent of a disc plow, $30.

For the same period, rent of railroad plow, $15.

For the period December 3, 1923, to January 3, 1924, for mules, horses and harness hired, $1,075.

For the same period, rent of 4 slip scrapers, $22.

For the period January 3, 1924, to February 3, 1924, for mules, horses and harness hired, $1,075.

For the period February 3, 1924, to March 3, 1924, for mules, horses and harness hired, $1,075.

For the period March 3, 1924, to March 28, 1924, for mules, horses and harness hired, $859.20.

The trial court also found that defendant Egan promised and agreed to pay the freight upon the mules, horses, and equipment from Santa Cruz to Lathrop, Cal., and to load the same upon the cars, and that said defendant failed to do so and plaintiff was thereby compelled to do said work and pay said freight and that the amount expended therefor was $268; that all of these amounts were properly chargeable against the defendant Egan and the defendant surety company.

It was found that by the terms of said agreement, defendant Egan promised to pay for any damage or injury to said mules or horses, and that in the course of said work and through the negligence and carelessness of said Egan, a horse and a mule were so in-

jured as to be rendered worthless and that their value, in the aggregate, was $225; that defendants are entitled to certain credits for articles appropriated by plaintiff and aggregating in value $265; that all the charges of plaintiff for the rental and use of said mules, horses, harness, and equipment as set forth in the findings as due from defendants to plaintiff were the reasonable, proper, and going charges for such character and kind of mules, horses, harness, and equipment furnished by plaintiff and used upon said work, and for the character of work to be done and the use to be made of said mules, horses, harness, and equipment; that by agreement of plaintiff and defendant Egan, plaintiff was not to be paid for said mules and horses during the period from November 3, 1923, to December 3, 1923, when the said mules and horses were not working on account of rain or due to rainy weather; that due to said rain and rainy weather said mules and horses did not work for fifteen days of said period, and by reason thereof plaintiff is entitled to one-half of the full amount of $12.50 per head per month for said 86 head of mules and horses, with their harness.

That upon the 27th day of March, 1924, plaintiff filed with said city of Santa Cruz and its city clerk and commissioner a verified statement of his said claims against defendants herein, together with a statement that the same had not been paid, and in all respects complied with the provisions of the act of the Legislature approved May 10, 1919 (St. 1919, p. 487), and entitled "An act to secure the payment of the claims of persons employed by contractors upon public works, and the claims of persons who furnish materials, supplies, teams, implements or machinery used or consumed by such contractors in the performance of such works, and prescribing the duties of certain public officers with respect thereto." That at the proper time and in the proper manner, plaintiff did and performed all things and acts required by the provisions of said act of the Legislature and did all things and acts and filed all notices and other documents necessary to preserve and protect his claims against defendants herein, and each of them.

That it is true that at the time of the commencement of this action, the work on the original contract entered into between defendant Egan and the city of Santa Cruz had not been completed, nor at that time had said work of improvement been completed, nor had there been at said time cessation from labor on said contract and work of improvement for thirty days.

Upon these findings, judgment was given against the defendants.

[1] It is contended on appeal, first, that plaintiff's action was prematurely brought. The following facts are undisputed: The contract between Egan and the city of Santa Cruz was dated October 24, 1923. Egan commenced work at once. He abandoned work on or about February 23, 1924. On February 28, 1924, the city council adopted a resolution declaring that Egan had abandoned work. Within thirty days from the date of abandonment, Egan's surety caused the work to be resumed and completed. Formal acceptance of completion was signified by the city council by the adoption of a resolution to that effect on December 4, 1924. Plaintiff took possession of the rented property and removed it from the work on or about March 28, 1924, and on that date he filed with the city of Santa Cruz a verified statement of his claim against Egan and he commenced the present suit on May 26, 1924. It is the appellant's contention that under the provisions of the Public Works Act of 1919 (St. 1919, p. 487), plaintiff had no right to commence suit against appellants on their bond until after the expiration of thirty days following the completion of the work of improvement, i. e., December 4, 1924. Section 2 of the act in question provides, in part: "Any materialman, person * * * renting or hiring teams * * * and whose claim has not been paid by the contractor * * * may at any time prior to the expiration of the period within which claims of lien must be filed for record, as prescribed by the provisions of section 1187 of the Code of Civil Procedure, file * * * a verified statement of such claims, together with a statement that the same have not been paid. *At any time within ninety days following the expiration of the period last mentioned, the person, company or corporation filing the same may commence an action* against the surety or sureties on the bond, specified and required in section one hereof." Appellants concede that the claim was filed in time, but contend, in effect, that the foregoing language of section 2 of the act fixes not only a date after which suit cannot be brought, but also a date before which no action can be maintained. While this precise question seems not to have been decided in this state under the act of 1919, it was decided adversely to appellants' contention with reference to the similar act of 1897 (St. 1897, p. 201). French v. Powell, 135 Cal. 636, 68 P. 92, 94. In the case just cited it was held: "When time is spoken of, any act is within the time named that does not extend beyond it."

We feel constrained to hold upon principle and authority that the language "within ninety days following the expiration of the period" (for filing claims) means not beyond the ninetieth day after such period. It has been held that "within ten days after service" of a commissioner's report, means before, or less than ten days after service (Chicago, etc., Ry. Co. v. Eubanks, 32 Mo. App. 184); that a waiver "at any time within six months after the

probate" of a will includes a waiver made two months before probate (Atherton v. Corliss, 101 Mass. 40); that a certificate filed before a vessel's departure is "within four days from the time of the vessel's departure from port" (Young v. The Orpheus, 119 Mass. 179); that a claim filed prior to a declaration of insolvency is filed "within nine months after declaration of insolvency" (Levert v. Read, 54 Ala. 529); that "within thirty days from the time such work is completed" means "before completion, or not more than 30 days afterwards" (French v. Powell, 135 Cal. 636, 641, 68 P. 92; Hub Hardware Co. v. Ætna Co., 178 Cal. 264, 269, 173 P. 81).

[2] It is also contended that the amendment to plaintiff's complaint was filed too late. The work having been completed on December 4, 1924, the last day for filing suits against the surety was April 5, 1925, and the amendment was not filed until November 30, 1925. It is asserted that the purported amendment was in fact not such, but was the statement of a new cause of action. The original complaint was for the contract price of the teams and the amendment sought to add a count for the reasonable value of the rented equipment. However, recovery was allowed to the plaintiff upon the cause of action stated in the original complaint for the contract price, and the error, if any, in permitting the amendment would not affect the merits of the case nor warrant a reversal of the judgment.

Appellants contend that the judgment for rental against both defendants is excessive in the amount of $859.20, because in the itemized statement herein set forth as constituting the elements of the judgment is included that sum as rental from March 3, 1924, to March 28, 1924, after the work had been abandoned by Egan, and that rental for this period and this amount was not asked in the complaint. In other words, it is contended that the judgment is $859.20 in excess of the amount prayed for in the complaint. A discussion of this matter is unnecessary, because plaintiff concedes the correctness of this objection and the judgment must be reduced accordingly.

[3, 4] It is contended, finally, that as against the defendant surety company the judgment is erroneous because it makes no allowance in rental for the time the teams might not have worked on the job due to rain or unfavorable conditions; that the surety is liable only for rental during the time the teams were actually used on the work of improvement. This argument is predicated upon the language of the bond obligating the surety to pay for labor, materials, etc., "used in, upon, for or about the performance of the work." We are not disposed to give so narrow a construction to the terms of the bond. The plaintiff did not agree to permit his teams to be present on the job, ready to work at any and all times, but without compensation in the event they could not work for a day or more or for a fractional part of a day because of conditions over which plaintiff had no control. It is not shown that the contract for rental was unreasonable, nor that it did not represent the usual terms and charge for such rental. Delays due to the weather were a part of the surrounding circumstances which entered into the cost of the improvement. The bond sued upon here is one required by statute and its provisions are to be liberally construed to effectuate its purpose. Continental National Bank v. Republic Cas. Co., 202 Cal. 586, 589, 262 P. 300.

The judgment against each defendant is modified by reducing the same in the sum of $859.20, and as so modified the judgment appealed from is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

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105 Cal. App. 401

McKINNEY v. WRIGHT et al.

Civ. 4058.

District Court of Appeal, Third District, California.

April 28, 1930.

1. Fraudulent conveyances ⟹299(11).

Evidence sustained finding that there was no consideration for conveyance from husband to wife and subsequent conveyance to daughter.

2. Fraudulent conveyances ⟹206(2).

Liability for injuries by reason of automobile accident arose, as respected right to set aside conveyance of property, immediately at time of accident.

3. Fraudulent conveyances ⟹215.

Transfers to wife for purpose of defeating recovery on judgment for injuries in automobile accident were void (Civ. Code, § 3439).

Appeal from Superior Court, Orange County; E. J. Marks, Judge.

Action by B. Z. McKinney, as trustee of the estate of Thomas Wright, bankrupt, against Sarah E. Wright and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

A. J. Bledsoe, of San Francisco, and Oliver O. Clark, of Los Angeles, for appellants.

Clyde C. Downing and Scarborough, Forgy & Reinhaus, all of Santa Ana, for respondent.

PLUMMER, J.

The plaintiff had judgment in an action brought by him as trustee of the estate of Thomas Wright, bankrupt, against Sarah E. Wright, wife of said bankrupt, and Edith Lillian Salter, daughter of said bankrupt, in an action prosecuted to set aside conveyances: First, one made by the bankrupt to Sarah E. Wright, and, second, one made by Sarah E. Wright to Edith Lillian Salter. From this judgment the defendants appeal.

The real estate is described in the complaint.

On the 19th day of January, 1925, the minor son of Thomas Wright and Sarah E. Wright, to wit, Thomas Wright, Jr., was the driver of an automobile which was involved in an accident wherein Aurilla A. Edson and Roxanna J. Archer were injured. Thomas Wright, Sr., had, prior to the accident, signed the application for a driver's license in favor of his said minor son, Thomas Wright, Jr.

On the 25th day of May, 1925, Thomas Wright and Sarah E. Wright, his wife, one of the defendants herein, by deed, purported to convey a one-half interest in the property described in the complaint to Sarah E. Wright. On May 11, 1926, judgment was rendered in the superior court of Orange county in favor of Aurilla A. Edson against Thomas Wright in the sum of $800 and costs, and on July 21, 1926, judgment was rendered in the superior court of Orange county in favor of Roxanna J. Archer against Thomas Wright for the sum of $3,260. These judgments were based upon injuries sustained in the automobile accident heretofore referred to as occurring on the 19th day of January, 1925, wherein Thomas Wright, Jr., was the driver of one of the automobiles. On the 19th day of July, 1926, Sarah E. Wright, one of the appellants herein, conveyed to Edith Lillian Salter, a daughter of Thomas Wright and Sarah E. Wright, all the property described in the complaint.

On the 11th day of September, 1926, Thomas Wright was adjudged a bankrupt on a petition which listed as his only creditors Aurilla A. Edson and Roxanna J. Archer. On October 12, 1926, the claims of said Aurilla A. Edson and Roxanna J. Archer were allowed by the referee in bankruptcy of the estate of Thomas Wright. Thereafter, the plaintiff in this action, as the trustee in bankruptcy of Thomas Wright, brought this action to set aside the conveyances heretofore referred to.

The court, among other things, found that Thomas Wright and Sarah E. Wright were husband and wife and had been such during all the times mentioned in the action; that Edith Lillian Salter was the daughter of Thomas Wright and Sarah E. Wright. The court also found that on the 19th day of January, 1925, the said Thomas Wright and Sarah E. Wright were joint owners as tenants in common, with the right of survivorship, and were in possession of the real estate described in the complaint; that on the 19th day of January, 1925, the property described in the complaint was all the property, of whatsoever kind or character, owned by the said Thomas Wright. The court further found that on the 25th day of May, 1925, when the conveyance was made purporting to convey the interests of Thomas Wright in and to said real property to his wife, Sarah E. Wright, that Sarah E. Wright had knowledge of the claim for damages of Aurilla A. Edson and Roxanna J. Archer, arising out of the automobile accident occurring on January 19, 1925, and upon which claims judgments were thereafter entered as herein stated; that the conveyance dated May 25, 1925, wherein Thomas Wright and Sarah E. Wright, his wife, purported to convey to Sarah E. Wright all of the right, title, and interest in and to the real property described in the complaint, was without consideration; and that said deed of conveyance was made with the intention, and for the purpose of defrauding the creditors of Thomas Wright, to wit, Aurilla A. Edson and Roxanna J. Archer. The court found also that on May 11, 1926, judgment was entered in favor of Aurilla A. Edson against Thomas Wright for the sum of $800, based upon the automobile accident heretofore referred to; that thereafter and on July 19, 1926, Sarah E. Wright, a married woman, made and delivered a purported deed of conveyance of the real property described in the complaint to Edith Lillian Salter, one of the defendants in this action. The court further found that this deed was made without consideration and was made with the intention to and for the purpose of defrauding the creditors of Thomas Wright, to wit, Aurilla A. Edson and Roxanna J. Archer. The court further found that the defendant Edith Lillian Salter was entitled to remove from the premises described a certain dwelling house estimated to be of the value of about $2,000. The conveyances referred to were directed canceled, and likewise, a purported mortgage on the premises, whereby Edith Lillian Salter purported to mortgage the same in favor of Sarah E. Wright for the sum of $20,000, was ordered canceled, and declared to be of no force or effect. Other facts were found by the court not necessary to be here mentioned.

[1] While the testimony in this case was elicited only from the defendants when called to the witness stand to testify under the provisions of section 2055 of the Code of Civil Procedure, we think it establishes beyond question sufficient basis for the trial court to find that no actual consideration passed from Sarah E. Wright to Thomas Wright for the

conveyance to her of the interest theretofore owned by Thomas Wright in and to the real property described in the complaint, and likewise justified the trial court in holding that no consideration passed from Edith Lillian Salter to Sarah E. Wright for the conveyance by which Sarah E. Wright purported to transfer to her all of said real property. The testimony also shows that Sarah E. Wright and Edith Lillian Salter knew of the automobile accident in which the two judgment creditors of Thomas Wright were injured, where one of the automobiles was driven by the minor son of Thomas Wright and Sarah E. Wright.

The transcript shows that about 1900 Thomas Wright bought a certain piece of property mentioned in the testimony as the "Broadway property" ; that thereafter this property was traded for the property involved in this action. This trade was made some time in the year 1919. That in 1919 the property involved was conveyed to Thomas Wright and Sarah E. Wright as joint tenants, and on the part of Sarah E. Wright it is claimed that the interest of Thomas Wright was conveyed to her in 1925 for and on account of certain moneys loaned by her to Thomas Wright in 1919. The amount so loaned is alleged to be the sum of $2,650, and that Thomas Wright was to pay 8 per cent. interest thereon; that no note was executed by Thomas Wright to Sarah E. Wright, or any written instrument signed or executed by Thomas Wright, evidencing such transaction. An examination, however, of the transcript shows that all of this money, except a possible $600 alleged to have been loaned by Sarah E. Wright to Thomas Wright, came out of the community earnings of Thomas Wright and Sarah E. Wright, his wife, $800 being profit on what was called the "Broadway Property," when the deal was made, $1,200 being claimed as the interest of Sarah E. Wright in the Broadway property, which had been given to her by Thomas Wright, $1,000 profit on the crops raised on the premises alleged to have been given by Sarah E. Wright to her husband, Thomas Wright. The conveyance made by Sarah E. Wright to Edith Lillian Salter purports to have been made for a consideration of $22,000. The facts disclosed, however, show that Edith Lillian Salter and her husband built a dwelling house on the premises involved, valued at the sum of about $2,000, and executed a mortgage for the sum of $20,000. The judgment in the case permits Edith Lillian Salter and her husband to remove the house from the premises.

The defendant Sarah E. Wright testified that she bought the property, or rather bought the interest of Thomas Wright, to protect herself. After referring to the automobile accident in which Sarah E. Wright stated that she knew thereof, we quote the following:

"Q. Mrs. Wright, was there anything said about this action just prior to the time your husband deeded the property to you? A. Why, I knew of it, yes.

"Q. Did you and your husband discuss that in regard to transferring his property to you? A. Well, because of my interest in the property, and because of my separate property, I bought the property to protect my interest.

"Q. When you say 'protect your interest', you mean this present litigation? A. Yes; it is possibly, not probable, not likely, but it might interfere."

The witness then went on to detail how the money was obtained which went into the property, and testifies in relation to the money being loaned by her to her husband in 1919, and that in 1925, after the automobile accident in question, this discussion was had and the property conveyed to her. We do not need to set out the testimony, and content ourselves with the simple statement that a reading of it shows that the trial court was justified in holding that no consideration was paid for any of the transfers involved herein; that practically all of the money alleged to have been loaned by Sarah E. Wright to Thomas Wright were the profits realized upon community property owned by them.

We find nothing in the testimony justifying the contention of appellants that in May, 1925, Thomas Wright, pursuant to an agreement entered into years prior thereto, conveyed his interest in the property involved to Sarah E. Wright for a consideration in the sum of $12,500.

[2] On the part of the appellants it is claimed that the relation of debtor and creditor did not exist at the time of the transfer of the property involved, made by Thomas Wright to Sarah E. Wright, his wife; that while Thomas Wright was liable to respond in damages for any injury occasioned by the negligence of his son in the automobile accident occurring in January, 1925, he was not, at the date of the transfer of the property in question, to wit, in the following month of May of the same year, a debtor of the two women injured in the accident thereafter adjudged to be due to the negligence of Thomas Wright, Jr. This contention appears to be made without having consulted the decisions of the Supreme Court and of this court relative to the date when one becomes liable to respond in damages, and when the law relative to the existence of the relationship of debtor and creditor, finds its inception.

In the case of Allee v. Shay, 92 Cal. App. 749, 268 P. 962, 966, this court had occasion to examine quite thoroughly, and set forth at length, the authorities bearing upon such relationship. That case involved circumstances very similar to the ones we are now considering. A man by the name of Kienzle was the owner of an automobile, and while driving the

same on January 4, 1925, he injured a boy by the name of Lee E. West. Some time after the date of the injury, and before judgment had been entered on account of the injury just referred to, Kienzle disposed of all of his property. Judgment was thereafter entered in favor of West, execution was issued on the judgment, and the property which Kienzle had transferred to one of his relatives levied upon. Thereupon an action was begun against the sheriff to restrain the sale and vacate the levy. The trial court found in favor of the plaintiff in that action, and this court, upon a review of the facts, set aside the judgment and findings of the trial court, and directed judgment in favor of the sheriff and his right to proceed with the execution, the holding of this court being that the rights of the parties dated as of the date of the automobile accident. In the opinion in the Allee Case, supra, this court said: "On January 4, 1925, at the instant the automobile driven by Kienzle injured the minor, Lee E. West, a cause of action arose in favor of West against Kienzle, and a claim for damages then and there instantly arose, of which claim J. H. Kienzle then and there had immediate notice. We make this statement upon the authority of Cioli v. Kenourgios, 59 Cal. App. 690, 211 P. 838, and the case of Chalmers v. Sheehy, 132 Cal. 459, 84 Am. St. Rep. 62, 64 P. 709. In the latter case, the opinion quotes from Freeman on Executions, as follows: 'That one having a claim for a tort is a creditor before the commencement of an action thereon, as well as after, and, as such creditor, is, upon recovering judgment, entitled to avoid a fraudulent transfer antedating the commencement of his action.'" We do not need to quote further from the case of Allee v. Shay, but will refer to the authorities set out on page 759 of the volume referred to (268 P. 966). In the case of Allee v. Shay, just as appears by the circumstances in the case at bar, no property remained in possession of Kienzle, just as no property remained in the possession of Wright after the date of the purported conveyance to his wife. By that conveyance he rendered himself a bankrupt.

This case, in relation to the appointment of a referee in bankruptcy, comes within the cases of Hemenway v. Thaxter, 150 Cal. 737, 90 P. 116, 117; Wolters v. Rossi, 126 Cal. 644, 59 P. 143; Wills v. E. K. Wood Lumber Co., etc., 29 Cal. App. 97, 154 P. 613. Section 3442 of the Civil Code is likewise applicable to this case where it provides that a transfer or incumbrance, without valuable consideration, by a party while insolvent, or in contemplation of insolvency, shall be fraudulent and void as to existing creditors. As said in one of the cases to which we have referred, if the act under consideration renders one insolvent, the intent will be inferred that the transfer was made for the purpose of rendering one insolvent, the language in the case of Hemenway v. Thaxter, supra, in this particular, being as follows: "The consequence of this conveyance being, then, to render Hemenway insolvent, he will be presumed to have intended its natural consequence, from which follows an intent to become insolvent, or contemplated insolvency, in the language of the act." The record clearly shows that the conveyance by Thomas Wright to his wife purported to divest him of all of his property, and also that this fact was known to all the parties concerned. The petition in bankruptcy filed by Thomas Wright listed as his creditors Aurilla A. Edson and Roxanna J. Archer, and constituted very persuasive evidence to be considered by the trial court in determining that the conveyances hereinbefore referred to were made to defeat the claims of creditors.

[3] That the conveyances herein involved come within the provisions of section 3439 of the Civil Code declaring such transfers to be void, we think clearly established, and the trial court could not very well, under the testimony, enter any other judgment than the one from which the defendants have appealed.

The judgment is affirmed.

We concur: FINCH, P. J.; L. R. THOMPSON, J.

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105 Cal. App. 366

LOWE et al. v. PENN.★

Civ. 4066.

District Court of Appeal, Third District, California.

April 23, 1930.

Rehearing Denied May 23, 1930. Hearing Denied by Supreme Court June 19, 1930.

1. Quieting title ⟹10(2).

Grantees who leased out parts of lot, received rents, and paid taxes, were entitled to judgment quieting title in their favor (Code Civ. Proc. § 1963, subd. 12).

Under Code Civ. Proc. § 1963, subd. 12, there is a disputable presumption that a person is the owner of property when exercising acts of ownership over it.

2. Trial ⟹46(2).

Court, in action to quiet title, properly sustained objection to record showing unpaid assessments, where counsel failed to show such evidence was relevant.

There was nothing in the record to show that the evidence was relevant or material, and no showing that the defendants were interested in the assessment or had any claim thereunder, and the court refused to accept the evidence only after repeatedly asking defendant's counsel whether his client had some claim under the assess-

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. Hearing denied by Supreme Court.

ments, and after defendant's counsel refused to state whether the evidence in question would be followed by other evidence showing its relevancy or materiality.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by C. Luther Lowe and another against Laura E. Penn; Cora Jakobsen, substituted defendant. Judgment for plaintiff, and the substituted defendant appeals.

Affirmed.

J. Everett Brown, of Los Angeles, for appellant.

Benjamin Kirby and Flint & MacKay, all of Los Angeles, for respondents.

FINCH, P. J.

This is an appeal by the defendant from the judgment entered herein quieting the plaintiffs' title to a city lot in the city of Los Angeles.

[1] Appellant contends that there are technical defects in the plaintiffs' chain of title, but it is not necessary to consider them, as the plaintiffs made a sufficient showing of title without the aid of the instruments claimed to be defective. The property was conveyed to the plaintiffs on November 17, 1923. During the following year the plaintiffs leased a part of the lot and the tenant paid them rent therefor. They also leased a part of the property to another tenant and received rent therefor. They exercised other acts of ownership over the lot and paid taxes thereon. It is a disputable presumption "that a person is the owner of property from exercising acts of ownership over it." Code Civ. Proc., § 1963, subd. 12. In the absence of any evidence tending to overcome the presumption, it is of sufficient weight to warrant a judgment quieting title in favor of the person exercising such acts of ownership. Pearson v. Hellman Commercial, etc., Bank, 199 Cal. 305, 249 P. 10. There is not the slightest evidence in this case tending to overcome the presumption. It follows that the evidence is sufficient to support the findings and judgment, and that the defendant's motion for a judgment of nonsuit was properly denied.

[2] The only other point urged by the appellant is that the trial court erred "in sustaining objections of plaintiffs to offer of defendant's maps and assessments." Having identified a record of street assessments, the defendant offered in evidence "the map which appears between pages 160 and 161, and the printed matter on that page; also the fly-leaf on page 161," showing an assessment against lot 73 which did not appear to have been paid. Counsel for the plaintiffs objected on the ground, among others, "that it is not shown that the defendants are interested in any portion thereof." The court thereupon said: "The defendant cannot prove his defense all at the same time. I am assuming, of course, that the defendant will connect it up." The court thereafter repeatedly asked counsel for the defendant whether he expected to show that the defendant had any claim under the assessment, but counsel declined to so state. The court finally said: "I don't want to waste the time of this court having records introduced unless you tell me that you expect to connect them with your clients and show that your clients had some claim under that assessment; if you do, I will overrule it; if not, I will sustain it." Counsel for the defendant, still declining to state whether he expected to make such connecting proof, the court sustained the objection and no further proof was offered by the defendant. For the reasons stated by the trial court, the ruling was eminently proper. There is nothing in the record to show whether the evidence offered was relevant or material to any issue in the case, and the objection thereto was properly sustained upon counsel's refusal to state whether it would be followed by other evidence showing its relevancy or materiality. 24 Cal. Jur. 760; 2 Cal. Jur. 275; People v. Rulia Singh, 182 Cal. 457, 482, 188 P. 987; Snowball v. Snowball, 164 Cal. 476, 479, 129 P. 784; Shasta Lumber Co. v. McCoy, 85 Cal. App. 468, 474, 259 P. 965; Merz v. Poole, 82 Cal. App. 12, 15, 254 P. 914; Pedrow v. Federoff, 77 Cal. App. 164, 178, 247 P. 212.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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105 Cal. App. 430

KOHNER et al. v. NATIONAL SURETY CO.

Civ. 7258.

District Court of Appeal, First District, Division 2, California.

April 30, 1930.

1. Appeal and error ⟹1011(1).

In action on burglary policy where evidence as to date on which insurer received proof of loss conflicted, finding of court would be taken as true.

2. Insurance ⟹539(1).

Burglary policy clause requiring proof of loss to be furnished within 60 days *held* binding on insured.

3. Insurance ⟹641(2).

Waiver by insurer of proof of loss within 60 days must be pleaded to be available.

4. Insurance ⚷645(3).

Waiver of proof of loss within 60 days under burglary policy cannot be proved under implied issue raised by affirmative allegations of answer that proof of loss had not been given.

5. Insurance ⚷665(4).

Finding that wife whose property had been stolen, was not member of insured husband's household within burglary policy, *held* supported by evidence.

The evidence disclosed that the wife, whose property was stolen on September 10, 1924, had commenced an action for divorce on September 4, 1924, and had obtained an injunction pending suit restraining the husband, the insured, from entering premises, and that the husband and wife did not live together thereafter. The policy covered insured's property and property of members of insured's household.

6. Insurance ⚷425.

Theft of wife's property *held* not within burglary policy covering husband's property or "member of his family," where husband and wife had separate residences and wife had court order restraining husband from entering her residence.

[Ed. Note.—For other definitions of "Member (of Family or Household)," see Words and Phrases.]

7. Insurance ⚷670.

Finding, in action on burglary policy, that it was untrue that persons committing theft were unknown to insured, *held* to support judgment for insurer.

The policy provided that it covered all loss through causes stated by any person except one whose property was covered by the policy, and was therefore a condition precedent to recovery on the policy. The condition was pleaded by insured but not proved.

8. Insurance ⚷670.

Finding, in action on burglary policy, regarding insured's residence, *held* to support judgment for insurer.

The complaint alleged in substance that at time of theft the insured and wife maintained their household at certain place, and the finding was to the effect that it was untrue that at time of acts complained of the plaintiffs maintained their household at place as claimed.

9. Trial ⚷395(5).

Contention that court should state probative facts and find whether they are true *held* untenable.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by Milton J. Kohner and Lurline Kohner against the National Surety Company. Judgment for defendant, and Lurline Kohner appeals.

Affirmed.

Adolph Johnson, of Los Angeles, for appellant.

Bailie, Turner & Lake and Richard A. Turner, all of Los Angeles, for respondent.

BURROUGHS, Justice pro tem.

This action was commenced by the plaintiffs to recover from the defendant the sum of $2,500 alleged to be due them upon a policy of insurance. The insurance is what is commonly called "burglary insurance."

The policy upon which this action is based recites in substance that in consideration of $52.25 premium and of the declarations thereinafter contained, which the assured warrants to be true and which are to be construed as conditions precedent, the defendant agrees to indemnify Milton J. Kohner in the sum of $5,000 for the term of twelve months, beginning on the 1st day of January, 1924, for all loss by burglary, theft, or larceny of property insured thereunder, from within the house, building, apartment, or rooms, occupied by the assured as described in the declarations and thereinafter called the premises, caused by any person except one whose property is covered thereby.

The policy then sets forth the schedule of articles insured thereunder, which included watches, necklaces, gems, precious and semi-precious stones, jewelry, articles of gold, platinum, sterling silver, and other specific articles, to an amount not exceeding 50 per cent. of the total amount of insurance under the policy. The house which contained the property insured is located at 208 North Beechwood drive, Los Angeles, Cal. It was used as a private residence.

There is a further provision in the contract of insurance that it "applies to all property owned by the assured, or by any permanent member of the household of the assured who does not pay board or rent, or by a relative of the assured permanently residing with him, but shall not apply to such property owned by a domestic servant or other employee of the assured."

It is further provided that: "The assured shall give notice of any loss hereunder so soon as practicable by telegraph to the company at its home office in New York City or to an agent of the company and to the public police or other police authorities having jurisdiction."

The policy further provided that: "Affirmative proof of loss or damage under oath

must be furnished to the company at its home office in New York City within sixty days from the date of the discovery of such loss or damage."

There is no dispute in the evidence that said Milton J. Kohner and Lurline Kohner were husband and wife and, with Maxine Rose Kohner, who was treated as a member of the Kohner family, lived on the premises described in the insurance policy up to September 4, 1924. It is also an undisputed fact that Mr. Kohner supported the family during said period and for some time thereafter. On September 4, 1924, Lurline Kohner instituted divorce proceedings against her husband, Milton J. Kohner, and on said date the court issued an order restraining said Milton J. Kohner from entering the home at 208 North Beechwood drive pendente lite. Mr. Kohner thereupon took up his residence in a downtown hotel. An interlocutory decree of divorce was granted in the month of August, 1925. On September 10, 1924, at about 7:45 p. m., some one knocked at the door of the Kohner home. There were then in the house Mrs. Kohner and Maxine Rose Kohner. Mrs. Kohner went to the door and inquired what was wanted. The party answered that he was a deputy sheriff and wanted to talk to her and would tell her his business when she let him in. Mrs. Kohner thereupon opened the door, and the party on the outside exhibited to her a deputy sheriff's badge and together with two others forced an entrance into the house. He claimed that they were prohibition officers and had been sent out by headquarters to search the premises for liquor. Mrs. Kohner immediately denied that there was any liquor on the premises, but one of the men slapped her in the face and pushed her over to the floor, and while two men held her the other man proceeded to the back of the house. Thereupon Maxine Kohner came into the room and one of the men told Mrs. Kohner to send the girl back. This Mrs. Kohner refused to do. The man let Mrs. Kohner up and placed her and Maxine on a davenport in the room. One man stayed with them while the other two went through the premises and took jewelry and diamonds belonging to Mrs. Kohner to the value of $3,100. They thereupon left the house. Under the direction of Mrs. Kohner, Maxine Rose Kohner notified police headquarters and called up a friend and the defendant was notified at its local office. The men from police headquarters arrived in about fifteen minutes, and it appears from the evidence that the bureau drawers and various places in the home had been ransacked. While it is disputed by Mrs. Kohner's testimony, there is evidence that at the time of the arrival of the police, Mrs. Kohner stated that she suspected that her husband had instigated the theft. The evidence also shows that all of the property taken by the thieves was the separate property of the plaintiff Lurline Kohner. On September 11, 1924, Sidney Gerson, an investigator for the defendant, appeared and secured a sworn statement from Mrs. Kohner of the facts and the amount of loss. The proof of loss on regular blanks furnished by the respondent company was prepared by I. R. Ruben, an attorney for Mrs. Kohner, after a communication with George W. Seith, who represented the respondent as their attorney and investigator. On September 17, 1924, this proof of loss was mailed to one John E. Mattress, who was the insurance broker who negotiated insurance for the Kohners. The evidence further discloses that on September 20, 1924, Mattress mailed this proof of loss to the defendant company at its Los Angeles office marked "Personal attention of Mr. Paine." Although Mr. Paine was not then in the employ of the respondent company, the proof of loss, together with Mr. Ruben's letter, was actually received by the respondent on September 23, 1924. Whether this proof of loss ever reached the New York city office of the respondent does not appear.

It further appears from the testimony of Mrs. Kohner that she was advised by Gerson, the investigator of the burglary, that Mr. Kohner should also furnish proof of loss to the company. According to the testimony of Mrs. Kohner, on November 1, 1924, Milton J. Kohner filled out a proof of loss in her presence. It was sworn to by him before Grace C. Newlove, a notary public, on November 1, 1924, and the witness went with her husband to the post office, where he mailed said proof on said day to the company at their New York office. Grace C. Newlove, the notary public, testified that on November 1, 1924, Milton J. Kohner did appear and make his affidavit to the proof of loss, but she further positively testified that Mrs. Kohner was not with him at her office where the proof was sworn to. There was also a registry receipt received by the Kohners on November 6, 1924, for a package forwarded by registered mail to New York to the National Surety Company. Said receipt was produced at the trial by the respondent company and it had indorsed thereon with a rubber stamp, received December 5, 1924. Mr. Weil, the manager of the defendant company at its headquarters in New York, testified that this rubber stamp was placed thereon December 5, 1924, the day of its receipt at the home office; that he probably placed it there himself.

On December 20, 1924, acting under the direction of Mr. Weil, George W. Seith, the attorney for the respondent, notified Milton J. Kohner of the rejection of their claim of loss for the reason "that said claim is not covered by said policy contract and the same is hereby denied for the reason, among others that said premises described in said policy contract ceased to be your residence prior

to September 10, 1924, and was not at that time your residence."

The court made a finding that on the 10th day of September, 1924, plaintiff Lurline Kohner was the owner of all the personal property which was stolen from the premises at 208 North Beechwood drive, but neither the property nor the premises were in the possession of Milton J. Kohner. The court further found that at said time Milton J. Kohner did not maintain his household at said place and that at the time the robbery was committed the plaintiff Lurline Kohner was not a permanent or any member of the household of Milton J. Kohner. The court also found that at the time of the burglary the burglars were unknown to plaintiff Lurline Kohner and that said property was taken by theft and larceny and had a value of $3,035. The court further found that it was untrue that the persons who committed said theft were or that either of them was unknown to the plaintiff Milton J. Kohner, and that it was untrue that said jewelry or any part thereof was in the possession of said plaintiff Milton J. Kohner at the time of said theft. The court further found that neither of said plaintiffs within the time provided by said policy of insurance furnished affirmative or any proof of loss or damage to the defendant under oath at its home office in New York, but such proof was made December 5, 1924. It is further found by the court that no notice of any loss was given by plaintiffs or either of them by telegraph to the company at its home office in New York City or to any agent of the company. That within sixty days plaintiff Lurline Kohner caused to be delivered to the Los Angeles office of the defendant under oath a proof of loss, but that said proof stated that the property insured belonged at the time of the said burglary to Mrs. Lurline Kohner and that no other person had any interest therein and that there had been no change of the occupancy of the premises of the assured since the issue of said policy and that said premises were occupied by said Lurline Kohner and Maxine Kohner and by no other person. It is further found that the loss to said plaintiff Lurline Kohner is not one for which the defendant became liable or obligated to pay under the terms of the policy.

The court entered its judgment in favor of the defendant, and the plaintiff Lurline Kohner appeals.

Many grounds are advanced by the appellant for a reversal of the judgment. It is claimed that the court erred in its finding of fact that the only affirmative proof of loss was delivered to the defendant at its home office in New York city on December 5, 1924. The evidence upon this branch of the case discloses that three forms of proof of loss were executed by the plaintiffs. The first one was executed by the plaintiff Lurline Kohner and verified by her on September 15, 1924. This proof was forwarded by the attorney for Mrs. Kohner to one L. E. Mattress, the broker who negotiated the insurance for Milton J. Kohner. L. E. Mattress was not connected with the defendant, but was an independent insurance broker. Mr. Mattress mailed this proof of loss to the National Surety Company on September 20, 1924, addressed to its Los Angeles office. This office in turn sent the same to Mr. Seith, who was an independent investigator of losses by burglary, but was also an attorney for defendant. He returned it to the Los Angeles office of the defendant, and at the time of the trial it was produced in court from their files. The second proof of loss was unverified, but was signed by Milton J. Kohner and sent to the home office of the company in New York City. This proof was returned to Kohner because it was unverified. A third proof, executed and verified by Milton J. Kohner, was sent to the company at its home office in New York City, but according to the testimony of one Bert Weil, who was the manager of the burglary proof department of the company, it was received at the home office of the company December 5, 1924. It is claimed by the appellant that this proof of loss was received by the company at his home office on November 5, 1924, and appellants produced a registry received from the company bearing that date. The testimony of the said Bert Weil was that this receipt was for the package containing the unverified proof of loss which they had formerly returned to Mr. Kohner.

[1-4] The evidence upon this point being in conflict, the finding of the trial court that the proof last above referred to was not received by the company at its home office until December 5, 1924, must be taken as true. The policy of insurance provides that affirmative proof of loss or damage under oath must be furnished to the company at its home office in New York City within sixty days from the date of the discovery of such loss or damage. The loss occurred September 10, 1924. No affirmative proof of loss was submitted to the company until December 5, 1924, a period of eighty-seven days. In White v. Home Mutual Insurance Co., 128 Cal. 131, 60 P. 666, it is held that policy of insurance containing a clause that proofs of loss must be furnished within sixty days from the date of the fire is the contract of the parties and is binding on the assured. The same rule is enunciated in Seccombe v. Glens Falls Ins. Co., 45 Cal. App. 611, 188 P. 305; Harris v. North British & Mercantile Ins. Co., Ltd. (C. C. A.) 30 F.(2d) 94; and San Francisco Savings Union v. Western Assur. Co., etc. (C. C.) 157 F. 695. It is also claimed by appellant that the respondent waived the sixty-day limitation for presenting proof of loss. We do not discover in the record any acts done by the company or its officials that amount to a waiver. Further, the plaintiffs had before them the pol-

icy of insurance which provided in unmistakable language that affirmative proof of loss must be furnished within sixty days to the company at its home office in New York City. The waiver claimed by appellant is but another term for an estoppel. Wheaton v. Insurance Co., 76 Cal. 415, 419, 18 P. 758, 9 Am. St. Rep. 216. To be available to a party such waiver or estoppel must be pleaded in the first instance. Aronson v. Frankfort, etc., 9 Cal. App. 473, 99 P. 537; Schwab v. Bridge, 27 Cal. App. 204, 149 P. 603. Nor can such alleged waiver be proved under the implied issues raised by the affirmative allegations of the answer that proof of loss had not been given. Goddard v. Fulton et al., 21 Cal. 430; Arnold v. American Insurance Co., 148 Cal. 660, 668, 84 P. 182, 25 L. R. A. (N. S.) 6; Bank of Anderson v. Home Insurance Co., 14 Cal. App. 208, 214, 111 P. 507. The ruling by the trial court on this question was correct.

[5, 6] It is also claimed that the finding of the court that it was untrue that at the time of the theft plaintiffs maintained their household, or that plaintiff Milton J. Kohner did maintain his household, at said 208 North Beechwood drive, or the finding that it was untrue that at said time plaintiff Lurline Kohner was a permanent or any member of the household of said Milton J. Kohner, is against the evidence. The evidence in support of this finding is, in substance, that about September 4, 1924, plaintiffs ceased to live together as husband and wife. The former going to an hotel, where he lived until October 16, 1924, the wife continuing to occupy the premises at 208 North Beechwood drive, which was her separate property. The wife, on September 4, 1924, commenced an action for divorce and obtained an injunction pending suit, restraining the defendant in said action (her coplaintiff) from entering the premises at 208 North Beechwood drive. An interlocutory decree of divorce was entered in said action on the 11th day of August, 1925, and the final decree therein was entered October 25, 1926. The evidence shows that the plaintiff Milton J. Kohner never lived at 208 North Beechwood drive after September 4, 1924. The policy of insurance indemnifies Milton J. Kohner for all loss by burglary, theft, or larceny of the property insured and those designated as residing with him from within the house, occupied by the assured. It also insures the property of any permanent member of the household of the assured, etc. It seems to us that the questions presented are: Was Milton J. Kohner at the time of the loss residing on the premises at 208 North Beechwood drive? Was Lurline Kohner a member of Milton J. Kohner's household? We are of the opinion that both of these questions must be answered in the negative. Milton J. Kohner was residing at an hotel. Mrs. Kohner had restrained him by order of a court from again entering the family residence. One of the conditions under which the insurance was accepted by the company was that the premises were occupied by the assured. In Goldstock v. Fidelity & Deposit Co., 201 App. Div. 816, 195 N. Y. S. 94, it was held that under a policy of burglary insurance, which covered property not only belonging to the assured, but to any relative of the assured permanently residing with the assured, the company was only liable for such articles as were in the possession of the members of the household of the assured while he was alive and occupied the premises, and therefore a suit by the wife to recover for goods belonging to her and which were stolen after the death of the assured was dismissed. It was held in Balzer v. Globe Indemnity Co., 211 App. Div. 98, 206 N. Y. S. 777, the policy covered only property owned by the assured or by any relative of the assured permanently residing with him. The court held the clause covered the wife "only during the time when she answered the description of a relative of the assured permanently residing with the assured." It has also been held that "A permanent abode is a home, which a party may leave as interest or whim may dictate, but which he has no present intention to abandon." Sullivan v. Detroit, etc., 135 Mich. 661, 98 N. W. 756, 760, 61 L. R. A. 673, 106 Am. St. Rep. 403. In McGrew v. Mutual Life Insurance Co., 132 Cal. 85, 64 P. 103, 84 Am. St. Rep. 20, it is held that upon a suit for divorce the presumption that the domicile of the husband is also the domicile of the wife ceases to exist and it is a matter of proof. Each may have a separate domicile.

In the case at bar there seems to be no question that at the time of the theft Mr. and Mrs. Kohner had separate domiciles and that the husband did not reside at 208 North Beechwood drive, and therefore the loss was not covered by the policy of insurance.

[7] It is also claimed that there is no evidence to support the finding that it was untrue that the persons who committed the theft of the property were unknown to Milton J. Kohner. The contract of insurance provides that it covers all loss through the causes stated by any person except one whose property is covered by the policy. This is a condition precedent to a recovery. Under these circumstances, we cannot say the finding was improper or not supported by the evidence. It was pleaded by plaintiffs, but not proved.

[8] It is a further claim of error that there are not sufficient findings of fact on material issues to support the judgment. This claim seems to be predicated upon the theory that the findings of fact are mere conclusions of law. Fifteen of the findings are attacked as coming within this class. As it would unnecessarily lengthen this opinion to discuss each one separately, we will examine the first alleged error, a decision of this one is suf-

ficient to cover all of said objections. The court found: "That it is untrue that on the tenth day of September, 1924, or at the time the acts complained of in the complaint herein were committed, plaintiffs herein maintained their household or that plaintiff herein, Milton J. Kohner, did maintain his household at said 208 North Beechwood drive, Los Angeles, California." This finding responds to an allegation of the complaint, "That on or about said tenth day of September, 1924, and while plaintiffs herein did maintain their household at said 208 N. Beechwood drive, said city of Los Angeles. * * *" It is held in Dam v. Zink, 112 Cal. 91, 44 P. 331: "The only purpose of the findings is to answer the questions put by the pleadings; and, if facts are stated in the findings in the same way in which they are stated in the pleadings, they are sufficient." In McCarthy v. Brown, 113 Cal. 15, 45 P. 14, it is said, the "findings should state the ultimate facts pleaded, and not probative facts." The following cases give illustrations of what constitute findings of fact: Weidenmueller v. Sterns, etc., Co., 128 Cal. 623, 61 P. 374; Levins v. Rovegno, 71 Cal. 275, 12 P. 161; Hollenbach v. Schnabel, 101 Cal. 317, 35 P. 872, 40 Am. St. Rep. 57. It is necessary for the court to state certain facts as a reason for finding the issue. Dam v. Zink, supra. In Butler v. Agnew, 9 Cal. App. 327, 330, 99 P. 395, it is held that in case of a doubt as to which class the findings belong, the doubt should be resolved in favor of the judgment. We are satisfied that the findings are sufficient.

[9] It is another claim of appellant that the court failed to find upon material issues. Under this particular branch of the case, it seems to be appellant's contention that the court should state the probative facts and find whether or not they are true. The authorities last cited answer this claim in the negative.

The judgment herein should be affirmed. It is so ordered.

We concur: NOURSE, P. J.; STURTEVANT, J.

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105 Cal. App. 414

ARIES et al. v. SQUIRES.

Civ. 7259.

District Court of Appeal, First District, Division 2, California.

April 29, 1930.

1. Sales ⟹82(1).

Contract selling furnishings of lessee to apartment owner to be payed for when owner sold apartment required payment when furnishings and lease were sold, not when realty was sold.

Lessee in arrears entered into contract with owner providing for sale of all furniture and equipment belonging to lessee located in apartment and surrender of note in consideration of owner paying to lessee sum of $7,000 at time and when owner sold apartment, owner resold furnishings and equipment conveyed by lessee, and leased apartment to another, but retained title to real estate.

2. Appeal and error ⟹1011(1).

Trial court's construction of conflicting evidence in construing ambiguous contract *held* binding on appellate court.

3. Trial ⟹397(6).

Finding that equipment was to be paid for on resale covered issues of cross-complaint seeking reformation of contract concerning time of payment.

Contract for sale of furnishings and equipment of apartment provided that owner should pay for same when she sold apartment. Court construed contract to require owner to pay when furnishings and equipment were sold. Apartment owner in her cross-complaint sought reformation of contract to require payment when building was sold.

Appeal from Superior Court, Los Angeles County; George H. Cabaniss, Judge.

Action by Walter J. Aries and another against Ella B. Squires, in which defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals.

Affirmed.

Harry A. Finkenstein, of Los Angeles, for appellant.

Fred W. Morrison, of Los Angeles, for respondent.

BURROUGHS, Justice pro tem.

This is an action by Walter J. and Clella M. Aries to recover the sum of $7,000 alleged to be due from the defendant, Ella B. Squires, by virtue of an agreement entered into by the parties on February 15, 1926. The plaintiffs recovered judgment as prayed for, and from the said judgment defendant appeals.

The agreement, above referred to, recites that Ella B. Squires, the defendant herein, is the owner of the Dresden Apartments, 1919 West Seventh street, Los Angeles. That the plaintiffs Aries, herein, are lessees of said apartments and are in arrears for rent due thereon in the sum of $3,550, which they are unable to pay. That, for the purpose of settling their business difficulties without re-

sorting to the courts, it is provided in said agreement that the Aries will execute a bill of sale for all of the furniture, furnishings, and equipment belonging to them and located in said apartment, and will assign and surrender the lease thereof to the defendant, Squires, and also assign and surrender to the said defendant, Ella B. Squires, certain promissory notes received by them from tenants of said apartments for rent past due. As a consideration therefor the defendant Squires agreed as follows: "the party of the first part (Squires) agrees that she will pay the said second parties (Aries) their heirs, administrators, and assigns, the sum of Seven Thousand ($7,000.00) Dollars in gold coin of the United States, at the time and when she sells the Dresden Apartments, Los Angeles, California."

The present dispute between the parties arises out of the proper interpretation to be given to the paragraph, above quoted, as to the time when the payment of the $7,000 falls due. Under the evidence admitted by the court, it appears that the plaintiffs Aries have performed all of the conditions required by said contract, and that the defendant has resold all of the furniture, furnishings, and equipment conveyed to her by the plaintiffs, also that she has leased the apartment house for a period of five years, but that she still retains title to the real estate and apartment house itself. It is claimed by the appellant that the clause of the contract requiring her to pay the plaintiffs $7,000 fixes the time of payment as of the date she sells the real estate and apartment house thereon. It is the claim of the respondent that the time referred to for the payment was upon the sale of the furniture, furnishings, and equipment, and the leasing of the apartment house.

[1, 2] We think it does not require a citation of authorities to demonstrate that the clause of the contract quoted is ambiguous. The appellant owned the apartment house itself. The respondents had no interest therein except a leasehold. They also owned the furniture, etc. The date of payment of the purchase price depends upon a sale by the defendant of either the real estate and improvements, or a sale of the apartment house furnishings and the lease. To give the contract the construction contended for by appellant would be to postpone the date of payment of the sum due respondents according to the caprice or whim of the appellant, or if she never sold the real property then the amount would never become due. This would be an absurd construction. The evidence admitted by the court to explain this ambiguous clause of the contract was conflicting. The respondents' evidence was to the effect that there was no mention of the time of the sale of the building. The reference was to a sale of the property conveyed by them. The evidence of the appellant was to the effect that it was specifically stated in the presence of the respondents that the amount was to be paid when the building itself was sold. The court having construed the evidence in the light favorable to the respondents' contention, this court is bound thereby.

That the appellant and her counsel have not always entertained their present view that the contract, as to the time of payment, is unambiguous, appears from a cross-complaint filed in this action to reform the above-quoted clause of the contract. It is alleged in said cross-complaint that said clause was intended to mean that she would pay the second parties the sum of $7,000 when she sold the said building, and she prays a reformation for that purpose.

[3] Complaint is also made that the court failed to find upon the issues of her cross-complaint. The court found that the payment was due when the appellant sold the property which had been conveyed to her by the respondents, and not at the time of the sale of the building. We are of the opinion that such findings cover the issues raised by the cross-complaint.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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105 Cal. App. 426.

In re PEACOCK'S ESTATE.★

Civ. 7375.

District Court of Appeal, First District, Division 2, California.

April 30, 1930.

Rehearing Denied May 29, 1930. Hearing Denied by Supreme Court June 26, 1930.

Wills ⟹166(8).

Evidence required finding that will of 70-year old testator, making sons residuary legatees, was not obtained by sons' undue influence.

The proponents of the will who were residuary legatees thereunder were the children of a former marriage, while the will was contested by the deceased's widow who received under it only her rights to community property and a bequest of $100. The property left to the children was that which the mother of those children and decedent had accumulated. The evidence failed to disclose any abuse of confidential relations, though one son had deceased taken to his house, and his wife called the lawyers who drew the will.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. Hearing denied by Supreme Court.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Proceeding by Loyal R. Peacock and another for the probate of the will of James C. Peacock, deceased, contested by Zilpha Nellie Peacock. From an order refusing to admit the will to probate, proponents appeal.

Reversed.

Pierre A. Fontaine, of Oakland, for appellants.

Kilpatrick & Goodman, of Oakland, for respondent.

STURTEVANT, J.

James C. Peacock died at his home in Berkeley on the 11th day of October, 1928. Thereafter Loyal R. Peacock presented to the probate court a document purporting to be the last will and testament of the deceased, and applied to have the same admitted to probate. Shortly thereafter Zilpha N. Peacock, as the surviving wife of the decedent, filed a contest. The contest was answered and a trial was had before the trial court sitting with a jury. The jury returned a verdict in favor of the contestant, and an order was entered refusing to admit the will to probate. From that order the proponents have appealed and have brought up a typewritten record.

The second amended contest was based on two grounds, unsoundness of mind and undue influence. At the conclusion of the proceedings had in taking the evidence, all issues were abandoned by the contestant except that of undue influence. The proponents assert that there was no evidence introduced to sustain the allegations of undue influence. In support of this assertion they print upwards of 150 pages of the testimony. In reply the contestant summarizes the case and calls to our attention such portions of the record as, according to her contention, tend to support the order complained of.

The decedent had been married twice. By his first wife he had two sons, Loyal and Albert, who are the proponents of the will. During the life of the first wife, the decedent had become the owner of a house and lot in Oakland of the value of $4,000 and which was free from incumbrances. Later they acquired a lot at 5822 Shattuck avenue in Oakland. The decedent built a house on that lot and installed furniture therein. Thereafter he married the contestant, and, at the time of the marriage, he owed the Oakland Bank $3,500. That would be about April 23, 1924, the date of the marriage. At that time the decedent was an engineer on one of the ferryboats, in the employment of the Southern Pacific Company. The contestant was at the time of her marriage a widow. She had three daughters and one son. At times the contestant was engaged in doing restaurant work. On February 1, 1928, the decedent retired from active duty and commenced to draw a pension. The earnings of both went towards the payment of household expenses and the debt to the bank. At the time of his death the balance owing to the bank was $2,050. By the terms of the purported will the decedent directed that the court of competent jurisdiction might ascertain and determine the amount of community property of himself and the contestant, and that said court should confirm to the contestant her rights therein. He also bequeathed to her $100. All of the rest of his property he bequeathed to his two sons, Loyal and Albert, share and share alike.

In support of the claim that the will was made under undue influence, the contestant calls to our attention that at the time it was made the testator was seventy years of age, suffering from many illnesses, very weak physically and enfeebled; that Loyal R. Peacock, during the latter days of his father's life, attended to his father's business, cashed his father's checks, kept his father's papers, and stood in a confidential relationship to him; that prior to the execution of the will Loyal admitted that his father had spoken of making a will and had discussed some property matters with him; that whenever Loyal visited his father during the last illness the attitude of the testator towards the contestant was materially affected and changed; that during the time that the will was signed the contestant was not present, but was absent engaged in her work; that the decedent did not directly employ the attorney who drew the will, but the attorney was called by the wife of Loyal; that the attorney, upon being called, went to Loyal's house and there met the decedent and discussed the provisions of the purported will; that said discussion occurred in the presence of Loyal; that at no time did the decedent discuss any matters with the attorney except in the presence of one or both of the decedent's sons; that at the time of the execution of the will, although the weather was fair and the decedent lived only one block away, Loyal called at the decedent's house and took him in an automobile to Loyal's house; that the decedent was so removed for the purpose of executing the will in the absence of decedent's wife and without her knowledge, and when she returned to her home immediately thereafter she found her husband in an extremely exhausted physical condition; that at the time the decedent signed the will Albert Peacock was also present; that after Mr. Fontaine had prepared the will he took it to the house of Loyal and there it was signed in the presence of both Loyal and Albert; that there is a conflict in the testimony as to what Loyal's wife said to Mr. Fontaine when telephoning him to call

on the deceased. Mrs. Peacock, Jr., testified that she did not state the purpose of the call. Mr. Fontaine testified that she did; that Loyal paid Mr. Fontaine for drawing the will, that is, Loyal delivered the money to Mr. Fontaine, but the money had been given to him by the decedent with directions to send it to Mr. Fontaine; and finally it is asserted by the contestant that the will itself is unnatural because it gives to the widow only what the law would give to her as her share in the community property, plus the sum of $100, and then gives all the rest of the estate to the decedent's two sons.

Having called to our attention these matters, the contestant cites Estate of Gallo, 61 Cal. App. 163, 214 P. 496, and quotes extensively therefrom. However, that authority is not in point. The court was there discussing an order granting a motion for a nonsuit made at the end of the contestant's case. The facts in that case were very different from the facts in this case. In the instant case the decedent left to his only children the property which the mother of those children and the decedent had accumulated. In the Gallo Case the decedent left the bulk of her estate to a mere stranger, a small portion of her estate to her son, and practically nothing to her adopted daughter. Furthermore, the report of that case recites verbatim many facts showing or tending to show undue influence. It is statutory law in this state that it will be presumed that persons are innocent of crime or wrong; that prior transactions have been fair and regular; that the ordinary course of business has been followed, and that the law has been obeyed. Conceding with entire liberality that Loyal stood in the confidential relation to his father; that by the terms of the will a gift was made to him, and that on the hearing of the contest it was his duty to fully disclose all of the facts, the record shows that these things were done. The proponents called and examined fifteen or twenty witnesses. Among them they called and examined and turned over for cross-examination Mrs. Peacock, Jr., the individual that the decedent asked to inquire about an attorney; Mrs. Taylor, the individual of whom Mrs. Peacock made her inquiry; Mr. Fontaine, the attorney recommended by Mrs. Taylor and summoned over the telephone by Mrs. Peacock, Jr.; both of the sons who were present when the will was executed; both of the witnesses who witnessed the will, together with many others. Having done so it is freely submitted that the contestant is unable to and does not cite any parts of the record which contain any fact or facts proving or tending to prove undue influence. It is very clear that the proponents have met any burden whatever that may rest on them, and, having done so, that there is nothing in the record supporting the order.

The order is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

SKAGGS v. WILEY.★

Civ. 6938.

District Court of Appeal, First District, Division 1, California.

April 25, 1930.

Rehearing Granted May 20, 1930.

1. Negligence ⟹121(5).

Plaintiff suing for damages for personal injuries has burden to prove defendant's negligence was proximate cause of accident.

2. Evidence ⟹584(3).

One witness is sufficient to prove any fact in civil case.

3. Appeal and error ⟹1012(1).

Trial judge, who sees and hears witnesses, is in better position to determine weight of testimony than reviewing court.

4. Automobiles ⟹244(36).

Evidence, in action for personal injuries sustained in automobile collision at street intersection, *held* to support finding that defendant's negligence was proximate cause of accident.

5. Automobiles ⟹201(1).

Violation of law or traffic rule should not be interjected into action arising out of automobile collision, unless causal connection exists between violation and injury.

6. Negligence ⟹68.

Person may not shut eyes to danger in blind reliance upon another, but must use reasonable care to observe another's conduct affecting his safety.

7. Automobiles ⟹206.

One lawfully using highway may assume others will exercise due care and obey traffic laws, unless he as ordinarily prudent person is warned to contrary.

8. Automobiles ⟹206.

Automobile driver cannot assume others are superexpert drivers or that machines are mechanically perfect, but can only assume they are reasonably competent and machines reasonably well equipped.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing granted. 292 P. 132.

9. Automobiles ⟹244(43).

Evidence, in action for personal injuries sustained in automobile collision at street intersection, *held* to show plaintiff's contributory negligence, precluding recovery (California Vehicle Act, § 113 [St. 1923, p. 553, as amended by St. 1927, p. 1436], and § 94 [St. 1923, p. 545] as amended by St. 1929, p. 530).

Alleged acts of contributory negligence relied upon by defendant to defeat recovery consisted of plaintiff's entering intersection at an unlawful rate of speed where view was obstructed, and failure to exercise reasonable care in trying to avoid injury to himself.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Thomas R. Skaggs against D. Baldwin Wiley for damages for personal injuries arising out of an automobile accident. Judgment for plaintiff, and defendant appeals.

Reversed.

J. Hampton Hoge, of San Francisco, for appellant.

Wyckoff & Gardner, of Watsonville, for respondent.

McKENZIE, Justice pro tem.

This is an action instituted by plaintiff to recover damages from defendant for injuries alleged to have been suffered by plaintiff by reason of the negligence of defendant in operating an automobile. Judgment was in plaintiff's favor for the sum of $12,750.31. Defendant urges several grounds for reversal: First, that defendant's acts were not the proximate cause of the accident; second, that the plaintiff was guilty of contributory negligence; third, that special damages were included without having been pleaded; and, fourth, that the award is excessive. Defendant made a motion for a new trial, which was denied, but no point is made of that.

The accident in question occurred at the intersection of Alisal and Soledad streets in the city of Salinas on the 11th day of February, 1924. Soledad street runs north and south, and Alisal street crosses it at right angles. Immediately before the collision defendant was driving his car on Soledad street in a northerly direction south of Alisal street, and plaintiff was driving his laundry truck on Alisal street in an easterly direction, west of Soledad street. The cars collided with great force in the northeast quarter of the street intersection, the front of plaintiff's car striking about the center of the left side of defendant's machine. The defendant was "knocked out," but suffered only minor injuries, but the plaintiff suffered very severe injury, probably caused by the overturning of his vehicle.

As to the facts relating to and surrounding the collision, the plaintiff himself was the only witness in his behalf. His testimony in this particular is fully and fairly covered in the following condensation: That at about 9 o'clock on the morning of February 11, 1924, he was driving a Ford laundry truck about the center of the south half of Alisal street; that he was proceeding in an easterly direction; that he was traveling at a speed of 18 miles an hour at all times until the collision occurred at about but a little beyond the center of the intersection; that at all times he kept on the right side of the highway until just before the collision, when, at about the center of the intersection, he turned to the left to avoid striking defendant's machine; that at no time did he sound the horn or apply the brakes; that the lot at the southwest corner of the intersection is vacant, and one driving a car easterly on Alisal street west of Soledad street can see a car being driven northerly on Soledad street south of Alisal street; that when plaintiff first saw defendant's car he (plaintiff) was a distance of (plaintiff's testimony ranges from 20 to 60 feet, but we will state the figures of his counsel as stated in his brief) 20 to 30 feet from the curb line of Soledad street, and that at that time defendant's car was on Soledad street going north at the speed of 40 miles per hour and distant 60 or 70 feet from Alisal street; that from a time previous to plaintiff's first seeing defendant's car there was no traffic in or near said intersection other than the cars driven by plaintiff and defendant. As to what plaintiff did after he saw defendant's car, we quote from the transcript of his testimony:

"Q. And after having noticed that car as you have described, what did you next do? A. Well, I drove right on into the intersection and looked to my left to see if there were any cars coming from the other direction.

"Q. At approximately what speed were you traveling, as you drove into the intersection? A. Along about 18 miles an hour.

"Q. Who reached the intersection first, you with your car or the car approaching on Soledad street? A. I reached the intersection first.

"Q. Was it before you entered the intersection or afterward you looked to your left along Soledad street? A. Well, I looked just like this at the street out of the door.

"Q. Well, was it before or after you entered the intersection you looked to your left? A. Along about the time I was at the curb, probably 10 feet before I got into it.

"Q. When did you next see the car that was approaching on Soledad street? A. The car on the right?

"Q. Yes, the car on your right. A. Well, I got into the intersection and supposing that I had the right of way, of course, I kept on go-

ing, and I turned to the left and looked and then turned back to the right, and I saw him coming and of course I supposed I had the right of way and seeing him coming then, I knew he was not going to give me the right of way.

"Q. Then what did you do? A. To keep him from hitting right amidships—that is where he was headed—I turned my car right like that and about that time he just dashed right in front of me and we collided right in the street."

The foregoing is a complete summary of all plaintiff's testimony relating to how the accident happened, except what might be inferred from the testimony of three witnesses who described the positions of the respective cars when they saw them some time after the accident. We have read this testimony and do not deem it of sufficient importance to be embodied herein.

The defendant testified that he was a physician and had resided at Salinas eleven years; that his residence was a block and 75 feet distant from the intersection and that on the morning in question he left his home in his car and was traveling north on Soledad street in the direction of Alisal street; that the morning was clear and frosty; that he had been driving automobiles for five years previous to the accident; that he was driving at the rate of 15 miles per hour and was on the right half of the street at all times; that when he approached the intersection he saw a man walking easterly along the northerly line of the intersection; that he honked his horn once and the man paid no attention, he honked the second time and the man looked in his direction and then got on the curb; that the defendant was about the center of the intersection when the man got on the curb; that he never saw plaintiff's machine or any other machine in or approaching the intersection until he felt an impact; that the car was an open car and the curtains were up on the left side and the curtains had rather small lights in them; that Mr. Stockdale was the man he saw walking on the street, and when he saw him he slowed down a little.

Ernest Stockdale, a witness for defendant, testified that he resided at Salinas in 1924 and that he was a horse-breaker employed by the McCrary Estate Company of San Benito county; that on the morning of February 11, 1924, he was at the intersection of Alisal and Soledad streets when an accident occurred, and at the time of the impact he was at the northeast corner of the intersection; that when he was halfway across the street some one honked a horn, when he had taken two or three steps the horn was honked again, and he looked around and saw two cars in the intersection, one car was headed north and the other east; the car that gave him the horn was the car headed north; the two cars came together in the northeast corner of the intersection; the car headed east was fully on the north side of Alisal street; that he saw the cars before they collided; that before the cars came together the laundry truck was running parallel with Alisal street; the automobile was going about 15 miles per hour, the laundry truck was going fast—"I do not know how fast."

Charles Rejewski, a witness called by defendant, testified that he had resided at Salinas for nine years; that he was a florist and had worked at Salinas Nursery for eight years; that at the time of the accident he was driving a florist's car westerly on Alisal street, distant 125 feet east of Soledad street; that he saw the machines before the impact, Dr. Wiley's car was just entering the intersection when he first saw it and it was traveling at a speed of 14 or 15 miles per hour; that he first saw the laundry truck when it pulled out from behind an oil truck that was coming east on Alisal street about 100 feet west of Soledad street; and that the laundry truck, when it pulled out from behind the oil truck, took the north side of Alisal street and continued on the same side of the street until the impact, and that the laundry truck from the time it passed the oil truck until the time of the impact was traveling at a speed of from 25 to 30 miles per hour.

George Fiese, a witness for defendant, testified that he was just a laborer working for the Pacific Gas & Electric Company and had resided at Salinas for 30 years; that on February 11, 1924, he was engaged in driving an oil truck for the Union Oil Company; that on the morning of that day he was driving an oil truck easterly on Alisal street about 300 feet west of Soledad street; that the laundry truck passed him and in passing him pulled over to the north side of the street and continued on that side of the street going at a speed of about 25 miles per hour, until it struck Dr. Wiley's car; that he saw Wiley's car approaching the intersection, which was traveling at a speed of 15 miles per hour; that from the time the laundry truck passed him until the impact he saw both cars at all times; and that Dr Wiley's car entered the intersection first and that the laundry truck and Dr. Wiley's car came together at right angles in the northeast corner of the intersection.

In rebuttal, Walter Wallace, a witness for plaintiff, testified that he was at the scene of the accident shortly after it occurred and that he did not see there Mr. Stockdale, Mr. Rejewski, or Mr. Fiese, nor did he see an oil truck or florist's wagon, and that he was acquainted with Mr. Stockdale and slightly acquainted with Mr. Rejewski; that he did not know Mr. Fiese. On cross-examination this witness said he would not swear those men or the trucks were not there, but he did not see them. "During the excitement they might have been there and I would not notice them.

Al. Wallace, a son of the preceding witness, testified that the family were at breakfast when they heard the crash; that his father went to the scene of the accident first, and after his father returned he went there and had no recollection of seeing Mr. Stockdale, Mr. Rejewski, or Mr. Fiese, nor did he have any recollection of seeing the oil truck or florist's truck. On cross-examination this witness stated that these men and trucks might have been there and he did not see them. "There was a crowd there, I cannot remember anyone I saw there."

Mrs. Wallace, the wife and mother, respectively, of the two preceding witnesses, was a witness for plaintiff and testified that Mr. Stockdale did not, on the morning of the accident, call at her home and inquire from her concerning her son, Al. Wallace. Stockdale in his direct examination had testified he did.

[1] On this evidence the trial court found that the defendant was guilty of negligence. This finding was justified from Dr. Wiley's own testimony that he never saw plaintiff's car until after the impact. The court further found that defendant's negligence was the proximate cause of the collision. To justify this finding the court had to reject the evidence of the three apparently disinterested witnesses that testified they saw the movements of both cars immediately before and at the time of collision. The trial court must have rejected this evidence upon either one of two theories: First, that they were at the scene of the accident, but all three had fantastic minds or were deliberately committing perjury; or, second, that they were not there at all, which brings us again to perjury. That three men, and being the only persons that saw the accident other than the principals, from different walks of life, should meet at a street intersection and each and all have a fantastic mind is beyond the realm of probability. Therefore, we are forced to the conclusion that the trial court determined that Stockdale, Rejewski, and Fiese were perjurers; and that this conclusion was arrived at from the testimony of witnesses concerning persons present at the scene after an accident five years previously, coupled, of course, with plaintiff's somewhat improbable story, viewing it from the record alone, concerning the speed at which Dr. Wiley was driving his car. While the defendant was negligent in not observing traffic, and this might have been caused by his exercising care for the pedestrian in his line of travel, there is, so far as the record shows, no reason why his testimony concerning the speed of his car is not entitled to as much, if not more, credit than that of plaintiff. They were both interested parties, but the defendant was not injured and the plaintiff was very seriously injured, which might tend to interfere with a clear recollection of what happened. Then, too, the burden of proof was upon plaintiff.

[2-4] We must admit that judging from the record alone there is strong appeal in appellant's contention that plaintiff did not establish by a preponderance of evidence that the proximate cause of the accident was owing to defendant's negligence. However, one witness is sufficient to prove any fact in a civil case, and a trial judge who sees and hears the witnesses is in a better position to determine the weight of testimony than a reviewing court. This is the universal rule, and a different rule would be hard, if not impossible, to formulate. Therefore we are constrained to hold that the finding of the trial court to the effect that defendant's negligence was the proximate cause of the accident cannot be disturbed.

Now we come to appellant's next contention that even if defendant was negligent, the evidence shows that plaintiff was also negligent and for this reason he cannot recover. Before going into a detailed discussion concerning the law of contributory negligence, we feel disposed to make a passing observation concerning a fact that is known by all drivers of motor vehicles, and that includes practically all mankind, and this is: That when motor vehicles are being driven on the highway and have to pass each other at right angles, this condition in itself creates a constant sign of danger, something in a modified degree like approaching a railway crossing; and that if two machines are approaching a street intersection where they are to pass at right angles and the view is unobstructed and there is no other traffic in the intersection or close to it and there is no unusual condition or circumstance arising and both drivers know the speed of the respective cars, there cannot be a collision without fault, more or less, on both sides. If the substance of this general statement be correct, then under our laws as they now stand a judgment for damages cannot be recovered by one who is guilty of contributory negligence simply because he suffered the greater loss or was the more needy or that insurance companies may be involved amongst themselves or otherwise. Appellant claims plaintiff was guilty of negligence that proximately contributed to the injury in two particulars: First, that he entered the intersection at an unlawful rate of speed, and, second, that he did not exercise reasonable care in trying to avoid injury to himself.

[5] Section 113 of the California Vehicle Act (St. 1923, p. 553, § 113 as amended by St. 1927, p. 1436) provides it shall be unlawful for the driver of a vehicle to drive the same at a speed greater than 15 miles an hour in traversing an intersection of highways when

the driver's view is obstructed. A driver's view shall be deemed to be obstructed when at any time during the last 100 feet of his approach to such intersection he does not have a clear and uninterrupted view of such intersection and of the traffic upon all of the highways entering such intersection for a distance of 200 feet from such intersection. To enable one to comply with this law, he is only concerned with the conditions existing at the two near corners of his approach. It makes no difference so far as he is concerned whether or not the two far corners are vacant or built up, because either way does not affect his vision of the street ahead of him or the one to either side, consequently in the instant case we are only concerned with the northwest and southwest corners of the intersection in question. The evidence is somewhat conflicting, but the court was justified in finding that the southwest corner was unobstructing, and as this southwest corner was a corner that defendant had to heed it was common to both. It is conceded that there was a house on the northwest corner that was obstructing, and the question is: Did this obstruction preclude plaintiff from entering and traversing the intersection at a greater speed than 15 miles per hour? His own testimony is that he was traveling 18 miles per hour. So far as this decision is concerned, it is not necessary to determine whether or not such an obstruction under all circumstances would make it an obstructed intersection. We will confine our discussion to the facts of this particular case. At the start we must keep in mind that the violation of a law or traffic rule should not be interjected into an action of this kind unless there is some causal connection which is generally designated as proximate cause between the act of violation and the injury—in this case the collision. By this we do not mean that a law violation having no causal connection with the injury may not be shown for the purpose of proving some other fact in a case. In this case it is clear that at the time of the accident there was no traffic in or close to the intersection other than that created by the plaintiff and defendant, other than Stockdale's walking across the street, which was without the intersection so far as this case is concerned. If after plaintiff first saw defendant he had given all his attention to the defendant and had not spent most of his time looking for traffic at the other corner, we fail to see how there could be any causal connection between the injury and the obstructing corner. However, as it was an obstructing corner and it did engage a lot of his attention there is a causal connection between the unlawful speed, the obstructing corner and the injury.

Preliminary to considering defendant's second specification of contributory negligence, we must revert to a passing observation made earlier in the opinion about plaintiff's account of what happened before the accident being improbable, so far as the record disclosed; but probable or improbable, it is the evidence and the only evidence that fastened a liability on defendant, and now when the question of contributory negligence is under consideration it must stand now just exactly as it did in the other issue. The improbability of the story consists in the statement that plaintiff saw defendant 60 or 70 feet away coming at a speed of 40 miles per hour on a path that would cross his at right angles, and instead of sounding his horn or applying his brakes or keeping his eyes on the onrushing menace, he spent his time in looking in an opposite direction where there was absolutely no traffic, and relied on his legal right of way. If the fact was that the defendant had seen the car but had paid no attention to the speed at which it was traveling, and it subsequently developed the car was going much faster than he thought, then it would be a question of fact for the jury to determine whether or not plaintiff was negligent in misjudging the speed of the car; but plaintiff knew the car was traveling at the rate of 40 miles per hour, and this fact becomes an established factor in the case when we are called upon to determine as a matter of law if plaintiff was guilty of contributory negligence.

[6, 7] The facts of this case must be viewed in the light of the conditions that existed in 1924: At that time motorcars were not so well equipped with brakes as now and the maximum speed allowed by law under any condition was 35 miles per hour. In this case the plaintiff saw defendant approaching him from an angle at a speed 5 miles in excess of the limit allowed by law, yet he did substantially nothing to avoid disaster to himself or his neighbor. A person may not shut his eyes to a danger, in blind reliance upon the unaided care of another, but must himself use reasonable care to observe the conduct of such other person so far as such conduct may affect his own safety at the time. 19 Cal. Jur. p. 579. Respondent's brief in a faint way intimates that the 40 miles per hour is a stumbling block, and rather suggests that this court may by conjecture substitute a lesser speed. Counsel then resort to the rule, "That one using the highway lawfully has a right to assume that others using the highway will exercise due care and caution and will obey the traffic laws." This rule is not comprehensive enough to apply to the facts of this case; there should be added to it, "unless he as an ordinarily prudent person is warned to the contrary."

[8] One traveling on a public highway has no right to assume that other drivers of mo-

tor vehicles are superexpert drivers, or that the machines they are driving are the acme of perfection in mechanical construction. Such person can only assume that the other drivers are reasonably competent and that the machines are reasonably well equipped. Consequently, when we determine the distance in which a moving vehicle may be stopped, we must have in mind the average driver and the average machine. Section 94 of the California Vehicle Act, which was adopted in 1929 (St. 1909, p. 530), has in a somewhat circuitous way determined what are reasonable distances in which to stop moving cars, which are as follows, the first figure of each designation being the speed per hour and the second figure the stopping distance: 10-9.3, 15-20.08, 20-37, 25-58, 30-83.3. At the same rate of progression, 40 miles per hour would call for more than 140 feet. The Society of Automotive Engineers has determined that under favorable conditions the average car traveling 40 miles per hour can be stopped when equipped with four-wheel brakes in 82 feet and with two-wheel brakes in 155 feet. We do not hold that the foregoing figures establish distances that must be observed by persons traveling on highways; they are only given for the purpose of aiding this court in determining when as a matter of law a reasonably prudent person should know that he and others were in great peril and should act accordingly. It is not necessary to fix the exact point or distance on Soledad street where in this instance safety ceased and danger commenced so long as we are satisfied it is well within the danger zone. We therefore hold: That where one driving a motor vehicle at a speed of 18 miles per hour is approaching a street intersection from the west and when he is 20 feet from the intersection he sees an automobile, which he knows is traveling at a speed of 40 miles per hour and shows no sign of slackening speed, approaching the intersection from the south at a point 60 or 70 feet from the intersection, that this situation of itself, as a matter of law, is a sign of danger, and such one is required to exercise reasonable care to avoid injury to himself, notwithstanding he may have the legal right of way.

[9] We are of the opinion that the testimony of plaintiff clearly shows, as a matter of law, that he did not exercise ordinary care to avoid the injury; consequently he was guilty of contributory negligence and is not entitled to recover in this action. This makes it unnecessary to consider the other points raised by appellant.

The judgment is reversed.

We concur: TYLER, P. J.; CASHIN, J.

105 Cal. App. 391

BATINI v. IVANCICH et al.

Civ. 3846.

District Court of Appeal, Third District, California.

April 28, 1930.

1. Execution ⚷222(1).

Failure to give statutory notice of execution sale *held* not to vitiate sale, statute being directory and aggrieved party left to remedy against officer (Code Civ. Proc. § 692, subd. 3, and § 693).

2. Execution ⚷250.

Price of $412, at execution sale of property worth between $5,000 and $6,000, *held* not grossly inadequate, where incumbrance and accrued interest amounted to nearly $5,400.

3. Execution ⚷224.

Fact that three parcels of land were sold en masse at execution sale *held* not to render sale void, absent showing of prejudice (Code Civ. Proc. § 694).

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by A. Batini against John Ivancich and wife and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Puter & Quinn, of Eureka, for appellants.

Eugene S. Selvage, of Eureka, for respondent.

PARKER, Justice pro tem.

This action involves the ownership and right to possession of certain real estate situated in this state.

Plaintiff rests his claim upon a sheriff's deed. Defendants contend that the deed is void and of no effect. Both sides here agree that the sole question presented both in the court below and here is on the validity of said sheriff's deed. The trial court held that the deed was effective to transfer title and entered its decree in favor of plaintiff, and the defendants appeal. At the outset, it may be noted that no claim of irregularity is made as to any proceeding up to the time of the issuance of the writ of execution under which the sheriff's sale was made. In other words, the writ of execution was regularly issued. Appellants contend that in making the sale no legal or sufficient notice thereof was given and that the property sold, consisting of three parcels of real estate, was sold en masse.

The facts are that the sheriff sold the property after having given fifteen days' notice and that the property did consist of three separate pieces and the sale was en masse. Section 692 of the Code of Civil Procedure, so far as material here, provides: "Before the sale of property on execution * * * notice thereof must be given as follows: * * * 3. In case of real property: by posting a similar notice particularly describing the property for twenty days, in three public places of the township or city where the property is to be sold and publishing a copy thereof once a week for the same period. * * *" Section 693, Code of Civil Procedure, provides that an officer selling without such notice forfeits $500 to the aggrieved party, in addition to his actual damages.

[1] The entire question here is as to what effect noncompliance with the statutory provision has upon the sale by the sheriff. The question is to be determined by a review of the authorities in point. In the early case of Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 475, construing similar sections of the Practice Act, we find this statement:

"It has been often decided that the provisions of statutes similar to ours, with respect to levy and notice of sale under execution, are merely directory, and the failure of the officer to comply with the requirements of the law, in this respect, would not vitiate such sale, but the party aggrieved by his neglect is left to his remedy by an action against the officer. * * * This rule is founded in justice and sound policy. * * *

"The intention of the Legislature, where it can be ascertained, must govern in the construction of a statute. This intention should not be taken from a particular section, but from the whole statute. Section 221 of the [Practice] Act provides that the sheriff shall, before a sale of real estate under execution, give notice of the time and place of sale, for twenty days. If the officer neglects to give such notice the following section provides, not that the sale shall be void, but 'an officer selling without the required notice shall forfeit five hundred dollars to the aggrieved party in addition to his actual damages.'"

The only argument advanced by appellants to offset the effect of this ancient ruling is that, under the Practice Act, it was provided that notice *shall* be given, while under the present Code section, notice as prescribed therein *must* be given. Without going into the distinction, it is sufficient to note that the reasoning of the cited case has been approved and the rule announced is followed under the code practice. 11 Cal. Jur. 133; Frirk v. Roe, 70 Cal. 302, 11 P. 820; Sheehan v. All Persons, 80 Cal. App. 393, 252 P. 337; Williams v. Reed, 43 Cal. App. 434, 185 P. 515.

As stated, a review of the cited authorities will disclose, beyond dispute, that our courts are still committed to the earlier rule. Particularly is this true where the attack is collateral and no showing, other than of defective or insufficient notice, is made. Doubtless much well-directed criticism may appear justifiable and many plausible arguments might be advanced against the holding. But all of these arguments have been weighed and considered and found insufficient to disturb the rule. Obviously, the courts have had in mind the harmful results following an easy voiding of judicial sales and have decided that mere deviation from the statute would not bring such results, unless by the statute itself so provided. And, further than this, the courts have always lent a willing ear to the debtor who could show fraud or unfairness in the sale of his property, and where a proper showing has been made full relief has followed. No such showing is attempted here.

[2] It is somewhat weakly urged that there has been shown a gross inadequacy of consideration. This is not wholly true. The value of the property was between $5,000 and $6,000 and the said property was incumbered to the extent of $4,300, which, with accrued interest, amounts to now practically $5,400. The sale price was $412. Hence, it is obvious that the claim of gross inadequacy cannot be maintained.

[3] The final contention of the appellant is that the sheriff's sale was void by reason of the fact that three parcels of real property were sold en masse instead of separately, as required by section 694, Code of Civil Procedure.

Appellant makes no showing other than that such was the method of sale. No evidence was offered nor is argument made that any different price could or would have been obtained, nor is there any attempt to show any injury to appellant in the slightest degree. The mortgage referred to covered each lot.

Hudepohl v. Liberty Hill Consol. Water & Mining Co., 94 Cal. 588, 29 P. 1025, 28 Am. St. Rep. 149, holds that a sale of property under execution will not be set aside because sold en masse, unless it is made apparent to the court that a larger sum would have been realized from the sale of the property had it been sold in parcels, or that a sale of less than the whole tract would have brought sufficient to satisfy the writ. In Bechtel v. Wier, 152 Cal. 443, 93 P. 75, 15 L. R. A. (N. S.) 549, the same rule was followed.

In Sargent v. Shumaker, 193 Cal. 122, at page 132, 223 P. 464, 468, we find the following language: "The sale en masse of several known lots or parcels, in the absence of special circumstances to justify it, is clearly an

irregularity; but this court has frequently held that such an irregularity will not justify vacating the sale, in the absence of an affirmative showing that it operated to the actual injury of the owner," citing Hudepohl v. Liberty Hill, etc., Co., supra; Meux v. Trezevant, 132 Cal. 487, 489, 64 P. 848; Summerville v. March, 142 Cal. 554, 76 P. 388, 100 Am. St. Rep. 145.

On the showing here made, which is nil, we see no grounds to set aside the sale in question.

Judgment affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

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105 Cal. App. 297

COEN v. WATSON et al.

Civ. 7247.

District Court of Appeal, First District, Division 2, California.

April 19, 1930.

1. Venue ⟹22(3).

Residence of automobile driver's wife not owning automobile, separated from husband, and made party solely to try action in her county, *held* erroneously considered in determining venue (Code Civ. Proc. § 395).

Complaint, in action to recover damages for death of deceased killed in automobile accident, alleged that wife of driver of automobile in which deceased was riding owned such automobile, and that driver was her agent, but, on hearing on motion for change of venue by defendant on ground of residence, it appeared that wife of driver of automobile in which deceased was riding did not own automobile, but was separated from her husband at time of accident, and knew nothing of trip being made by her husband and deceased until after accident.

2. Pleading ⟹8(2).

Allegations in complaint that driver was wife's agent *held* mere conclusion, not creating conflict on motion to change venue.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Sheila Coen against Stanley Watson and others. From an order denying motion for change of venue, defendant named appeals.

Reversed.

Brobeck, Phleger & Harrison, of San Francisco (James S. Moore, Jr., and Kenneth Ferguson, both of San Francisco, of counsel), for appellant.

Vincent W. Hallinan and Henry D. Egan, both of San Francisco (W. Earl Shafer, of San Francisco, of counsel), for respondent.

STURTEVANT, J.

This is an appeal from an order refusing to grant a motion to change the place of trial from the city and county of San Francisco to Mendocino county.

[1] The plaintiff's husband, William F. Coen, and Paul E. Falk were traveling in an automobile in a southerly direction from Healdsburg toward San Francisco. Stanley Watson was traveling in a Buick automobile along the same road northerly from San Francisco to Healdsburg. At a point about three miles south of Healdsburg, the automobiles collided. Plaintiff's husband and Falk were both killed. In her complaint the plaintiff sued Watson and Anita Falk and First Doe, Second Doe, and Third Doe. Among other things she alleged "that on the third day of September, 1928, defendant Anita Falk was the owner of a certain Ford automobile which was on said day being driven by one Paul B. Falk, who was then and there the agent of said Anita Falk and acting within the scope of his employment by her; and that said Anita Falk is a resident of the City and County of San Francisco, State of California." The defendant Anita Falk has never been served. The defendant Stanley Watson appeared and answered and filed the formal papers asking for a change of venue. When the motion for a change of venue came on for hearing, the defendant offered in support of his motion the plaintiff's complaint, Watson's answer, his demand for change of venue, his notice of motion for change of venue, his affidavit of merits, the deposition of Anita Falk, and the deposition of plaintiff. The plaintiff offered in opposition to the motion her complaint. From the foregoing papers the following facts appear and are not contradicted: At the time of the accident, plaintiff and William F. Coen were husband and wife residing in San Francisco. The husband was a special policeman. Prior to the accident Anita Falk and Paul B. Falk had been husband and wife, but she had applied for a divorce and had obtained an interlocutory decree eight months prior to the accident. Paul B. Falk was by occupation a truck driver for the Acme Ice Cream Company in San Francisco. From the time Mrs. Falk applied for a divorce she had had no business relations whatever with her husband. Mrs. Falk never owned a Ford car nor any other kind of an automobile. Whether business or pleasure had taken Mr. Falk and Mr. Coen from San Francisco to Healdsburg does not appear. Mr. Coen was the owner of a Ford car at the time of his death, and afterwards the plaintiff made no inquiry to ascertain where that Ford car was. At the time of the accident Mrs. Falk was at Healdsburg on a visit. She knew nothing of the trip being made by Mr. Falk and Mr. Coen until the

morning after the accident. At the time of the accident, Mrs. Coen was in San Francisco, and of her own knowledge knew nothing of the facts concerning the accident. When her complaint was framed, she had not communicated with any witness or witnesses, and knew nothing of the facts concerning the accident. The defendant Stanley Watson is and was at all times a resident of Mendocino county. From the foregoing it clearly appears that Anita Falk was improperly joined as a defendant, and that she was made a defendant solely for the purpose of having the action tried in the city and county of San Francisco, where she resides. Under these circumstances her residence should not have been considered in determining which is the proper county for the trial of the above-entitled action. Code Civ. Proc. § 395.

[2] The allegations of agency contained in the plaintiff's complaint were but conclusions of law. They did not create any conflict as to the facts hereinabove recited. Petrich v. Francis, 83 Cal. App. 72, 256 P. 444; 1 Cal. Jur. 669, 670. There was not, therefore, any evidence in opposition to the motion, and it should have been granted.

The order denying the motion is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

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105 Cal. App. 458

HAMELIN v. FOULKES et al.★

Civ. 6847.

District Court of Appeal, First District, Division 2, California.

May 2, 1930.

Rehearing Denied May 29, 1930.

1. Landlord and tenant ⚷167(2).

Lessee is ordinarily liable for injuries to third person occasioned by defective condition of premises after beginning of lease.

2. Landlord and tenant ⚷167(2).

Liability of lessee to third person injured as result of defective condition of premises arises by virtue of lessee's exclusive possession and control.

3. Landlord and tenant ⚷167(1).

Lessee must exercise ordinary care in maintenance of leased premises to avoid injuring third persons.

4. Landlord and tenant ⚷167(5).

Lessee of store *held* liable to pedestrian for injuries sustained due to failure to maintain proper covering over sidewalk hydrant box used in connection with store.

Since the hydrant box was solely for the use of the lessee's store, and was connected with the lessee's meter, possession and control thereof passed as an appurtenant to the lease of the store and basement, and the lessee became liable to the pedestrian for injuries by virtue of having such possession and control. Morever, the lease provided that all repairs to the leased premises should be made at lessee's expense, and that lessee waived right to charge them to lessor, so that lessee's liability might be based on duty to make repairs. The grating used to cover the hydrant box had been broken for more than a month prior to the accident, and lessee had knowledge of this condition during that time, but did nothing to repair it except to report the matter to the lessor.

5. Landlord and tenant ⚷167(5).

As regards lessee's liability to pedestrian falling in hole over sidewalk hydrant box, question whether lessee actually used hydrant was immaterial.

6. Landlord and tenant ⚷167(5).

That hydrant box connected with store was defectively covered at time of lease did not relieve lessee from using ordinary care to protect public.

7. Damages ⚷132(3).

$10,000 for injury to back and spine, causing pain, numbness, sleeplessness, exhaustion, and permanent incapacity for active work by 30 year old woman earning $150 per month, *held* not excessive.

At the time of the trial, a little more than two years after the accident, plaintiff had expended $333.50 for treatments, had lost earnings in the sum of $3,450, was unable to stay on her feet more than ten minutes at a time, and was still wearing a surgical corset, and, according to medical testimony, would never be able to undertake vigorous employment, and would have to forego the possibilities of motherhood. Her only hope of recovery was by surgical operation resulting in incapacity for three to five months.

8. Appeal and error ⚷1004(1).

Verdict will not be set aside, unless so plainly excessive as to suggest at first blush passion or prejudice.

9. Damages ⚷62(2).

Injured person is only required to act in good faith and exercise ordinary care respecting treatment.

10. Damages ⚷62(2).

Plaintiff who wrenched her leg was not precluded from recovering damages for injury to back and spine by having failed to secure immediate medical assistance.

★Rehearing denied.

Plaintiff obtained medical treatment on discovering that injury amounted to more than a simple wrenching of her leg and spine, and it did not appear from the record that failure to obtain medical treatment immediately aggravated her injury.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Ethel Hamelin against Edward T. Foulkes, H. C. Swanson, and the H. C. Swanson Company. Plaintiff recovered judgment against the two defendants last named, and they appeal.

Affirmed.

Barry J. Colding and Theodore Hale, both of San Francisco, for appellants.

M. Mitchell Bourquin and Ford & Johnson, all of San Francisco, for respondent.

SPENCE, J.

An action for personal injuries was brought by Ethel Hamelin, respondent, against Edward T. Foulkes, H. C. Swanson, and H. C. Swanson Company. A motion for nonsuit was granted as to the defendant Foulkes. The jury rendered a verdict in the sum of $10,000 in favor of respondent and against the appellants H. C. Swanson and H. C. Swanson Company. This appeal is taken from a judgment entered upon the verdict.

Respondent sustained her injuries on the night of November 6, 1926. While alighting from an automobile, she stepped into an open hole in the sidewalk occasioned by failure to maintain a proper covering upon the sidewalk hydrant box in front of appellants' store in the Webster block in the city of Oakland. The defendant Foulkes was the lessor of the premises known as the Webster block. The building consisted of stores on the ground floor, offices above, and basement below. Appellants were the lessees of a portion of the premises described in the lease as that certain store and basement thereof known as 361 and 363 Twelfth street. Each of the stores on the ground floor had its own hydrant box in front of the store. A water hydrant was housed in each hydrant box for use by the tenant in the washing of windows, cleaning of sidewalks, or for whatever purposes the tenant desired. The hydrant in front of each store was connected with the water meter of that store, and each tenant paid his own water bill. The hydrant boxes were cut in the concrete near the curb, and were approximately ten inches square. The openings were covered by iron gratings. The basement referred to in the lease extended under the sidewalk, and appellants' water meter for his store and basement was in the basement almost directly under the sidewalk hydrant box. Sidewalk elevators were used leading to this basement. The only keys to the basement were in control of the appellants, and access to that portion of the building could be had only through appellants' store or through the sidewalk elevators. The lease of these premises was made in August, 1922, and the injuries were sustained by respondent more than four years later. The grating used to cover the hydrant box in front of appellants' store had been broken for more than a month prior to the accident and a portion thereof was being displaced constantly, thus leaving the opening unguarded. Appellants had knowledge of the dangerous condition for a month or more prior to the accident. According to appellants, they reported the matter to the lessor, but did nothing more.

[1–5] On this appeal, numerous specifications of error are urged in the giving and refusing of various instructions. Primarily, the questions involved in these specifications depend upon whether the appellants, as lessees of a portion of the building involved, are liable for the injuries to the respondent. In brief, appellants contend that the liability rested solely upon the lessor and not upon the lessee. With this proposition we cannot agree.

The lessee and not the lessor is ordinarily liable for injuries to third persons occasioned by the negligence of the lessee or due to a defective condition of the premises occurring after the beginning of the lease. Rider v. Clark, 132 Cal. 382, 64 P. 564; 15 Cal. Jur. 737, par. 150. This liability of the lessee exists irrespective of the covenants of the lease relating to repairs, and arises by virtue of his exclusive possession and control of the premises. The right of the lessee to possession and control of the premises is accompanied by a corresponding duty to exercise ordinary care in the use and maintenance of the premises so as not to occasion injuries to third persons. That such liability ordinarily is imposed solely upon the lessee, with certain exceptions hereinafter noted, is conceded by appellants, but it is contended that the general rule applies only where the possession and control of the entire premises passes by the lease and does not apply to the facts in the present case where only a portion of the building was leased and the injury was occasioned by failure to properly maintain a sidewalk hydrant box. There would be much force in this contention if the hydrant box was appurtenant to the entire building rather than to appellants' store, but, where the hydrant box was solely for the use of appellants' store, and was connected with appellants' meter, the lease of the store and basement to appellants passed with it the possession and control of the hydrant box as an appurtenance thereto. "A lease of a part of a building passes with it, as an incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part demised. * * * The general rule is that where a store is leased, everything then in use for the store, as an incident or appurtenance, passes by the lease." Runyon v. City of Los Angeles, 40 Cal. App. 383, 387, 180 P. 837, 839.

Much stress is placed upon appellants' testimony to the effect that they did not use the hydrant. However, it is not the actual use which is important, but the right to the exclusive possession and control which governs.

The general rule and the exceptions thereto are stated in Rider v. Clark, supra. The court there said at page 386 of 132 Cal., 64 P. 564, 565: "When the tenant enters into possession under a lease, the landlord parts with all his right to and control over the premises, and is not liable to third persons, except for such defects in the premises or defective construction as existed in the premises when let to the tenant. * * * 'It is well settled that a landlord is not liable for such consequences unless: (1) The nuisance occasioning the injury existed at the time the premises were demised; or (2) the structure was in such a condition that it would be likely to become a nuisance in the ordinary and reasonable use of the same for the purpose for which it was constructed and let, and the landlord failed to repair it; or (3) the landlord authorized or permitted the act which caused it to become a nuisance occasioning the injury.'"

[6] Appellants seek to evade liability under the second exception above noted, claiming that at the time the lease was made the hydrant box was in such condition that it would be likely to become a nuisance in the ordinary and reasonable use thereof. We find nothing in the record which would warrant a finding that at the time the lease was made in 1922 the cover of the hydrant box was in such condition, but, if such were the case, it would only operate to impose a liability upon the lessor. It would not serve to relieve the lessee from the duty imposed upon him by virtue of his possession and control of the premises, nor permit him, after notice of a defective condition, to sit idly by and fail to use ordinary care in protecting the public therefrom.

No reference has been made thus far to the terms of the lease between the lessor and the lessees. It was provided "that all repairs to the demised premises shall be made by and at the sole cost and expense of the lessee and said lessee hereby waives all right to make repairs at the lessor's expense under the provisions of section 1942 of the Civil Code of California." There were other provisions regarding damage, alteration, and repairs, including a provision for restoration by the lessor in the event of partial destruction of the premises with a waiver by the lessee of the provision of section 1932 and subdivision 4 of section 1933 of the Civil Code. Reading the provisions of the lease together, it appears that the duty was upon appellants to make such repairs as were here required. There can be no question under these circumstances concerning the lessee's liability for injuries resulting from the failure to exercise ordinary care in keeping the premises in a safe condition. Runyon v. City of Los Angeles, 40 Cal. App. 383, 390, 180 P. 837. As heretofore stated, the duty is imposed upon the lessee by reason of his exclusive possession and control, and it has been said that "a covenant by the tenant to repair but enforces his liability." 15 Cal. Jur. 740, par. 152.

Considerable space in appellants' briefs is devoted to a consideration of cases which have sustained liability against the lessor under certain circumstances. The question here involved is not whether the lessor might also be held liable, but whether the liability may be properly imposed upon the lessee. This is an appeal from the judgment against the lessee, and is not an appeal from the judgment of nonsuit granted upon motion of the lessor. The duty to use ordinary care to keep the premises in a safe condition having been imposed upon appellants both by virtue of their exclusive possession and control of the premises and also by the covenants of the lease regarding such repairs, we find no prejudicial error in the giving or refusing of any of the instructions relating thereto.

[7, 8] Appellants further contend that the damages were excessive, and that respondent failed to use ordinary care and diligence in procuring medical or surgical treatment following the injury. On November 6, 1926, when respondent's foot went into the open hole, she was thrown to the pavement, and her foot was thereafter pulled from the hole. Her leg was wrenched, but the main injury was to her back and spine, more particularly to the sacroiliac joint. The respondent suffered severe pain, but the injury appeared to consist of nothing more than a severe wrenching. She was immediately put to bed, her back was strapped, and relief was attempted by means of the application of home remedies by her mother and sister. She remained in bed the following day, and on Monday, the second day following the accident, she returned to her work as saleslady. In spite of severe pain and loss of sleep she continued her work under difficulty until December 22, 1926. She had consulted Dr. Boscowitz in the latter part of November or first part of December, and on December 22 he ordered her to bed. She remained in bed for six weeks under treatment consisting of taping and electrical treatments. She then began treatment with Dr. Hitchcock, who ordered her to wear a surgical corset and to have boards under the mattress to keep her firm. In April, 1927, she consulted Dr. Hunkin, who prescribed a different form of corset, the wearing of a higher heel on the right shoe, and gave her certain injections. Thereafter, during the spring of 1927, she sought relief from Dr. Fraser, an osteopath, whose treatment consisted of adjustments and manipulation of the spine, which treatment continued up to the time of trial in November, 1928. At the time of the trial, a little more than two years after the accident, she testified that she was never free from pain; that her legs became numb and cold at frequent intervals; that she did not

sleep well at night, and could not eat as well as she formerly did; that she could not sit up all day because she became exhausted; that she could not stay on her feet more than ten minutes at a time, and that she was still wearing a surgical corset, sleeping with boards under the mattress, and wearing specially constructed shoes. She had lost considerable weight due to her suffering. Shortly before the trial she was examined by Dr. Cleary, who testified for respondent, and Dr. Cary, who testified for appellants. Although not entirely in accord in all details, both agreed that respondent had suffered an injury to the sacroiliac joint, the exact nature of which injury was described by the use of X-rays. Dr. Cleary testified that she was absolutely incapacitated for active work, and that he did not consider that treatment by surgical operation or otherwise would completely restore her to capacity. He stated that, after the best could be done for her, she could never undertake any vigorous employment and would have to forego the possibilities of motherhood. The only hope of recovery held out by Dr. Cary, appellants' witness, was by means of a surgical operation which he termed the Smith-Peterson-Cary operation, which surgical procedure would result in incapacity for three to five months. Prior to the injury, the testimony showed that respondent was a woman thirty-one years of age, in good health, and regularly earning $150 per month. At the time of trial, respondent had already expended $333.-50 for treatment of her injuries, and had lost earnings in the sum of $3,450. Further facts could be set forth, but a recital of the above testimony is a sufficient answer to appellants' claim that the damages were excessive. It is fundamental that upon appeal the verdict will not be set aside upon this ground, unless it is so plainly excessive as to suggest at first blush passion, prejudice, or corruption on the part of the jury.

[9, 10] Nor do we find any merit in the claim that respondent failed to use ordinary care and diligence in procuring medical or surgical treatment following the injury. The exact nature and extent of the injury were unknown to respondent. It should be noted that medical men were not in accord on this subject, nor upon the proper treatment for the relief of her condition. Respondent obtained medical treatment upon discovering that her injury amounted to more than a simple wrenching of her leg and spine, and there is no evidence in the record that the failure to obtain medical treatment at an earlier date had aggravated her injury. The evidence is ample to show that respondent acted in good faith and exercised ordinary care and diligence, which is all that is required. Marshall v. Ransome Concrete Company, 33 Cal. App. 782, 786, 166 P. 846.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

105 Cal. App. 320

SINGLETON et al. v. HARTFORD FIRE INS. CO.★

Civ. 3880.

District Court of Appeal, Third District, California.

April 21, 1930.

As Modified on Denial of Rehearing May 21, 1930. Hearing Denied by Supreme Court June 19, 1930.

1. Insurance ⟹658.

Evidence showing value of building destroyed by fire *held* competent on issue whether fire was of incendiary origin, rendering insurance policy void.

2. Insurance ⟹668(10).

Whether fire which destroyed hotel building covered by insurance was of incendiary origin, totally avoiding insurance policy, *held* for jury under evidence.

3. Insurance ⟹668(6).

Whether alleged false statements by insured regarding property destroyed by fire were willfully made *held* for jury under evidence.

4. Trial ⟹139(1).

Directed verdict on fact question, where substantial evidence justifies contrary decision, *held* in conflict with constitutional inhibition against charging jury on matters of fact.

5. Trial ⟹178.

Upon motion for directed verdict, every reasonable inference should be resolved in favor of party against whom application is made.

6. Trial ⟹142.

Directed verdict should be denied when reasonable minds may differ as to effect of evidence upon fact question.

7. Trial ⟹139(1).

Application for directed verdict upon facts should be granted with caution, and only when there is clearly no substantial evidence to support contrary finding.

8. Insurance ⟹429, 553(1).

Under terms of fire policy, insured's willful destruction of property or willful and false statements in proof of loss with intent to defraud *held* to totally avoid policy (St. 1909, p. 404, § 1).

Fire insurance policy in question in conformity with St. 1909, p. 404, § 1, contained forfeiture clause rendering policy void if insured concealed or misrepresented any material fact or circumstance concerning insurance or subject thereof, and also in case of any fraud or false swearing touching any matter relating to insurance or

 ★Rehearing denied. Hearing denied by Supreme Court.

subject thereof, whether before or after loss.

On Petition for Rehearing.

9. Trial ⟹139(1), 140(1).

Weight of evidence and character of witness affecting credibility of testimony are questions solely for consideration of jury.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by George Singleton and another against the Hartford Fire Insurance Company. Case was dismissed as to the Indian Valley Bank, and judgment rendered for plaintiff, and defendant appeals.

Reversed.

Percy V. Long and Bert W. Levit, both of San Francisco (S. C. Young, of Quincy, of counsel), for appellant.

Huston, Huston & Huston, of Woodland, and L. H. Hughes, of Quincy, for respondent.

R. L. THOMPSON, J.

This is an appeal from a judgment in favor of the plaintiff Singleton which was entered upon a directed verdict. The suit was founded upon liability under a fire insurance policy. The defenses were urged that the fire was of incendiary origin caused by the willful acts of the plaintiff Singleton, and that his recovery was barred by willfully rendering a false claim of loss.

The plaintiff Singleton owned a hotel at Crescent Mills, in Plumas county, which he acquired by exchange of properties in 1924. The exchange value of this property was about $6,000. It was alleged the property was worth $8,000 at the time of the fire. The building was somewhat dilapidated. The equipment was poor and the business did not prosper. The hotel building was insured by the appellant April 2, 1926, for $4,000 and the contents for $1,000 additional. The policy conformed to the California statutes of 1909, page 404. It contained this forfeiture clause: "Matters avoiding policy. This entire policy shall be void, (a) if the insured has concealed or misrepresented any material fact or circumstances concerning this insurance or the subject thereof; or, (b) in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss." Section 1. The property was subject to a mortgage of $800 held by the plaintiff Indian Valley Bank, which was paid by the appellant subsequent to the commencement of the action. The cause on the part of the bank was then dismissed.

The building and its contents were completely destroyed by fire which occurred at about noon on September 2, 1926. The respondent promptly made a claim for the full amount of insurance on both the building and its contents. No question is raised on appeal as to the value of the building. The respondent included in his statement of loss, which was sworn to and filed with the defendant, an itemized list of personal property which he claimed was destroyed in the fire. It included no separate valuations of items but merely a claim of loss of an aggregate valuation of $2,000. The number and description of these items of personal property are included in the following statement, to wit:

7	Wood beds .....at	$15.00	$ 105.00
23	Iron beds .....at	13.50	310.50
30	Springs .....at	9.50	285.00
30	Mattresses .....at	15.75	472.50
22	Dressers .....at	22.50	495.00
3	Bureaus .....at	24.50	73.50
52	Chairs .....at	3.50	182.00
11	Tables .....at	18.00	198.00
4	Rugs .....at	25.00	100.00
4	Sofas .....at	36.00	144.00
10	Iron stools .....at	4.50	45.00
	Dishes and cooking utensils		300.00
50	Pillows .....at	2.00	100.00
36	Sheets .....at	2.25	81.00
6	Blankets .....at	8.50	51.00
36	Pillow cases .....at	.50	18.00
4	Quilts and blankets at	4.50	18.00
	Replacement value ...		$2,978.50
	Depreciation		1,490.00
	Sound value and loss		$1,488.50

Testimony was adduced to the effect that a substantial number of the foregoing items were not included in the building at the time of the fire. There was also evidence of circumstances tending to indicate that the respondent may have set fire to the building, which issues should have been submitted to the jury. At the close of the evidence, however, the court directed the jury to return a verdict for the plaintiff, which it accordingly did. A judgment was thereupon rendered in favor of the plaintiff for the full amount of his insurance, less the sum of $800, which had been previously paid to the bank in settlement for the mortgage which it held. From this judgment the appeal was perfected.

At the trial, the respondent was the only witness called in his own behalf. With the exception of a single item of the personal property, he persisted in testifying that he did not know the separate value of any of the articles of hotel equipment, but said that the agent, Bacher, who wrote the policy, listed the personal property at a total valuation of $2,000 and that "they were worth $2,000 to me there in the hotel."

Substantial evidence was adduced in support of the defense that the fire was caused by the incendiary acts of the appellant and

that his recovery on the policy was barred by subsequent false, fraudulent, and exaggerated sworn statements with respect to the articles of property which were burned, and their valuation.

The following circumstances which appear in the record sufficiently support the foregoing defenses to have required the submission of these issues to the jury notwithstanding the fact that they were contradicted by the respondent. A directed verdict was therefore erroneous.

[1] The appellant was precluded from proving the value of the hotel building on the theory that the insurance company had waived its right to question the value which was asserted in the claim of loss by its failure to dissent therefrom by written notice to the insured within twenty days from the receipt of the proof of loss, as required by the policy. The policy, however, contained the further provision that: "This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof, by assenting to the amount of the loss or damage. * * *" Evidence of the value of the building was competent not for the purpose of reducing the amount of insurance to be paid thereon, but to determine whether the policy had become void on account of the incendiary acts of the insured. He testified that the building and its contents were originally procured by him at an exchange valuation of only $6,000. Exchange valuations are usually exorbitant. The evidence indicates that the building had deteriorated and was sadly in need of repairs and that the business had not prospered. Assuming that the evidence might have shown the building to have been worth much less than the amount for which it was insured, it would have furnished a motive for the fire. This evidence should not have been excluded. In support of the court's ruling upon this line of evidence, the respondent relies on Victoria Park Co. v. Continental Insurance Co. of New York, 39 Cal. App. 347, 178 P. 724, and other similar cases. But in none of these cases was the issue of an incendiary fire or fraudulent declarations of values involved. In the case above cited it is said: "There was no issue in the case as to the fire having occurred as alleged by the plaintiffs."

[2, 3] In the present case the witness Joe Palazzi testified that within a few months prior to the fire the plaintiff twice tried to persuade him to burn the hotel. The first occasion was about a month or two before the property was insured. Palazzi said the plaintiff came to his cabin near by and offered to pay him $200 if he would burn the hotel. He testified that Singleton said: "You go in the hotel. * * * I will put insurance on that building * * * and then * * * we will burn him down; if you don't want to do it, I will get somebody else. * * * I take five gallon coal oil and I will soak all of the carpet on the second floor. * * * I will let you know when I am ready to go, and * * * you can take your stuff away. * * * I will (then) build for you a little restaurant on the corner of my lot. * * *" "That (conversation occurred) a month or two before (I moved, which was in March)." As a matter of fact the hotel and its furnishings were subsequently insured April 2, 1926, for $5,000. The record discloses the existence of no previous insurance on the property. Palazzi further testified that in June after the property had been insured, the plaintiff again returned and renewed his offer to pay him $200 to burn the property. In a long cross-examination the witness strenuously adhered to his story. There is evidence to support the theory that the fire was in fact started in the upper story of the hotel, which was unoccupied. The plaintiff had been absent for a week or ten days prior to the fire and had just returned a day or two before that occurrence. In spite of the fact that he denied having been in the alleyway behind the hotel at any time "for half a month" prior to the fire, the witness Mary Esani, who lived back of the hotel, testified that she saw him just a few minutes before the fire going into the hotel from the alleyway in the rear "through the fence," which was attached to the woodshed. This was corroborated by a witness by the name of Rose Lucier, who said: "He went right through the gap of the fence, right in front of my place there, to go in through his back yard." Within a few moments after he entered his premises from the rear smoke was seen coming through the roof of the hotel toward the rear of the building. After this Mrs. Lucier testifies that "about half an hour or twenty minutes" after she saw him leaving the hotel to go up the street, he returned and she says, "When I saw him peeking through between the houses, that was after the fire." Mr. William Kingdon, Jr., who was a clerk in a store across the street from the hotel, testified that about a month before the fire he saw a truck standing in the back yard of the hotel "right close to Mr. Singleton's bedroom," upon which Mr. Westover, a truckman who was then stopping at the hotel, had a number of small boxes. He said, "It was somewheres about a month before (the fire), and it was along in the morning when it was being loaded." There is evidence that during the burning of the building, while many of the neighbors were frantically working to control the fire and to save some of the contents of the building, the plaintiff stood calmly by, neatly dressed and apparently unconcerned. Mr. Kingdon, Sr., whose store across the street from the hotel was also destroyed by fire, testified that he rushed across to assist in putting out the fire, and, seeing Singleton calmly standing there, accused him of burning the property. He said: "I advanced towards him

and called him a vile name and accused him of setting the fire for the purpose of bettering himself and not paying any attention to what became of the rest of us. * * * As soon as I accused him of setting the fire, he backed away from me and acted as if he was afraid of me." Shortly after the fire the plaintiff visited the garage of John Haker, who testified that he seemed nervous and agitated. He said, "He appeared rather nervous. * * * He was rolling a cigaret, his hands were shaking." Singleton owned an automobile, which was not insured and which he usually kept in a garage adjoining the hotel. He testified that about a month or six weeks before the fire this car had been taken by him to Woodland, where his wife was then living. Upon the contrary, however, Mr. Kampschmidt, an automobile mechanic, testified that he had worked on that machine at Crescent Mills shortly before the fire. He said, "I am pretty fairly positive that it was about a week or ten days before the fire." In conflict with the itemized statement of the articles of hotel furniture and their valuation, which the plaintiff had previously sworn he had lost in the fire as above specified, a number of witnesses, including the barber who rented a couple of rooms in the building and had charge of the hotel in the absence of the owner, testified to an absence of furniture and equipment which is at startling variance with the plaintiff's claim of loss. As a matter of illustration, instead of 30 mattresses, which he claimed to have lost, there is evidence that the hotel contained but 13 which were of any value; instead of 22 dressers, one witness says there were but 3; there is evidence which tends to reduce the number of 50 pillows claimed to have been lost to 12; 36 sheets were reduced to 15; and 36 pillow cases to 15.

The foregoing state of the record conclusively indicates that the issues as to the cause of the fire and respecting the alleged fraudulent misrepresentation as to the personal property which was claimed to have been destroyed by fire, should have been submitted to the jury. The liability of the insurance company depended upon the solution of these questions.

[4] A direction to the jury to render a verdict on a question of fact, where there is substantial evidence to justify a contrary decision thereon, is an invasion of the province of the jury and in conflict with the constitutional inhibition against a trial judge charging the jury on matters of fact. 24 Cal. Jur. 916, § 164; Umsted v. Scofield Eng. Const. Co., 203 Cal. 224, 263 P. 799.

[5-7] Upon a motion for a directed verdict every reasonable inference from the evidence should be resolved in favor of the party against whom the application is made. When reasonable minds may differ as to the effect of the evidence upon the solution of an issue of fact, the application to direct a verdict should be denied. Boyle v. Coast Imp. Co., 27 Cal. App. 714, 151 P. 25; Robertson v. Weingart, 91 Cal. App. 715, 726, 267 P. 741; 33 C. J. 130, § 863. From time immemorial the courts have jealously guarded the rights of juries to pass upon facts. An application to direct a verdict upon facts should be granted with caution, and only when it is clear there is no substantial evidence to support a contrary finding. In the present case it may not reasonably be said there is no substantial evidence to support the appellant's contentions that (1) the fire was of incendiary origin, and (2) false statements of the property alleged to have been lost were willfully made. These were questions for the jury to determine. This evidence was material.

[8] Under the provisions of the policy in the present case, willful destruction of the property on the part of the insured, or willful and false statements made by him on his proof of loss with intent to defraud the insurance company, will totally avoid the policy and relieve the insurer from all liability thereunder. Pedrotti v. American Nat. Fire Ins. Co., 90 Cal. App. 668, 266 P. 376; 33 C. J. 19, § 667; 6 Cooley's Br. on Ins., p. 4938; 7 Cooley's Br. on Ins., p. 5858.

The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

On Petition for Rehearing.

PER CURIAM.

Upon petition for rehearing it is ordered that column 2, lines 24 to 31 of 287 P. 530, be stricken out, and in lieu thereof that the following be inserted: "The respondent included in his statement of loss, which was sworn to and filed with the defendant, an itemized list of personal property which he claimed was destroyed in the fire. It included no separate valuations of items but merely a claim of loss of an aggregate valuation of $2,000. The number and description of these items of personal property are included in the following statement, to-wit:"

[9] The petition for rehearing is chiefly addressed to a general discussion of the weight of evidence and to a criticism of the character of the witness Palazzi, asserting that his testimony is therefore unworthy of belief. These are questions solely for the consideration of the jury and conclusively illustrate the error of directing a verdict. This court does not decide that the plaintiff burned the property or falsely swore to the value or character of the property destroyed. Circumstances disclosed by the record are marshaled in the opinion merely to indicate there was substantial evidence to support the defendant's claims and that it was therefore error to take these issues from the jury and direct a verdict.

The petition for a rehearing is therefore denied.

105 Cal. App. 359

PEOPLE v. HALL et al.★

Cr. 1567.

District Court of Appeal, First District, Division 1, California.

April 23, 1930.

Rehearing Denied May 8, 1930. Hearing Denied by Supreme Court May 22, 1930.

1. Robbery ⟹11.

Defendants in possession of revolver and black-jack at time of robbery *held* guilty of first-degree robbery, whether they exposed them or not; "armed with dangerous weapon" meaning furnished or equipped with weapon of offense or defense (Pen. Code, § 211a).

2. Criminal law ⟹980(2).

Extrajudicial confessions *held* admissible on hearing to determine degree of crime after pleas of guilty without showing that they were voluntary (Pen. Code, § 1192).

3. Criminal law ⟹516.

Defendants' admissions of possessing deadly weapons at time of robbery *held* not inadmissible as confessions.

4. Criminal law ⟹516.

Only confessions expressly acknowledging crime charged must be proved voluntary to be admissible in evidence.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Jack Hall and Harry Russell were found guilty of first-degree robbery after pleading guilty of robbery, and they appeal.

Affirmed.

Walter McGovern, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

TYLER, P. J.

Appellants were charged by information with the crime of robbery. Each defendant pleaded guilty of the offense charged, and they were sentenced to the state's prison for the period prescribed by law. On the date set for the pronouncement of judgment, a hearing was had by the trial court under the provisions of section 1192 of the Penal Code, to determine whether the defendants were guilty of robbery in the first or second degree, as the charging language of the information did not allege facts sufficient to bring the offense definitely within the scope of the statute defining first-degree robbery.

It appeared on the hearing that they had entered the office of a Dr. Young, robbed him of the sum of $206 and other personal property. After committing the crime they tied their victim with a rope and departed. Appellant Russell was captured a few moments later, and a revolver and black-jack were found upon his person, together with the stolen property. Appellant Hall was arrested shortly thereafter, and he admitted to the arresting officers that he participated in the robbery, and, further, that he was armed at the time with an automatic pistol loaded with seven bullets. Both defendants denied that they had exposed any deadly weapon during the commission of their act. At the conclusion of the hearing, the court found both defendants guilty of robbery in the first degree.

[1] Appellants claim that the trial court committed error in finding that they were armed with a dangerous or deadly weapon in perpetrating the offense to which they pleaded guilty, and that the crime committed by them was therefore robbery in the second degree. This contention is based upon the claim that the weapons were not exposed to the victim at the time of the perpetration of the crime. As above stated, the evidence showed that both defendants were armed with a revolver, and that, in addition thereto, one of them was possessed of a black-jack. Whether or not they exposed these deadly weapons in order to carry out their criminal act is of no consequence. The fact that they had them in their possession available for immediate use is sufficient to bring the case within the statute. "Armed" with a dangerous weapon means furnished or equipped with weapons of offense or defense. State v. Lynch, 88 Me. 195, 33 A. 978. Section 211a of the Penal Code, which declares that "all robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon, is robbery in the first degree," does not require proof that there was an actual assault upon the person with a deadly weapon, but only that the accused was armed with a dangerous or deadly weapon. People v. Seawright, 72 Cal. App. 414, 237 P. 796.

[2-4] Appellants next complain of the admission in evidence of their extrajudicial confessions for the purpose of ascertaining their degree of crime without a showing first being made that such confessions were free and voluntary. The contention is without merit. No objection was made by appellants to this evidence, but, even assuming that the burden was upon the prosecution to show that the confessions were freely and voluntarily made before they could be properly received, a hearing to determine the degree of crime, after a plea of guilty, is in no sense a trial. People v. Chew Lan Ong, 141 Cal. 550,

★Rehearing denied. Hearing denied by Supreme Court.

75 P. 186, 99 Am. St. Rep. 88. It is a mere investigation to determine the degree of guilt. Moreover, the so-called confessions as to the possession of the deadly weapons are mere admissions of acts of guilty conduct, as they do not include all the elements of the crime. Defendants' pleas of guilty established the corpus delicti. It is only with respect to confessions, which are acknowledgments in express terms by a party in a criminal case, of the truth of the crime charged, that the rule prevails that preliminary proof that they were voluntary must be made before they can be admitted in evidence. People v. Fowler, 178 Cal. 657, 664, 174 P. 892. There is no merit in the appeal.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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105 Cal. App. 372

GILMOUR v. GILMOUR.

Civ. 7151.

District Court of Appeal, First District, Division 2, California.

April 25, 1930.

1. Insane persons ⟹33(1).

In proceedings for appointment of guardian for incompetent person, citation not addressed to such person, though irregular in form, was not void (Code Civ. Proc. § 1707).

2. Insane persons ⟹32.

Court had jurisdiction of incompetent person in guardianship proceeding, where irregular citation was issued and served and such person was present.

Appeal from the Superior Court, City and County of San Francisco; Thomas H. Selvage, Judge.

Action by John Gilmour, as executor of the estate of Sarah Gilmour, deceased, against Andrew Gilmour. Judgment for plaintiff, and defendant appeals.

Affirmed.

Harry S. Whitthorne and Twain Michelsen, both of San Francisco, for appellant.

Emilio Lastreto, of San Francisco, for respondent.

STURTEVANT, J.

[1, 2] The plaintiff, as executor, commenced an action against the defendant to obtain possession of the funds alleged to be the property of Sarah Gilmour, deceased. The defendant answered, and the trial was had before the court sitting without a jury. The court made findings in favor of the plaintiff, and, from a judgment entered thereon, the defendant has appealed. The defendant claims to be the absolute owner of the funds by reason of the fact that, as he claims, on the 25th day of April, 1923, the decedent joined him in opening a joint savings account, and that as the survivor he is entitled to the funds in dispute.

In reply the plaintiff asserts that prior to the opening of said account, to wit, on the 22d day of May, 1920, the decedent was adjudged an incompetent person and this plaintiff was appointed guardian of her estate, and that thereupon he qualified and thereafter continued to act and was so acting at the time of the death of the decedent. If the proceedings so appointing him guardian were regular and free from legal objection, the contention of the plaintiff must be sustained. O'Brien v. United Bank & Trust Co. of California (Cal. App.) 279 P. 1048. However, the defendant asserts that the probate court had no jurisdiction to appoint the plaintiff as guardian of the estate of Sarah Gilmour. In this connection the defendant claims that the finding: "That the appointment of John H. Gilmour as guardian of the estate and person of Sarah Gilmour as an incompetent was proper and lawful," is not sustained by the evidence. Some of the undisputed facts are that the guardianship proceeding was commenced by John Gilmour. He presented to the trial court a verified petition. The court ordered citations issued. They were issued, served, and returned. The citation as to Sarah Gilmour was not addressed to her, but there was evidence that the citation was *issued* and *served* and that she was present at the hearing of the guardianship proceeding. No objection was made in said proceedings regarding the informality of any paper. In its judgment the trial court recited "* * * coming on regularly to be heard." We will concede the citation was irregular in form. Code Civ. Proc. § 1707. But it was not void. Walker v. Carver, 93 Fla. 337, 112 So. 45, 47. Jurisdiction depended upon the fact of service and not on the return of service. Morrissey v. Gray, 160 Cal. 390, 117 P. 438.

We think it cannot be said that the trial court sitting in probate did not have jurisdiction of the person of Sarah Gilmour when it heard the guardianship proceeding.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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105 Cal. App. 395

DETROIT TRUST CO. v. TRANSCONTINENTAL INS. CO. OF NEW YORK.★

Civ. 4004.

District Court of Appeal, Third District, California.

April 28, 1930.

Rehearing Denied May 28, 1930. Hearing Denied by Supreme Court June 26, 1930.

1. Insurance ⟹96.

Question of broker's authority to act as insured's agent must be determined from facts and circumstances, together with conduct and communications between parties.

2. Insurance ⟹108.

If broker had authority to procure fire policy regardless of rate, insurer should be bound by policy at increased rate in broker's possession, uncanceled and premium fully paid.

3. Insurance ⟹98.

Broker's agency in insured's behalf may exist even though commissions are paid broker by insurer.

4. Insurance ⟹100.

Evidence *held* to show broker was insured's agent in taking out policy at increased rate, making policy in full force and effect.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by the Detroit Trust Company, a corporation, against the Transcontinental Insurance Company of New York, a corporation. Judgment for plaintiff, and defendant appeals.

Affirmed.

Guy R. Kennedy, of Chico, and Redman, Alexander & Bacon, of San Francisco, for appellant.

Carleton Gray, of Oroville, and Chickering & Gregory, of San Francisco, for respondent.

R. L. THOMPSON, J.

This is an appeal from a judgment in favor of plaintiff in an action for indemnity on a fire insurance policy.

The plaintiff is the trustee of the Feather River Pine Mills Company, which operates its lumber mills near Oroville, in Butte county. It was successor to the Hutchinson Lumber Company. In 1923 a trust indenture was executed by the first-mentioned company to the plaintiff, by the terms of which it was provided the trustee should keep the milling property insured for 80 per cent. of its insurable value, payable in the name of the trustee. Marsh & McLennan were general insurance agents. However, for several years this company had acted as brokers for the milling company in procuring its insurance and for this purpose became its agent. Mr. Land, president of the Feather River Pine Mills Company, testified, "They (Marsh & McLennan) were acting as our brokers." They were not the agents of the defendant insurance company. Mr. Hoditz, chief accountant of this brokerage company, testified: "Marsh & McLennan did not * * * act as general agents for the Transcontinental Insurance Company of New York. Marsh & McLennan had nothing to do with the writing or issuance by the Transcontinental Insurance Company of New York of its policy numbered 79,348." Pursuant to directions from the plaintiff, said brokers procured and forwarded to it, September 1, 1927, several policies of insurance on the milling plant, equipment, and stock on hand aggregating a large sum of money. Included among these policies was one numbered 79,348 for $2,500 written by the defendant insurance company. The uniform rate of premiums on these policies had formerly been 1.319 per cent. According to custom a large amount of insurance, such as is involved in this transaction, was apportioned among twenty or more insurance companies so as to divide the liability. This was done in the present instance. The defendant company carried only this one small policy and another one for $6,500, which is not involved in this action. In 1927 the general rate of all such policies was increased by the Pacific Board of Underwriters to 3.14 per cent. The various insurance companies which had executed these policies had charged plaintiff's brokers with the premiums at the increased rate of 3.14 per cent. This increased rate of insurance was charged from July 15, 1927. On September 16, 1927, seventeen of these policies, aggregating the sum of $348,750, including the $2,500 policy which is involved in this action, were returned by the plaintiff to its said agents, Marsh & McLennan, accompanied with a letter which reads in part: "Confirming conversation of yesterday, together with understanding, we advise as follows: You will cancel without charge to us, for either the so-called earned premium or otherwise, the following policies: * * * 79,348, Transcontinental, $2,500. * * * The above policies were handed to you by the writer on yesterday with advice that we would not pay for these policies and would not want any policies issued at figures above our old rate, namely, 1.319."

Instead of procuring the cancellation of these policies, the brokers held them for some three weeks attempting to obtain an adjustment of the rate. In the latter part of September, a representative of the firm of Marsh & McLennan visited the office of the defendant in San Francisco and informed it that the plaintiff refused to accept, among others, policy number 79,348 for $2,500 at the increased rate, and requested the defendant to

★Rehearing denied. Hearing denied by Supreme Court.

issue a cover note in lieu of the policy. This the defendant refused to do and declined to cancel the policy until the premium, which was at this time earned, was fully paid. Mr. Morrice, representing the defendant, testified in this regard: "I talked to him about the flat cancellation. * * * Q. And he (Mr. Parry, manager of the defendant company) told you then that they would not cancel the policy flat, didn't he? A. Why yes, he said * * * that they could not cancel the policy flat." The premium on this policy was subsequently paid to the defendant in full on September 27th by the check of Marsh & McLennan, which check was accepted and cashed by the defendant. The policy was retained in the office of plaintiff's brokers. The fire which destroyed the property covered by this policy occurred October 6, 1927. Proof of loss in the total sum of $1,162,504.08 was subsequently duly made. Upon demand of the defendant, without further communication with the plaintiff about the matter, the brokers, Marsh & McLennan, returned the policy to the defendant after the fire on October 12th and it was thereupon marked "canceled." Without knowledge or consent on the part of the plaintiff, on December 28th, the defendant credited the brokers with the amount of this premium which had been previously paid. Upon the trial the court found that the defendant "executed and delivered to said Feather River Pine Mills" Company policy number 79,348 for $2,500 insurance on August 8, 1927. The court further found that this policy "was not cancelled by said defendant and was at all times prior to said fire and on the date thereof in full force and effect"; that in said transaction, with relation to the insurance of said property, the brokers Marsh & McLennan were the agents of plaintiff and were not the agents of the defendant.

The complaint alleged that the value of "said property so damaged and destroyed by said fire was the sum of $1,162,504.28," and that said property was insured in the aggregate sum of $1,226,641.21, including said $2,500 policy which is involved in this action. The answer denied that "said property was insured against loss or damage by fire in the sum of $1,226,641.21, or any sum in excess of the sum of $1,033,891.21, and alleges that said last-named sum does not include any insurance issued by the defendant herein." Upon the foregoing pleadings the court properly found from defendant's admission that the property was insured for a total sum of $1,033,891.21 in addition to said $2,500 policy. Thereupon judgment was rendered upon said policy for $2,369.28. Accepting, as correct, the allegations of the answer with respect to the total amount of insurance with which the milling property was covered at the time of the fire, the loss by fire greatly exceeded the aggregate insurance, and, under such circumstances, the judgment may not be said to be excessive. Even though the total insurance to which the plaintiff might resort, to compensate its loss by fire, exceeded the amount of loss by substantially $64,137, as appears from the findings, still the amount of the judgment which was rendered was not excessive.

[1, 2] The defendant contends that the insurance brokers, Marsh & McLennan, were not acting as the agents of the plaintiff in this transaction; that plaintiff's return of the policy to these brokers, together with the accompanying letter, constituted a repudiation of such agency and a definite rejecting of the policies, and that the subsequent payment of the premium on this bond by Marsh & McLennan was made by mistake. The question of agency must, however, be determined from all the facts and circumstances of the case, together with the conduct and communications between the parties. If there is substantial evidence to support the court's findings with relation to the agency, then the judgment should be affirmed. If Marsh & McLennan had authority from the plaintiff to procure this policy of insurance and was not limited as to the rate of premium it was permitted to pay, then the defendant should be bound by this policy, for the policy was in the possession of the plaintiff's agent uncanceled and the premium was fully paid. The controversy between the plaintiff and its agent respecting the rate of insurance had nothing to do with the validity of the policy. The payment of the premium and the retaining of the policy by Marsh & McLennan after their fruitless effort to adjust the rate with the defendant is a circumstance strongly tending to show their agency for the plaintiff. Regardless of their relationship toward other insurance companies, there is ample evidence to support the finding that in this particular transaction Marsh & McLennan acted as the agents of the plaintiff. Mr. Hill, who was manager of the milling company, testified: "March & McLennan had full charge of all of the insurance for the Hutchinson Lumber Company. * * * Under mere general instructions as to the extent of the lines to be carried, they were charged with all of the details of seeing that we were kept covered and seeing that we maintained conditions at the plant that we were required to maintain under the policies and seeing that our rates were kept low and in general serving us in the capacity of insurance agents—brokers—and managers to whom we intrusted all of our insurance affairs."

[3] In the case of Solomon v. Federal Ins. Co., 176 Cal. 133, 138, 167 P. 859, 861, the following language is used which is peculiarly applicable to the present case: "It is well settled that, where, in circumstances such as are presented here, an insurance agent requests insurance from a company which he does not represent, he is acting for the insured."

This agency in behalf of the insured may exist even though the commissions are paid to the broker by the insurer. Solomon v. Federal Ins. Co., supra; Parrish v. Rosebud M. & M. Co., 140 Cal. 635, 74 P. 312; Bennett v. N. W. Nat. Ins. Co., 84 Cal. App. 130, 135, 257 P. 586; Mahon v. Royal Union Mut. Life Ins. Co. (C. C. A.) 134 F. 732; McGraw Wooden Ware Co. v. German Fire Ins. Co., 126 La. 32, 52 So. 183, 38 L. R. A. (N. S.) 614, 20 Ann. Cas. 1229; 5 Cooley's Br. on Ins., (2d Ed.) p. 1452.

[4] We are satisfied the record sufficiently supports the findings to the effect that Marsh & McLennan were the agents of the plaintiff in this transaction, that the policy was not canceled at the time of the fire, but, upon the contrary, was then in full force and effect, and that the defendant was therefore liable.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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105 Cal. App. 446

GOLISH v. VAN PELT.

Civ. 6871.

District Court of Appeal, Second District, Division 2, California.

May 1, 1930.

Appeal and error ⟹612(1), 657(1).

Failure to present transcript to respondent, or to judge for authentication, prevented effective appeal; hence return of transcript for approval was denied (Code Civ. Proc. §§ 953a-953c).

Code Civ. Proc. § 953a, requires that transcript shall be presented to judge for his approval, and that respondents may require alteration or amendment. Section 953c requires clerk to transmit the record "prepared in accordance with the two preceding sections." Appellant relied upon the alleged oversight or neglect of the clerk of the superior court, or judge, or both, but it affirmatively appeared that the clerk, pursuant to appellant's request, forwarded the transcript given him and that the transcript had not been presented to the respondent or to the judge as required by the statute.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by R. H. Golish against Peter R. Van Pelt. From an order vacating a default judgment, plaintiff appeals. Motion by plaintiff to return transcript to superior court for approval.

Motion denied.

Perry F. Backus, of Los Angeles, for appellant.

R. J. Welch, Jr., of Riverside, for respondent.

CRAIG, Acting P. J.

The plaintiff appealed under the alternative method from an order vacating a default judgment, whereupon a purported transcript was forwarded to the clerk of this court as required by sections 953a, 953b, and 953c of the Code of Civil Procedure, without the certificate of authentication of the trial judge. The appellant has moved that it be returned for preparation, examination and approval in the superior court in accordance with said sections.

The clerk's certificate recites that the contents of the transcript are "full, true and correct copies" of the originals, but it does not appear that it contains all of the papers filed below. The asserted grounds of the motion are that through no fault of appellant, the clerk and judge inadvertently neglected to obtain its authentication as a full, true, and fair transcript of all the proceedings. However, it is shown by affidavit of the clerk, and is uncontradicted, that upon demand of appellant's counsel a copy of the transcript as originally served upon counsel for the respondent was recalled, and a portion of the same was removed. Further, that: "He then requested that I mail the original transcript to the clerk of the court of appeals, asking if I would mail it that afternoon, and that he could call at the clerk's office the next day and pay the filing fee, and I informed him if such was his request that same be immediately forwarded to the clerk of court of appeals that I would do so, to which he answered: 'Yes, that is what I want you to do.' I thereupon forwarded the original transcript as so altered to the clerk of the District Court of Appeal, Los Angeles, mailed copy to Mr. Backus, and took Mr. Welch's copy to his office and left same with his secretary."

Although it appears from the same source that respondent had repeatedly expressed a desire that other matters be embodied in a transcript, and had objected to the sufficiency of the one in controversy, as to which the trial judge had also indicated a doubt, the same was at no time presented to the court as required by the Code of Civil Procedure, nor was respondent afforded an opportunity to propose alterations or amendments. Section 953a of said Code provides, in part:

"* * * Said transcript shall be presented to the judge for his approval, and the

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

judge shall examine the same and see that the same is a full, true and fair transcript of the proceedings had at the trial, the testimony offered or taken, evidence offered or received, instructions, acts or statements of the court, also all objections and exceptions of counsel and matters to which the same relate. * * *

"The respondents on said appeal may at the time said transcript is presented for settlement and allowance, require the insertion therein of such other papers, files, documents, records and proceedings of said cause as they then desire to have incorporated therein. * * *"

And section 953c specifically requires that: "* * * It shall be the duty of the clerk of the court from which the appeal is taken, within ten days after the preparation of the record, to transmit to the clerk of the court to which the appeal is taken, the record *prepared in accordance with* * * * *the two preceding sections.* * * *"

The appellant bases this motion entirely upon the asserted oversight or neglect of the county clerk, or judge, or both, and wholly relies upon the authority of Lake v. Harris, 198 Cal. 85, 243 P. 417, 419. This was a proceeding in mandamus to compel the trial judge to authenticate a transcript containing matters which had been stricken from the clerk's transcript as constituting no part of the judgment roll. While the petition was dismissed for reasons not here pertinent, it was said: "* * * While it may be said that the appellants should not be prejudiced because of mistakes on the part of the reporter and the clerk, * * * it may also be said that the respondents should have the opportunity, after notice, to object to the inclusion of the said 21 items or any of them before the same are authenticated by the trial judge as a part of the reporter's transcript, and it appears that they have not had such notice."

In the proceedings here under consideration there is not alone an absence of the asserted oversight or inadvertence, but an affirmative showing of strict compliance by the clerk of the superior court with appellant's demands. There is but one transcript before us, which contains the judgment roll and notice of appeal, certified by the clerk. Other matters are discussed in the briefs as properly constituting an additional transcript for authentication, had one been filed. But it is the duty of the appellant in such a case to prepare and present in the trial court, upon notice, a proposed transcript, and to afford the respondent an opportunity to participate in its final settlement for examination and approval. Since none of these steps requisite to a valid appeal have been taken, and no transcript is available for return or approval, appellant's motion is without foundation.

The motion is denied.

We concur: IRA F. THOMPSON, J.; NORTON, Justice pro tem.

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105 Cal. App. 363

DICK v. ATCHISON, T. & S. F. RY. CO.★

Civ. 6278.

District Court of Appeal, Second District, Division 2, California.

April 23, 1930.

Rehearing Denied May 22, 1930. Hearing Denied by Supreme Court June 19, 1930.

1. Master and servant ⟹278(18).

Evidence sustained judgment for fireman suing for injuries sustained while coaling tender when train moved (45 USCA § 51 et seq.).

2. Appeal and error ⟹1001(1).

Reviewing court is bound by jury's finding upon substantial evidence.

3. Commerce ⟹8(6).

Carrier's liability for injuries locomotive fireman sustained while coaling tender on train engaged in interstate commerce is determinable under Federal Employers' Liability Act (45 USCA § 51 et seq.).

4. Master and servant ⟹219(1), 226(3).

Ordinarily, or at common law, servant assumes risks obviously incident to employment, plus dangers obvious or known caused by employer's negligence.

5. Master and servant ⟹295(8).

Instruction that locomotive fireman injured while coaling tender assumed risks incidental to employment and extraordinary risks, or which ordinarily prudent person would observe and appreciate, *held* not erroneous (45 USCA § 51 et seq.).

6. Master and servant ⟹288(3).

Whether fireman, injured while coaling tender when train moved, assumed risk, *held* for jury (45 USCA § 51 et seq.).

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Thomas R. Dick against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. Hearing denied by Supreme Court.

E. W. Camp, M. W. Reed, and Robert Brennan, all of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

[1, 2] The defendant appeals from a judgment rendered in favor of the plaintiff in an action brought for the recovery of damages for personal injuries. And inasmuch as it is earnestly insisted that the evidence is insufficient to support the verdict of the jury, we shall first set down that portion of the testimony which justifies the jury's finding. The respondent was a fireman on a freight train and in the employ of appellant on a run between Winslow, Ariz., and Gallup, N. M. On the night of the accident, September 17, 1925, the train, in charge of one D. M. Birney as engineer and respondent as fireman, was scheduled to stop at Houck, Ariz., for the purpose of taking on fuel coal. As the train approached the coal bins, which are located above the level of the tender and from which coal is loaded by gravity, after the fireman has pulled down an iron apron long enough to extend from the bin to the tender, it was traveling an upgrade of about 7/10 of 1 per cent., or about 37 feet to the mile. There was in effect at the time a rule of the appellant that when coal was to be taken the engine should be uncoupled and spotted at the bin. On this occasion, according to the testimony of the respondent, the engineer refused his request to uncouple the engine, saying that they were in a hurry to meet, at a certain other siding, a passenger train. Accordingly, with 60 freight cars attached, they drifted by the bins four or five car lengths and then back up to the proper place. During the time the train was being reversed the respondent was riding on top of the cab in view of the engineer, although he could not see the latter. According to respondent's testimony, he stood there for ten or twelve seconds after the train stopped and then the engineer told him that the "first pocket there was all right, to get down and get to work." Whereupon respondent stepped down on "the tool box just behind the cab." After four or five tons of coal had run into the tender the engineer told him to get out of there, that he was going to spread it with the engine, but, to quote the witness, he "didn't have time —caught me before I could get out." The respondent's right leg was so badly crushed as to necessitate an amputation, near the hip, rendering him a permanent cripple. It is only just to say that evidence produced by the defendant was in conflict with much of that we have already recited, but it is sufficient for our purposes to set down that which the jury evidently accepted as the true version of the occurrence. It is manifest from the statement that there is ample support therein for their verdict and their belief that the engineer negligently and carelessly and without sufficient warning moved the train while the respondent was in a perilous position. The running out of the slack of the train insistently pressed upon us by appellant as a reason for the accident does not accord with the respondent's statements that he waited some time after the train had stopped before descending from the cab, and that he had loaded four or five tons before the train was again moved. The jury having found the fact upon substantial evidence we are bound thereby.

[3-6] The next question for consideration is whether the court properly instructed the jury upon the subject of assumption of risk. In this connection it is to be noted that the allegations of the acts negligently done were to the effect that the engineer in charge of the engine negligently failed to hold the train standing still and negligently permitted it to move during the time of loading the tender with coal. It is further to be observed that the defendant was engaged in interstate commerce at the time of the accident, and therefore the provisions of the act of Congress approved April 22, 1908 (35 Stats. at Large, 65, c. 149, 45 USCA § 51 et seq.), and acts amendatory thereof, commonly known as the Federal Employers' Liability Act, are applicable in determining the liability of the carrier in this instance. It cannot be doubted that according to the ordinary rule or at common law a servant assumes all risks naturally and obviously incident to the physical situation of his employment, plus such superadded dangers as are caused by the employer's negligence which are obvious or fully known and appreciated by the employee. Boldt v. Penna. R. Co., 245 U. S. 441, 38 S. Ct. 139, 62 L. Ed. 385; Morgan v. Robinson Co., 157 Cal. 348, 107 P. 695. Nor has the statute enlarged the defense in any particular. Rather it has eliminated the defense in certain cases of which this is not one, indicating, as has been declared, a legislative intent that, in all other instances, such assumption shall have its former effect. Seaboard A. L. R. Co. v. Horton, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475. Upon turning to the instructions we find that the court instructed the jury that the respondent not only assumed the risks and dangers incident to his work but also extraordinary risks "caused by the employer's negligence which are fully known and appreciated by him or which are so obvious that an ordinarily careful and prudent person would, under the circumstances, have observed and appreciated them." In fact, from a reading of not less than six instructions pertinent thereto we are of the opinion that the jury was very fully instructed upon the law in this particular and that appellant

can have no possible complaint. Appellant's counsel suggests that assumption of risk in this case is a question of law and not of fact. It is a sufficient answer to this assertion to say that we could only apply the doctrine here as a matter of law by assuming a state of facts contrary to that which the jury evidently believed to be the true circumstances.

The arguments already reviewed are put in other forms by the appellant, but we deem further discussion unnecessary.

Judgment affirmed.

I concur: CRAIG, Acting P. J.

Owing to the absence of Presiding Justice WORKS, he does not participate in this opinion.

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105 Cal. App. 441

BISSINGER & CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.★

Civ. 7363.

District Court of Appeal, First District, Division 2, California.

May 1, 1930.

Rehearing Denied May 29, 1930. Hearing Denied by Supreme Court June 30, 1930.

1. Master and servant ⟹405(4).

Evidence in compensation proceedings justified finding that death of salesman found seated in car in garage arose out of employment, when overcome by monoxide gas while working on employer's automobile (Code Civ. Proc. § 1960).

The deceased used his employer's car in his work as a traveling salesman, and had formed the opinion that adjustments were needed in the car. After midnight he went to the garage, and the next morning he was found in the car in the garage and seated at the wheel. He was dead at the time, the engine was in motion, and the garage was filled with monoxide gas. From these facts inferences could be drawn under Code Civ. Proc. § 1960, supporting the finding.

2. Evidence ⟹59.

It will not be presumed that person has committed suicide.

3. Master and servant ⟹403.

Finding employee's dead body enveloped in deadly gas warranted presumption in compensation proceedings that he was asphyxiated (Code Civ. Proc. § 1963, subd. 28).

4. Appeal and error ⟹996.

Where two different inferences may be drawn from evidence, reviewing court must presume that fact-finding body adopted inference which supports judgment.

Proceedings under the Workmen's Compensation Act by Emma Carpenter and others for the death of Walter Carpenter, employee, opposed by Bissinger & Co. and others. The Industrial Accident Commission awarded compensation for death, and the employer and others bring certiorari.

Award affirmed.

Redman & Alexander and R. P. Wisecarver, all of San Francisco, for petitioners.

Edward O. Allen, of San Francisco, for respondents.

STURTEVANT, J.

Walter Carpenter was an employee of Bissinger & Co. He was a traveling salesman. On September 10, 1929, and for a short time prior thereto, he had possession of and was entitled to use an automobile owned by his employer. His employer paid for the upkeep and repairs of the car, but permitted Mr. Carpenter to use the car for his private and pleasure uses as well as for business uses, and, when he was in San Francisco, to keep the car in his own garage. On September 10, 1929, he had been in Santa Cruz. His wife was with him. As they were coming home over the Santa Cruz grade, Mr. Carpenter noticed that the motormeter became quite hot, and he stated that he would have to fix that before starting on the next trip. He also stated that he would also have to fix the gasoline gauge, as it became stuck. On the next day he went to his office, and later called for his wife at her club and took her home and put the automobile in the garage which adjoins their home. They went into their home, had their dinner, and the wife thereafter reclined on a davenport, and her husband sat down in an armchair and went to sleep. About 9:30 she arose and went to bed. Later the husband arose and walked into the bedroom and inquired if she was asleep. He then went into the kitchen and from there down to the basement. The wife testified that she looked at the clock, and it was then about 12:20 a. m. About 7 o'clock the next morning a tenant of their building awakened Mrs. Carpenter. Immediately before doing so, the tenant and his wife had smelled gas escaping from the garage, and had opened it, and there they found Mr. Carpenter seated at the wheel in the front seat of the automobile. After Mrs. Carpenter was notified, she went downstairs, and Mr. Carpenter was sent to the emergency hospital. He was dead at the time. When he was discovered in the garage, he had his left hand on the steering wheel and his right arm on the seat, and his head was resting on his right arm. His coat and vest were found hanging in the basement of

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. Hearing denied by Supreme Court.

the house. The engine in the automobile was running, and the lights were turned on. A flashlight was lying on the floor of the car. A duster or mackintosh folded up was lying on the seat. Some two days later a small screwdriver was found on a ledge in the garage. It had formerly been upstairs. On the right sleeve of Mr. Carpenter's shirt there was a splotch of dirt. There was evidence that Mr. Carpenter sometimes replaced light bulbs and changed the tires, but there is no evidence that he ever at any time made repairs at night. After his death, Mrs. Carpenter presented to the Industrial Accident Commission her claim. The commission made award in her favor, and the employer and its insurance carrier have commenced this proceeding to review said award.

[1-3] The petitioner claims that there is no evidence showing that Mr. Carpenter's death arose by reason of an accident "arising out of his employment when overcome by monoxide gas while working on his employer's automobile." The respondents contend that said finding is supported by the inferences that may properly be drawn from the evidence introduced. Our statute, Code of Civil Procedure, § 1960, provides as follows: "An inference must be founded: 1. On a fact legally proved; and, 2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

It was a proved fact that a certain screwdriver theretofore was kept upstairs; that two days later the screwdriver was on a ledge in the garage. It is said, it may be inferred that the decedent took the screwdriver to the garage, that he did so on the night of the accident, and that he took it for the purpose of making adjustments on the car. No one of these inferences may properly be indulged. The only inference that may be indulged is that somebody at some time took the screwdriver from upstairs to the garage.

It was a proved fact that a spot of dirt was on the shirt of the decedent. It is said it may be inferred that there was dust and dirt on the car; that the decedent made adjustments to the car; that in doing so he rubbed up against the car; and that in doing so he got a splotch of dirt off of the car. No one of these inferences may be drawn. The only inference that may be drawn is that the decedent's sleeve had rubbed some dirty object.

There were also proved facts that the decedent had in his possession his employer's car; that the decedent had formed the opinion that adjustments were needed in the car; that it was no part of decedent's duty to make said adjustments; that he had not been in the habit of making such adjustments at night and in particular after midnight; that after midnight the decedent went to the garage; that the next morning he was in the car in the garage and was seated at the wheel; that at that time he was dead; that the engine in the car was then in motion; and that the garage was filled with monoxide gas. In addition to that direct evidence there was a presumption, as distinguished from an inference, which must be considered. It is the settled law of this state that it will not be presumed that a person has committed suicide. Ross v. Railways Co., 47 Cal. App. 753, 760, 761, 191 P. 703; Wilkinson v. Standard Accident Ins. Co. of Detroit, Mich., 180 Cal. 252, 256, 180 P. 607. That being so, the question is narrowed down to whether death was caused by accident or by natural causes. To answer that question, the commission was entitled to consider these facts and draw these conclusions: The decedent went into his garage and started the engine in motion. That is a proper and legal inference. Thereafter large quantities of monoxide gas accumulated. When discovered, the decedent was dead. As there was no evidence of a post mortem examination or any other evidence to the contrary, it will be presumed that things happened according to the ordinary course of nature. Code Civ. Proc. § 1963, subd. 28. Therefore, as his dead body was found enveloped in a deadly gas, it will be presumed that he was asphyxiated by that deadly gas. If the petitioners believed that death followed natural causes, they should have introduced evidence rebutting the foregoing evidence.

[4] He was not in the act of taking a drive, because the doors of the garage were closed. He was not there to amuse himself, because that act at that time of day was not "the usual propensity" of men, nor was it shown to be "the particular propensity" of the decedent. Therefore he must have been making adjustments to the car. When there are two different inferences which may be drawn, one of which will support and the other of which will overthrow the judgment, in support of the judgment we must presume the fact-finding body adopted the former and not the latter.

At the time the decedent and his wife went home on the day before his death, according to the ordinary customs of business, his day's work was at an end. As stated in the beginning, he was not employed to make adjustments to automobiles either during the daytime or at nighttime. Whether his acts, at midnight and later, in the nature of making adjustments to automobiles, came within his employment, might be debatable. So far as we are advised, that question was not presented to the defendant commission. It has not been presented by either side in this court. Therefore we express no opinion thereon.

The defendants did not exceed their jurisdiction.

The award is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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105 Cal. App. 369

THORNE v. GORDON et al.
SAME v. SILCOTT et al.

Civ. 4067.

District Court of Appeal, Third District, California.

April 24, 1930.

1. Vendor and purchaser ⟹185.

Failure of purchasers to make monthly payments worked forfeiture of purchase contract, where time was of essence.

2. Vendor and purchaser ⟹186.

Removal of house and trees by vendor did not, ipso facto, affect validity of purchase contract, and could not excuse performance by purchasers.

3. Vendor and purchaser ⟹299(3).

In grantee's action to quiet title against defaulting purchasers, evidence of damage done by vendor in removing improvements *held* inadmissible.

The evidence as to damage was inadmissible, since it was offered for sole purpose of permitting purchasers to carry out contract and receive credit on purchase price for alleged damages, and since purchasers had their remedy of a personal action for damages against vendor for removal of house and trees, and which remedy they had apparently pursued.

Appeals from Superior Court, Los Angeles County; William D. Dehy, Judge.

Consolidated actions by L. C. Thorne against John A. Gordon and others and C. S. Silcott and others. Judgment for plaintiff, and John A. Gordon appeals.

Affirmed.

Ray Howard, of Los Angeles, for appellant.

Davis & Thorne, of Los Angeles, for respondent.

TUTTLE, Justice pro tem.

This is a consolidation of two actions to quiet title to lots 9 and 10 of tract 6698 in the city of Monrovia. Each action involved one of said lots.

The complaints are in the usual form of such an action. The answers deny the allegations of the complaint. As a further defense, defendants in each case set forth a contract of purchase covering said realty. They allege that, on the day following the execution of said contract, their vendor entered upon said realty, without their consent, and removed a house of the value of $500 and three trees of the value of $100. They state that they stand ready to make full payment of the balance due under said contracts and to fully perform the same, but pray that the court adjust the value of said house and trees, in arriving at the said balance. There is also a prayer for general relief. The pleadings in each case are practically identical.

[1] The trial court found that defendants had no right, title, or interest in said property, and judgments were entered accordingly.

At the trial the court excluded all evidence bearing upon the second defense referred to above, and upon this ruling error is predicated.

Plaintiff introduced in evidence the deed to said property from the vendor of defendants. The contracts of purchase were then admitted in evidence. Then followed evidence of the failure of defendants to make the payments due under said contract.

The evidence of plaintiff showed, and defendants admitted, that on one contract no monthly payments whatever had been made, while on the other only two had been made. In other words, for some three years prior to the filing of the complaint, no attempt had been made by defendants to comply with the terms of said contract of purchase. By the terms of said contracts time is made of the essence of the same.

Appellants take the position that, when said house and trees were removed (which they offered to prove) and until they were given credit on the purchase price for damages thus inflicted, they were no longer under obligation to further perform said contracts.

Throughout the trial and on the pleadings, appellants consistently maintain the position that the contract is still in full force and effect. They do not set up a repudiation. It also appears that some time prior to the commencement of this action, one of appellants filed an action to recover damages from his vendor, based upon the removal of the house and trees. No judgment had been entered therein. The present action is brought by a grantee of the vendor of defendants.

By the terms of the contract, time of payment is made of the essence thereof, and failure to make said payments when they become due worked a forfeiture, and the effect was to nullify the agreement, and the vendor was thereafter entitled to act as if the contract no longer existed. Northern Assurance Co. v. Stout, 16 Cal. App. 548, 117 P. 617.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[2, 3] The removal of said improvements did not, ipso facto, affect the validity of the contract, and hence could not excuse performance upon the part of the vendees. If a rescission were involved, an entirely different question would be presented. Defendants have their remedy of a personal action for damages against their vendor, and this they apparently pursued, without in any manner assailing the validity of the agreement.

And so when plaintiff here proved that defendants had failed to make the installment payments as we have indicated, the contract was at an end, and defendants could no longer assert any rights based upon the same. The only purpose appellants had in mind and the only relief they asked was to be permitted to carry out their contract and to receive credit for any damages which might be awarded them.

We are of the opinion that the learned trial judge was correct in refusing to admit evidence of damage done by the vendor, for the sole purpose of permitting defendants to carry out the contract and receiving credit on the purchase price for the amount of said claim.

Judgments affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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105 Cal. App. 389

PEOPLE v. GAGAN.

Cr. 1570.

District Court of Appeal, First District, Division 2, California.

April 28, 1930.

1. Automobiles ⚷355(13).

That intoxicated motorist, without slowing down, struck automobile standing near intersection while crosswise traffic passed, sufficiently supported manslaughter conviction for pedestrian's death.

2. Criminal law ⚷1130(5).

Court need not consider alleged errors unsupported by statement of reasons or citation of authorities.

On appeal from a manslaughter conviction against a person who had operated automobile while intoxicated, it was insisted that verdict was rendered by reason of passion and prejudice; that trial judge erred in decisions on questions of law; and that numerous inadmissible and prejudicial statements were made during trial.

3. Criminal law ⚷1035(5).

In manslaughter prosecution, where entire new jury was selected at defendant's request, presence of three former jurors on second panel was not prejudicial, lacking objection (Pen. Code, § 1123).

It was suggested, after illness of one of jurors, that new juror be selected under Pen. Code, § 1123, but at defendant's request entire jury was discharged and new panel called. Although three of the former jurors were selected on the second panel, defendant made no objection at the time and did not exhaust his peremptory challenges.

Appeal from Superior Court, Alameda County; Homer R. Spence, Judge.

Jack Gagan was convicted of manslaughter, and he appeals.

Affirmed.

Jos. P. Lacey and James Wesolo, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for the People.

NOURSE, P. J.

The defendant was tried before a jury and convicted of manslaughter. He appeals on a typewritten record from the judgment and from the order denying him a new trial.

[1] The evidence is that the defendant, while under the influence of intoxicating liquor, was operating a Chevrolet coupé along Oak street, in the city of Oakland, at an excessive rate of speed. Other machines traveling ahead of defendant along Oak street in the same direction had stopped near the intersection of Fourteenth street to permit the traffic to pass on that street. At that time the deceased left the sidewalk on Oak street and attempted to pass behind a Nash sedan, which was the last of the line of cars to stop on that street. When she was directly behind the Nash the defendant's car, without slackening its speed, crashed into the Nash, striking the deceased with such force that she died soon thereafter.

On this appeal it is said that the evidence is insufficient to support the verdict. The portion of the evidence just stated is sufficient for this purpose.

[2] It is stated that the verdict was rendered by reason of passion and prejudice; that the trial judge erred in decisions on questions of law; and that many inadmissible and prejudicial statements were made during the course of the trial which prevented appellant from having a fair trial. We have nothing more than the mere statement that errors occurred in this way. If counsel do not deem them of sufficient importance to state their

reasons or to cite authorities, we are not required to consider them. People v. McLean, 135 Cal. 306, 309, 67 P. 770; People v. Meyer, 94 Cal. App. 696, 271 P. 751.

Criticism is made of a portion of an instruction given the jury. The criticism is made to appear plausible by quoting a portion of the instruction only. When the entire instruction is read it is as favorable to the appellant as he might ask. It was approved in People v. Wolff, 182 Cal. 729, 739, 190 P. 22.

[3] When a portion of the testimony on behalf of the people had been heard, one of the jurors became ill. It was then suggested that a new juror be selected to fill his place under the provisions of section 1123, Penal Code. At the request of appellant the entire jury was discharged and a new panel was called. Three of the former jurors were selected on the second panel, and it is now argued that this in some way prejudiced the appellant. But he made no objection at the time and did not exhaust his peremptory challenges. We find no error that he may assert at this time. The entire record discloses that appellant had a fair and impartial trial.

The judgment and order are affirmed.

We concur: STURTEVANT, J.; BURROUGHS, Justice pro tem.

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105 Cal. App. 295

BAKALOFF v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 7308.

District Court of Appeal, First District, Division 2, California.

April 19, 1930.

1. Master and servant ⚷419.

Industrial Accident Commission has power to alter award, as by terminating compensation, "upon good cause appearing" (Workmen's Compensation, Insurance, and Safety Act, § 20(d).

2. Master and servant ⚷419.

Employee, struck on wrist by falling timber, refusing re-employment at easier work, was properly denied further compensation, especially since medical treatment continued (Workmen's Compensation, Insurance, and Safety Act, § 20(d).

The injury was found to have caused a temporary total disability from June 15 to August 5, at which time the employee was tendered suitable work, at his former wages, which the evidence tended to show would not have interfered with recovery from the injury. On October 24, the commission ordered medical treatment to be continued to effect a cure, and further compensation payments to be terminated.

Proceedings under the Workmen's Compensation Act by H. Bakaloff, claimant, opposed by Lindgren & Swinerton, employer, and the Zurich General Accident & Liability Insurance Company, insurance carrier. To review an order of the Industrial Accident Commission directing further compensation payments to cease, claimant brings certiorari.

Affirmed.

Wayne R. Millington, of San Francisco, for petitioner.

Edward O. Allen, of San Francisco, for respondents.

NOURSE, P. J.

Petitioner sued in certiorari to review an order of the respondent commission.

On June 15, 1929, while in the course of his employment as a laborer, petitioner was struck on the left wrist by a falling plank. The injury was found to have caused a temporary total disability from June 15 to August 5, 1929, during which time petitioner received a weekly compensation of $20.38, based upon wages of $5.50 a day. He was also given all necessary medical care. On August 5 the petitioner was tendered by his employer "suitable light work and work which the applicant was capable of doing" (referee's findings), and for which the petitioner would receive the same wages he was receiving at the time of the injury. The petitioner refused to accept any offer of re-employment, and on October 24, 1929, the commission directed the insurance carrier to furnish further medical treatment to effect a cure of petitioner's injuries, and ordered further compensation payments to cease. The certiorari is directed to this order.

[1] The power of the commission to alter an award "upon good cause appearing therefor" is found in subdivision "d" of section 20 of the Workmen's Compensation Act (St. 1917, p. 850). This power includes the right to increase, diminish, or terminate an award "upon the grounds that the disability * * * has either recurred, increased, diminished or terminated."

The application of this section of the act was before us in Miller Creamery v. Ind. Acc. Commission, 66 Cal. App. 404, 226 P. 402, 403. In that case the injured employee, after receiving medical and hospital care, returned to work, and in about six weeks he claimed that his condition had grown steadily worse. We held that this was "a change in the facts of the case * * * a recurrence of disability," and that the commission had jurisdiction under this section to reopen the case and to make a new award.

In Standard Sanitary Manf. Co. v. Ind. Acc. Comm., 282 P. 948, the Supreme Court, citing numerous authorities, held a mistake or inadvertence of the commission in originally denying compensation was "good cause" for the exercise of this continuing jurisdiction under section 20(d), and affirmed an award of compensation made under the authority of that section.

[2] There is evidence tending to show that the work offered petitioner would not have interfered with a recovery from his injury, but that it would have contributed to the curing of that condition. As the employee would have received the same wages paid prior to his injury, he is in no position to complain of this arrangement if he is fairly interested in his ultimate rehabilitation to the position of self-support. As the insurance carrier was required to continue medical treatment of the injury, it seems to us that the commission has taken every caution to insure the rights and privileges of the petitioner under the Compensation Act.

The order is affirmed.

We concur: STURTEVANT, J.; DOOLING, Justice pro tem.

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105 Cal. App. 300

EKWALL v. LOS ANGELES HAT CO. et al.★

Civ. 6972.

District Court of Appeal, First District, Division 2, California.

April 19, 1930.

Rehearing Denied May 19, 1930. Hearing Denied by Supreme Court June 16, 1930.

1. Negligence ⟹93(2).

If motorist was contributorily negligent in making left turn against approaching traffic, negligence must be imputed to wife riding with him (California Vehicle Act, § 130).

California Vehicle Act, § 130 (St. 1923, p. 558), provides that motorist before turning shall first see that turn can be made safely, and, if it cannot, he must wait.

2. Negligence ⟹136(26).

Contributory negligence is ordinarily question of fact, lacking standard established by statute, judicial decision, or custom.

3. Automobiles ⟹246(25).

Instruction that if motorist, changing northerly course by attempting left-hand turn, entered northwestern quarter of intersection first, he had right of way over vehicles going south, was erroneous (California Vehicle Act, § 130).

Although an automobile first reaching the intersection may have the right of way, it does not follow that a motorist who changes his course at the intersection is entitled to the full protection of this rule.

Action by Vera Ekwall against the Los Angeles Hat Company, a copartnership consisting of Desery Robinet and Joseph Z. Robinet, and another. From a judgment for plaintiff, defendants appeal.

Reversed.

Hadsell, Sweet & Ingalls, of San Francisco, and Snook, Snook & Chase, of Oakland, for appellants.

Ford & Johnson, of San Francisco, for respondent.

NOURSE, P. J.

Plaintiff sued for damages for personal injuries arising out of an automobile accident. The cause was tried before a jury, which returned a verdict in the sum of $18,000. From the judgment on the verdict, the defendants appeal upon typewritten transcripts.

The complaint alleged that the injuries were due to the negligence of the defendant Marks, who was at the time of the collision a salesman in the employ of the Los Angeles Hat Company. An answer was filed, verified by the defendant Marks, in which this allegation was not denied. On the morning of the trial the defendants, having procured new counsel to represent them, moved the court for leave to amend the answer for the purpose of denying this allegation. The motion for leave to amend was denied and the cause went to trial before the jury on the original pleadings. The claim of the Los Angeles Hat Company was that, although the defendant Marks was a salesman in its employ, he was also engaged by two other concerns, and that at the time of the collision he was in the course of his employment with one of these others. On this theory the defendant Los Angeles Hat Company sought the privilege to urge in its defense that the defendant Marks was not in the course of his employment with the Hat Company at the time of the accident, and that the Hat Company was not, therefore, responsible for plaintiff's injuries. Offers to prove this theory were denied because of the admissions in the pleading. Denial of the request for leave to amend in this particular is assigned as error on this appeal. In answer to the point, the respondents cite numerous authorities holding that the application for leave to amend is addressed to the sound discretion of the trial court, and that the exercise of this discretion should not be interfered with by the court on appeal. The appellants do not quarrel with the rule of the cases cited, but insist that under the peculiar facts of this case the denial for leave to amend was an abuse of dis-

cretion, and that the cause should be reversed upon that ground. The question of when judicial discretion has been properly exercised is a difficult one to determine, because ordinarily it depends entirely upon a difference of opinion of the individual who is called upon to determine it. The fact that the original answer herein was verified by the defendant Marks, rather than by an officer of the Hat Company, and that the facts upon which the proposed amendment was based were not known to the Hat Company at the time the answer was verified present a different state of facts from those involved in any of the cases cited and would seem to have warranted a greater leniency on the part of the trial judge when the application for leave to amend was made. However, as the judgment must be reversed upon another ground, it is not necessary to determine this point, as the amendment will be allowed prior to the new trial.

The facts of the case are practically without conflict. The plaintiff was riding with her husband, Arthur Ekwall, going northerly on Telegraph avenue in the city of Oakland. The defendant Marks was driving southerly upon the same avenue. Plaintiff's husband signaled for a left-hand turn when he approached Apgar street. After he had turned to the left in the middle of Telegraph avenue, and had proceeded over the car tracks running north and south on that avenue, he came to a stop to allow other cars bound south on Telegraph avenue to pass him. After three such cars bound south had passed him, he started ahead and was struck by the Marks car before he had proceeded more than six or eight feet. He had witnessed this defendant's car approaching at a point about 150 feet north from the intersection. He noticed it again when at a point about 50 or 75 feet from the intersection, and saw that it was then going at a rate of 35 miles an hour. At this time defendant's car was traveling alongside of another car—on the east side of that car and closer to the street car rails than to the curb. With these two cars approaching in this order, the defendant's car traveling at a speed of 35 miles an hour and close to the street car rails, the plaintiff's husband put his machine in low gear and started to cross the path of this approaching traffic.

[1, 2] Upon this state of the evidence, the appellants insist that we should hold that the respondent was guilty of contributory negligence as a matter of law arising out of negligence of her husband with whom she was riding. It is conceded, as it must be, that if the respondent's husband was guilty of contributory negligence, such negligence must be imputed to her. But when it comes to determining whether a particular state of facts constitute contributory negligence as a matter of law, we are confronted with the rule "the question of contributory negligence is one of fact for the jury to solve under proper instruction, and not one of law, save in those cases in which, judged in the light of common knowledge and experience there is a standard of prudence to which all persons similarly situated must conform." Williams v. Pacific Elec. Ry. Co., 177 Cal. 235, 237, 238, 170 P. 423. As was said in Swartz v. Acme Express & Drayage Co. (Cal. App.) 283 P. 358, 360, "in the absence of some rule of conduct which is established by statute, by judicial decision, or by established custom or practice, we cannot say that any particular method employed to avoid injury is negligence as a matter of law because it is not the method that we would have used under the same circumstances."

In the case before us the rule of conduct prescribed by statute is found in section 130 of the California Vehicle Act (St. 1923, p. 558), and reads: "The driver of any vehicle upon a public highway before starting, turning or stopping such vehicle shall first see that such movement can be made in safety, and if it cannot be made in safety, shall wait until it can be made in safety. * * *" It would seem to be evident that when any driver, while making a left-hand turn, comes into collision with another car proceeding along the line of traffic which he attempts to intersect he did not "first *see* that such movement" could have been made in safety. Here we have a statutory rule of conduct to which all motorists similarly situated must conform, and which casts upon the motorists "the duty of exercising greater care than is ordinarily required of them." Donat v. Dillon, 192 Cal. 426, 430, 221 P. 193, 195. But we have not been cited any statute or rule of decision which determines what is a breach of this duty under any state of facts. However, if the argument of respondent is sound—that the issue of contributory negligence in this case is one of fact for the jury—it is patent that, because of the error in the instruction hereafter referred to, the jury did not have that issue properly before it for determination.

[3] The error in this instruction, number 46, is such that the cause must be reversed for a new trial. Therein the trial court instructed the jury that if the automobile of the respondent entered the northwesterly quarter of the intersection before the vehicle of defendant Marks had entered the intersection, then the respondents "would be entitled to the right of way to *cross Telegraph avenue* ahead of any vehicle coming from the north which had not at that time entered the intersection." The effect of this instruction was to advise the jury that any motor vehicle entering an intersection had the right of way to cross through that intersection making a complete left-hand turn (and even what is called a "U" turn) ahead of any other machine which had not previously entered the intersection at any other point. This is not the law, as was clearly pointed out by the Supreme Court in Donat v. Dillon, 192 Cal. 426, 430, 221 P. 193, 195. The facts in that case were very similar to the facts here, excepting that the party claim-

ing a continuous right of way was the defendant in the action. In dismissing this claim the Supreme Court said: "Although a machine first reaching the intersection may have the right of way, it does not follow that one who changes his course at the intersection of a street is entitled to the full protection of this rule, for common sense tells us that he is bound to exercise great care to avoid colliding with machines that are on the street, and across whose path he must travel. Clark v. Fotheringham, 100 Wash. 12, 170 P. 323. It seems to us that this was what the Legislature had in mind when it provided that a vehicle, before starting to turn, 'shall see first that there is sufficient space for such movement to be made in safety,' so that the practical effect of this provision is to cast upon motorists intending to turn the duty of exercising greater care than is ordinarily required of them."

The only defense to the instruction made by the respondent on this appeal is that it must be read in connection with all other instructions. This, of course, is a general rule of practice, but in this particular case the reading of this instruction with the others merely emphasizes the vice of the instruction complained of. In instruction number 45 the jury was advised that if the respondent's husband failed to ascertain that the left turn could be made in safety or neglected to give the requisite hand signal, that this constituted negligence as matter of law. This instruction was immediately followed by number 46, which is the one complained of. Taking these two instructions together, the jury could not escape the conclusion that if the respondent's husband approached the northwest corner of the intersection before appellants' car reached the corresponding corner, then respondent's husband had a clear right of way to proceed through that intersection turning to the left and crossing Telegraph avenue, and that this legal right was in itself sufficient to satisfy him that the left turn could be made in safety within the meaning of instruction number 45.

Judgment reversed.

We concur: STURTEVANT, J.; DOOLING, Justice pro tem.

HULL v. RAY.★

Civ. 4060.

District Court of Appeal, Third District, California.

May 2, 1930.

Rehearing Denied May 31, 1930. Hearing Granted by Supreme Court June 30, 1930.

1. Sales ⟹127.

Notice of rescission of contract for sale of cattle *held* insufficient to support action to rescind based solely upon omission to execute bill of sale.

Contract for sale of registered cattle required seller upon payment of purchase price to execute and deliver good and sufficient bill of sale together with warranty of title. Bill of sale and warranty of title were never executed. Written notice of rescission was based upon ground that seller failed to deliver certificate of cattle club showing transfer and seller's failure to correctly certify to date of service of certain of cattle, but omitted to mention seller's failure to execute or deliver bill of sale.

2. Sales ⟹135.

Seller's failure to furnish certificate of cattle club showing transfer of cattle sold would not furnish ground for rescission, absent covenant to that effect.

3. Contracts ⟹271.

Giving notice of intention to cancel contract is ordinarily prerequisite to maintaining action for rescission.

4. Contracts ⟹271.

Notice of intention to rescind contract expressing intention to terminate contract for breach thereof is ordinarily sufficient.

5. Contracts ⟹271.

Notice of intention to rescind contract assigning single specific ground of rescission will preclude one from abandoning ground designated and resorting to entirely different ground.

6. Contracts ⟹271.

Fact that notice of rescission need not generally specify ground of cancellation does not permit false ground assigned to be treated as surplusage.

7. Animals ⟹26(1).

Agister's lien, to secure purchaser's expense incurred in feeding and caring for cattle purchased, depends entirely upon validity of rescission proceedings.

8. Animals ⟹26(1).

Purchaser of cattle is entitled to agister's lien only after rescission and restoration of cattle has been refused, purchaser being under duty to exercise due care to preserve cattle (Civ. Code, §§ 3051, 3052).

9. Animals ⟹26(5).

When agister's lien and costs of sale have been satisfied, balance of proceeds of sale belongs to seller.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes
★Rehearing denied. Hearing granted. 294 P. 700.

10. Animals ⟹26(5).

In action to rescind contract for purchase of cattle wherein buyer asserted agister's lien, evidence showing circumstances surrounding assertion of lien *held* competent.

Evidence in question showed what expense had been necessarily incurred in caring for cattle purchased, proceedings pursued to secure lien and to foreclose same, and amount of proceeds acquired from sale.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by John S. Hull against Carl Ray to rescind contract for purchase of cattle and for return of purchase price. Judgment for plaintiff, and defendant appeals.

Reversed.

Scarborough, Forgy & Reinhaus, of Santa Ana, for appellant.

Sloane & Sloane, of San Diego, and M. B. Wellington, of Santa Ana, for respondent.

R. L. THOMPSON, J.

This is an appeal from a judgment of rescission of a contract to buy cattle and for return of the purchase price therefor.

The appellant contends that the judgment is erroneous on account of a fatal defect in the notice of rescission, and because he was precluded from showing that plaintiff's sale of the cattle to satisfy an agister's lien was illegal and that he had failed to account for the entire proceeds of such sale.

November 13, 1922, the parties to this action executed a written contract by the terms of which the plaintiff agreed to purchase fourteen head of registered cattle for the sum of $3,500. This sum was fully paid and the plaintiff took possession of the stock. The contract provided that upon payment of the purchase price the defendant would "execute and deliver to the * * * (plaintiff) a good and sufficient bill of sale of the said property, together with warranty of title." This bill of sale and warranty of title was not executed. After the plaintiff had fully performed all the covenants of the agreement on his part, he orally demanded of the defendant the delivery of the stipulated instruments, which was refused. At the same time the plaintiff also offered to restore the cattle to the defendant and attempted to rescind the contract. Pursuant to his effort to cancel the contract, the plaintiff served upon the defendant a written notice of rescission containing the following language: "You will please be advised that John S. Hull does hereby rescind that certain contract of sale * * * (describing the agreement heretofore referred to). This rescission is made by reason of the failure of said Carl Ray to deliver to the said John S. Hull a certificate of The American Jersey Cattle Club, showing transfer of the said cattle, and by reason of the said Carl Ray's failure to correctly certify to the date of service to certain of said cattle." It will be observed this notice of rescission omits to mention the defendant's failure to execute or deliver the bill of sale. This failure to deliver the bill of sale, and not the cause complained of in the notice of rescission, was the sole ground of cancellation relied upon by the plaintiff at the trial. The notice of rescission was admitted in evidence over the objection of the defendant. This variance in proof from the notice of rescission was fatal to the plaintiff's cause.

The court found that on May 5, 1923, the plaintiff did "rescind said contract of November 13, 1922, and notified the defendant in due form of such rescission." A decree was thereupon rendered in favor of the plaintiff canceling the contract and awarding him a judgment for the purchase price of the cattle in the sum of $3,500. From this judgment the defendant has appealed.

[1, 2] We are of the opinion the notice of rescission was fatally defective. It was insufficient upon which to maintain an action to cancel a contract for the purchase of cattle based solely upon an omission to execute and deliver a bill of sale. The court found that a notice of rescission in due form had been given. A notice of rescission which specifies only an erroneous ground of cancellation is misleading and would tend to deceive the adverse party and prevent him from defending the action on its merits. The fact that a "certificate of The American Jersey Cattle Club, showing transfer of the said cattle" on the records of said club had not been supplied the purchaser of the stock, in the absence of a covenant to that effect, furnishes no ground for cancellation of the contract. Upon a former appeal in this same case (Hull v. Ray, 80 Cal. App. 284, 251 P. 810), this court held the foregoing ground which was specified in the notice was not cause for cancellation of the contract. That decision becomes the law of this case. It was, however, held upon the former appeal that the failure of the vendor to execute and deliver a good and sufficient bill of sale was cause for a rescission of the contract for the reason that the agreement specifically provided for the delivery of a bill of sale which is tangible evidence of ownership and title and is therefore a valuable part of the consideration for the purchase.

It therefore follows that, since the notice of rescission was invalid, the effort to cancel the contract was ineffectual and the sale of the cattle to satisfy the agister's lien was void.

[3-6] It is ordinarily a prerequisite to maintaining an action for rescission that a notice of intention to cancel the contract be given to the adverse party. Zeller v. Milligan, 71 Cal. App. 617, 625, 236 P. 349; 2 Black on Rescission (2d Ed.) p. 1399, § 569. This notice, however, is not required to be couched in any particular form. It is ordinarily sufficient if it clearly expresses the intention to terminate the contract for a breach thereof. McNeese v. McNeese, 190 Cal. 402, 405, 213 P. 36; Simmons v. Briggs, 69 Cal. App. 447, 463, 231 P. 604; Guscetti v. Dugan, 60 Cal. App. 187, 212 P. 397; 2 Black on Rescission (2d Ed.) p. 1410, § 573. Assuming that a notice of rescission is adequate in form, which identifies the instrument and asserts an intention to cancel it, without specifying the particular ground of rescission, yet when a single specific ground of rescission is assigned, it will preclude one from abandoning the ground which is stated and resorting to an entirely different cause. This principle appears to be sound and just. Because one may not ordinarily be required to specify the ground of cancellation in the notice of rescission, it does not follow that a false ground which is assigned may be treated as surplusage and harmless. The danger of such a construction is evident from the facts of the present case. The contract required the vendor of the cattle to furnish the buyer with a good and sufficient bill of sale. It did not require a certificate of the transfer of registration of the stock on the records of the cattle club. The cattle had been delivered to the purchaser. The vendee might waive his right to a bill of sale assuming that his possession of the cattle was satisfactory evidence of his title. His notice of rescission on the sole ground of failure on the part of the defendant to furnish him with a certificate of transfer of registration of the stock clearly inferred that he was waiving his right to a bill of sale and that he relied solely upon the ground mentioned in the notice for cancelling the contract. The right of the plaintiff to an agister's lien and compensation for feeding the stock depended upon the validity of his cancellation of the contract. Knowing that the agreement did not require the delivery of a certificate transferring the registration of the stock upon the records of the cattle club, the defendant was warranted in assuming that the contract was not subject to rescission on that ground and that he was therefore not liable to the plaintiff for compensation for feeding the stock. For this reason he was justified in refusing to accept a return of the cattle. To permit the plaintiff, under such circumstances, to sell the stock for the satisfaction of an agister's lien and then seek to justify the sale on a false notice of rescission would encourage fraud and deceit. The result of such a misstatement as was contained in the notice in the present case led the defendant to assume that the contract was valid; that the plaintiff therefore held no lien; was entitled to no compensation for feeding the stock and was therefore deceived into permitting cattle of the value of $3,500 to be sold to the wife of the plaintiff for the nominal sum of $154. Certainly the law will not countenance so radical a departure from justice.

[7, 8] The plaintiff was entitled to an agister's lien to secure his expense incurred in feeding and caring for the cattle, dependent entirely upon the validity of his rescission proceedings. While the purchaser held possession of the stock under the provisions of an existing contract to buy them, obviously he would not be entitled to compensation for feeding the cattle. After the contract had been canceled and restoration of the cattle had been refused, the owner would become liable for the cost of feeding and caring for them. Under such circumstances it was the duty of the holder of the cattle to exercise due diligence to preserve the property. After a rescission of the contract had been accomplished, however, a statutory lien would be created to secure the payment of the necessary expense incurred in feeding and caring for the stock. Section 3051 of the Civil Code provides in part: "Persons pasturing horses or stock, have a lien, dependent on possession, for their compensation in caring for, boarding, feeding, or pasturing such horses or stock."

[9] As provided by section 3052 of the Civil Code, after notice to the owner, this lien may be satisfied by sale of the cattle at public auction. When the lien and the costs of sale have been satisfied, the balance of the proceeds of sale belongs to the owner. This was the process sought to be enforced by the plaintiff in the present case.

[10] Incident to the chief issue in this case was the plaintiff's claim of an agister's lien upon the cattle to compensate him for feeding and caring for them after his alleged cancellation of the contract. The complaint clearly asserted this claim and alleged that the cattle had been sold at public auction pursuant to law, but that the proceeds of sale were insufficient with which to satisfy the lien. The validity of this claim, the existence of the lien, the regularity of the proceedings, and the alleged insufficiency of the proceeds of sale were all controverted by the answer. No deficiency judgment on account of the cost of feeding the stock was prayed for or allowed. The defendant asserts that he was erroneously precluded from introducing evidence to refute this claim incident to the lien. Since, assuming that the contract had been canceled, the agister's lien was a proper issue incident to the chief cause for rescission, obviously evidence was competent to show what expense had been necessarily incurred to care for the stock, what proceed-

ings were pursued to secure the lien and foreclose the same, and the amount of proceeds which was acquired from the sale. Likewise the defendant was entitled to any reasonable opportunity to cross-examine witnesses or adduce evidence to refute the plaintiff's showing in this regard. In spite of the court's erroneous assumption that this evidence regarding the agister's lien and the sale of the cattle was competent only to account for plaintiff's failure to restore the property to the owner upon cancellation of the contract, the defendant appears to have been granted every opportunity to present all favorable evidence upon this subject which he possessed. If it be true that the application of this evidence was limited by the court to the sole question of inability of the plaintiff to restore the cattle to the owner as a prerequisite to maintaining an action for rescission, still the defendant is not injured by such limitation, since it becomes necessary to reverse this judgment for failure to prove the serving of an adequate notice of rescission. The legal authority to sell the cattle to satisfy an agister's lien depends entirely upon the validity of the rescission proceedings. If the contract was still in force the plaintiff acquired no lien and had no authority to sell the stock. Since it is necessary to serve a notice of cancellation as a prerequisite to the maintenance of an action of rescission, and the notice thereof was fatally defective, it follows that the sale of the cattle was invalid, and the decree of rescission was erroneous.

The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

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108 Cal. App. 158

NATHAN v. LOCKE et al.★

Civ. 7124.

District Court of Appeal, First District, Division 2, California.

April 28, 1930.

Rehearing Granted May 28, 1930.

1. Contribution ⚷5.

There is no right of contribution between joint tort-feasors.

2. Action ⚷27(1).

Whether action is on contract or in tort is to be determined by nature of grievance rather than by form of pleadings.

3. Action ⚷27(1).

When it is not clear whether action is on contract or in tort, it will ordinarily be construed as on contract.

4. Landlord and tenant ⚷130(3).

As between landlord and tenant, where lease contains covenant for quiet enjoyment, usual remedy of tenant wrongfully dispossessed is an action for breach of covenant.

5. Landlord and tenant ⚷130(3).

Where breach of covenant in lease for quiet enjoyment amounts to eviction, tenant may sue landlord for damages.

6. Contribution ⚷9(5).

As regards landlord's right of contribution against co-landlord, complaint setting up lease containing covenant for quiet enjoyment and eviction by landlord *held* to state action on contract.

7. Appeal and error ⚷757(3).

Failure to find on issue that landlord falsely represented facts to co-landlord, resulting in co-landlord's sanction of lessee's eviction, *held* not to require reversal, where no evidence was printed covering such issue (Code Civ. Proc. § 953c).

8. Appeal and error ⚷1071(6).

Failure to find on issue requires reversal only when issue would affect judgment and different finding might have been made.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Miriam Nathan against William J. Locke and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

H. A. Postlethwaite, of San Francisco, for appellants.

William Klein and Arthur H. Barendt, both of San Francisco, for respondent.

NOURSE, P. J.

Plaintiff sued for contribution against each of the defendants upon a final judgment which had been rendered against the three. Plaintiff had a several judgment against each of the defendants, from which they join in an appeal upon typewritten transcripts.

The three parties were co-owners of real property situated in Mendocino county. Plaintiff held an undivided one-half interest, and each of the defendants held an undivided one-quarter interest in the property. The three owners joined in a written lease to one Miller on May 16, 1922. In September, 1922, Miller notified the plaintiff herein that he would be unable to pay the balance of the rent due in October of that year, and offered to give her a note for it. Such a note was taken by the plaintiff and handed to the defendants herein, who declined to accept the note, unless it was secured by a mortgage on

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing granted.

the fall crops. Demand was thereupon made upon the lessee that such a mortgage be given, but the note was not returned to him. Thereafter a controversy arose between the lessors and the lessee as to the right of the latter to cut and remove wood from the premises, and, as a result of this controversy and the matter of the unsecured note, notice was given to the lessee to deliver possession of the property to an agent of the lessors, and about the same time suit was commenced against the lessee on account of the October instalment of rent, in which wood which he had cut upon the premises was attached. The lessee vacated the premises a few days later, and thereupon brought an action for damages against the three lessors. The cause was tried before a jury in Mendocino county, and resulted in a verdict for the lessee in the sum of $2,500. This judgment was appealed to the District Court of Appeal and affirmed. Thereafter, being threatened with execution upon her property located in Mendocino county, the plaintiff in this action paid the judgment, with the costs and attorneys' fees incurred in defending the action, amounting to something over $3,500. She then commenced this proceeding, demanding from her co-lessors contribution to her of their proportion of the amount paid, based upon their individual interest in the property which was under lease.

[1] The one issue involved in this appeal is whether the action maintained in Mendocino county was ex contractu or ex delicto. It is conceded that in this state there is no right of contribution between joint tort-feasors. 6 Cal. Jur. 512. If, therefore, the Mendocino action was one in tort, the respondent herein may not seek contribution from the appellants.

[2, 3] In determining whether an action is on the contract or in tort, the general rule is that the character of the action is to be determined by the nature of the grievance rather than by the form of the pleadings. Ft. Smith & W. R. Co. v. Ford, 34 Okl. 575, 126 P. 745, 746, 41 L. R. A. (N. S.) 745; 1 C. J. p. 1015. Another rule which is universally accepted in determining the nature of an action of this kind is that, when it is not clear to which class the action belongs, it will ordinarily be construed as in contract rather than in tort. 1 C. J. p. 1015. The reason for this rule is that the construction should be against the pleader and the liability in contract is less extensive than the liability in tort. May v. Georger et al., 21 Misc. Rep. 622, 47 N. Y. S. 1057, 1059. Another guide is noted in 1 Corpus Juris, p. 1016, where it is said: "Where a complaint states a cause of action in contract and it appears that this is the gravamen of the complaint, the nature of the action is not changed by the fact that there are also allegations in regard to tortious conduct on the part of defendant. * * * Conversely, if the complaint states a cause of action in tort and it appears that this is the gravamen of the complaint, the nature of the action is not changed by allegations in regard to the existence or breach of a contract." Illustrations of the latter class of actions are those for damages arising out of the contract relations between bailor and bailee, carrier and passenger, master and servant, innkeeper and guest, etc. In such cases the tort which is the basis of the claim for damages lies in the breach of the duty imposed by law, and the allegations of the contract relations between the parties are merely for the purpose of showing that the plaintiff was not a trespasser or that he was lawfully in the position or situation at the time the defendant's breach occurred. On the other hand, if there is no liability except that arising out of the breach of a purely contractual duty the action must be in contract, and an action in tort cannot be maintained. Illustrations of this class are found in the cases cited in the note, 1 Corpus Juris, p. 1016.

[4, 5] As between landlord and tenant, where the lease contains a covenant for quiet enjoyment, the usual remedy for the tenant is an action for a breach of the covenant. 36 C. J. 82, and cases cited. Where the breach of the covenant amounts to an eviction, either actual or constructive, the tenant may sue for damages resulting from the eviction, but, if the tenant's damage is a result of the lessor's failure to perform the covenant of quiet enjoyment only, and not the result of a trespass or other overt act on the part of the lessor, then, under the rules heretofore discussed, the presumption would be that the action is on the contract. Putting it in another way, if the acts complained of were actionable only because of the contract, and there is no negligence or breach of duty distinct from the breach of promise under the contract, the case is ex contractu. Tuttle v. George H. Gilbert Mfg. Co., 145 Mass. 169, 13 N. E. 465, 467.

[6] With these rules in mind, we may refer briefly to the amended complaint upon which the Mendocino trial was had. The execution of the lease containing the covenant for peaceable and quiet enjoyment was first pleaded. It was then alleged that, notwithstanding the terms of this covenant, the lessors evicted and ejected the lessee from the possession of the property, and that, if he had been allowed to continue in the peaceable possession thereof he would have obtained in profit from farming the land leased for the remainder of the term a sum of $6,500. It is also alleged that the plaintiff had prepared a portion of the land and sown the same to grain at an expense to him of $271.50, that he had also made permanent improvements to the land to the value of $550, and that he had been prevented from ob-

taining the profits from the sale of wood cut on the land which he was permitted to cut under the terms of the lease and which profits would have amounted to $750. Other items were listed under special allegations of financial loss to the lessee which were attributed solely to the lessors' failure to perform the covenant of undisturbed and peaceable possession of the premises. No overt act constituting a trespass or act of negligence on the part of the lessors was alleged, but the whole theory of the complaint, including the prayer, was based upon the loss of anticipated profits which the lessee would have received if he had been allowed to continue in the peaceable and undisturbed possession of the premises. We are satisfied from our examination of the pleading that the action was based upon the contract and was not an action in tort.

On this appeal the appellants insist that we cannot reach this determination upon a review of the pleadings in the former trial, but that we are bound by certain language found in the opinion of the District Court of Appeal on the appeal from that judgment. Miller v. Nathan, 87 Cal. App. 185, 261 P. 1047. Stress is laid upon the language of that decision, where it is said that, after the lessee vacated the premises, an action was brought for damages for the "eviction," and that upon the review of the evidence in the case the district court affirmed the judgment, holding that such evidence was sufficient to justify the judgment "as to the eviction." But, if the court in that case had been called upon to determine whether the eviction relied on was forcible or constructive, it would have been compelled to hold that it was constructive merely because of the allegations of the complaint. We have heretofore said that in cases of this character the action may be one upon the contract or it may be one in tort. But, where the pleadings upon which the action was tried unmistakably stamp the action as one upon the contract, we are not permitted to find it to be otherwise because of language in the opinion of the appellate court, where the point was not before that court to be decided.

[7] One other point raised by appellants requires attention. It is argued that the judgment herein must be reversed because the trial court failed to make a finding upon appellants' separate defense to the effect that respondent falsely represented to them the facts regarding the conduct of the tenant, and that by reason of such false representations they were led to sanction the actions of this respondent, which resulted in the eviction of the tenant, and which became the basis of the judgment in the Mendocino court.

[8] No evidence is printed covering the issue, as is required by section 953c, Code of Civil Procedure, and the appellants have therefore wholly failed to disclose any prejudicial error. The failure of the trial court to find upon an issue raised by either party requires a reversal only when it is shown that the issue is material to and would affect the judgment, and that the evidence was such that a different finding might have been made. 2 Cal. Jur. p. 1034. The principle is stated in Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 696, 75 P. 564, 565: "Error is not to be presumed, and, if the appellant would contend that the court should have found * * * it was incumbent upon him to cause the record to show that such finding was required by the evidence." Himmelman v. Henry, 84 Cal. 104, 106, 23 P. 1098; Preluzsky v. Pacific Co-operative C. Co., 195 Cal. 290, 295, 232 P. 970.

Judgment affirmed.

We concur: STURTEVANT, J.; DOOLING, Justice pro tem.

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105 Cal. App. 261

RICHARDS v. TAVARES.

Civ. 6883.

District Court of Appeal, First District, Division 1, California.

April 16, 1930.

1. Corporations ⟹79.

Advances under agreement for sale of stock on termination of contractual relation became due and payable.

Under contract for sale of corporate stock, certain advances for expense money were made to salesman with an understanding for repayment as specified therein after the sale of certain amount of stock. On failure of salesman to perform, the contractual relation between parties was terminated by subsequent agreement and by mutual consent of parties.

2. Bills and notes ⟹129(1).

Payment of note payable on happening of contingency may be required within reasonable time after ascertainment that event will not happen.

3. Bills and notes ⟹516.

Implied conclusion that event subsequently fixed on for payment of notes given for advances was merely for convenience of maker *held* supported by evidence.

4. Money received ⟹6(6).

Failure to use money for purpose advanced resulted in failure of consideration for loan with right to recover amount advanced (Civ. Code, § 1689, subd. 2).

5. Pleading ⟹236(5).

Allowance of amendments to conform to proofs rests in discretion of trial court.

6. Pleading ⟹237(3), 253.

Amendments to conform to proofs may be allowed after submission of cause and are deemed denied.

7. Pleading ⟹236(5).

Allowance of amendment to conform to proof must have resulted in prejudice to constitute abuse of discretion.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by G. L. Richards against J. G. Tavares. Judgment for plaintiff, and defendant appeals.

Affirmed.

Herman A. Bachrack and Brownstone & Goodman, all of San Francisco, for appellant.

Clark & Heafey, of Oakland, for respondent.

PER CURIAM.

This is an appeal by the defendant from a judgment rendered against him on two promissory notes, one for $5,000 and the other for $1,000. The notes were executed to the Latham Square Corporation and by it assigned to the plaintiff. Defendant alleged that the notes were conditional obligations payable only in the event that certain units of the stock of the corporation were sold by him, which was not done. The same contention is made on appeal, and, further, that the trial court erroneously permitted the plaintiff to amend his complaint to conform to the proof.

The facts are as follows: The commissioner of corporations on June 19, 1925, granted the corporation a permit to sell and issue six thousand shares of its preferred capital stock and six thousand shares of its common stock in units of one share of preferred and one share of common stock for the price of $120 per unit. On August 20, 1925, the corporation entered into an agreement with defendant by which he was appointed its sole and exclusive agent for the sale of the units mentioned, it being provided therein "that all expenses in connection with the sale of said stock, including advertising and circularization as well as salaries or commissions to the salesmen, are to be paid" by the defendant. It was also provided that the agreement should continue in force to and including March 1, 1926, the defendant agreeing to sell on or before that date 3000 units, in which event the contract was to remain in force for six months thereafter. Between August 20, 1925, and November 20, 1925, the corporation loaned to defendant the sum of $4,000 to assist him in the expense of selling the stock, and on the last-mentioned date the further sum of $1,000 was loaned for the same purpose. On that date the first note for $5,000 was executed by defendant, and at the same time the following memorandum was signed by him and the secretary of the corporation, the George G. Jamieson mentioned therein being its president:

"Memorandum of understanding had between George G. Jamieson, Maury I. Diggs and J. G. Tavares this 20th day of November, 1925.

"Having advanced prior to this date the sum of $5,000.00 to J. G. Tavares in accordance with our previous understanding for expense money for the Latham Square Corporation stock sales matter, it is understood by the parties hereto that when and as J. G. Tavares had sold 2,000 units of the Latham Square Corporation stock, that thirty days thereafter said J. G. Tavares is to repay said $5,000 advanced in the following manner, to wit:

"Commencing 30 days after the sale of the said 2,000 units the sum of $1,000.00 is to be repaid.

"60 days after the sale of said 2,000 units the sum of $2,000 is to be repaid.

"90 days after the sale of said 2,000 units the sum of $2,000 is to be repaid.

"As specified above the total sum of $5,000.00 is to be repaid within 90 days after the sale of said 2,000 units, said moneys to bear no interest.

"It is understood that the above-mentioned $5,000.00 is a sum which has been advanced to J. G. Tavares as a loan to assist him in the expense of the sale of said capital stock and is to be repaid in the manner above outlined.

"M. I. Diggs
"J. G. Tavares."

The note, by its terms, was payable in accordance with the above memorandum. The defendant not having sold 3,000 units of the stock by March 1, 1926, as required by the original agreement, at a meeting on April 6, 1926, the following letters were written and exchanged between them:

"April 6th, 1926.

"Mr. J. G. Tavares.
"Dear Sir:

"According to the terms of your contract you were to have sold 3,000 units of the capi-

tal stock of the Latham Square Corporation by March 1, 1926. To date this has not been accomplished. Please be advised that according to the terms of your contract the contract became null and void on March 1, 1926.

"Any sales that you are able to make in the future we will be pleased to accept, reserving the right, however, to stop the sale of our capital stock at any time hereafter.

"If this is satisfactory please acknowledge the same.

"Yours very truly,
"Latham Square Corporation,
"G. L. Richards, Treasurer."

"Oakland, Cal., April 6th, 1926.
"Latham Square Corporation.
"Gentlemen:

"I acknowledge receipt of your letter of April 6th, 1926, informing me that I have not sold 3,000 units of the capital stock of the Latham Square Corporation by March 1, 1926, in accordance with the terms of our contract, and that therefore said contract has expired.

"I will be pleased to proceed with the sale of said units of capital stock, and hereby give you the right to stop the sale of same at any time.

"It is understood that you are to advance moneys to be used for expenses in the sale of said units of stock, and that same will be repaid by me out of commissions accruing on sales of said units, but should you terminate the sale of said units at any time then said loans up to a limit of $3,000 will be considered to have been satisfied and liquidated.

"Yours very truly, J. G. Tavares."

"April 6th, 1926.
"Mr. J. G. Tavares.
"Dear Sir:

"In consideration of advancing you a loan of $1,000 this day, for which we have taken your note payable in 90 days, please be advised that this loan is made with the expressed condition that the money so advanced to you is to be used only for expenses pertinent to the sale of the capital stock of the Latham Square Corporation.

"You agree to submit to us vouchers showing that the money has been spent for this particular purpose and no other.

"Yours very truly,
"Latham Square Corporation,
"G. L. Richards, Treasurer."

Simultaneously with the exchange of these letters and as part of the same transaction, a further loan of $1,000 was made to the defendant, and the note sued upon was executed by him. This note was dated April 6, 1926, and made payable 90 days after its date. Thereafter the defendant continued to sell stock, and on October 5, 1926, received the following letter from the corporation:

"October 5, 1926.
"J. G. Tavares.
"Dear Sir:

"Please be advised from this date on we will not accept stock subscriptions from any one other than the sales made by salesmen who are operating under a corporate permit and directly in the employment of the Latham Square Corporation Securities Department and working from this headquarters.

"Yours truly,
"Latham Square Corporation,
"M. I. Diggs, Secretary."

His reply was as follows:

"October 9, 1926.
"Latham Square Corporation,
"Attention M. I. Diggs, Secretary.
"Gentlemen:

"This is to acknowledge receipt of your letter of October 5th as well as to confirm my conversation with your Mr. Diggs of yesterday with respect to said letter. I would have replied to this letter sooner but it arrived at my office while I was out of town, and immediately on my return I endeavored to locate Mr. Diggs on the telephone and only succeeded in doing so yesterday.

"My understanding with Mr. Diggs is that I am not to solicit any new sales of the capital stock of your company, but that I may however complete such sales which were solicited by me prior to the receipt of your said letter of October 5th, and that you will accept the same and pay me my regular commission therefor. I have spent a great deal of time and effort in such prospective sales which I now have pending, and I expect you to allow me up to and including the 15th of October in which to complete the same. In other words, after October 15th, 1926, our existing arrangement is to be entirely terminated.

"Please confirm this understanding to me.
"Very truly yours, J. G. Tavares."

To the latter communication the corporation made no rely, but accepted sales of stock from the defendant to and including October 15, 1926, and the present action was filed on December 30, 1926.

The memorandum of November 20, 1925, referred to the completion of the sale of 2,000 units of the stock as the date, after which the $5,000 first advanced to defendant should be repaid in installments as therein provided, and the complaint alleged that to and including July 1, 1926, more than that number of units had been sold by the defendant. It was shown at the trial, however, that the total number of units sold by him from August 20, 1925, to October 15, 1926, was 1,747, for which he received commissions amounting to $34,940; the commissions received from sales made after April 6, 1926, being the sum of $13,040.

It appears that the taking of testimony in the case was concluded on October 27, 1927, and that thereafter on February 3, 1928, the court, without notice to the defendant, granted the plaintiff leave to amend his complaint to conform to the proofs by striking out the allegation last mentioned and inserting the following in lieu thereof: "That said defendant has failed, neglected and refused to sell 2,000 units of the capital stock of said Latham Square Corporation; that said defendant has had a reasonable time within which to sell 2,000 units of the capital stock of said corporation, and that said reasonable time expired March 1, 1926." The order further provided that the allegations of the amendment were deemed denied. The amendment was filed on February 3, 1928, and on the same date a copy thereof, together with a copy of the proposed findings, was noticed for presentation to the court on February 9, 1928, and was signed and filed on February 28, 1928.

That under the contract of August 20, 1925, all expenses in connection with the sale of the stock were to be paid by the defendant, and that the amount evidenced by the promissory note for $5,000 was advanced as a loan to assist him in making such sales is undisputed. He contends, however, that his obligation to repay this sum was modified by the memorandum of November 20, 1925, and thereafter depended upon the condition that at least 2,000 units of the stock be sold by him.

[1, 2] The original contract was to remain in force until March 1, 1926, within which time defendant agreed to sell 3,000 units. The memorandum of November 20, 1925, indicates no intention to extend the contract, and that such was not its purpose is shown by the letters of April 26, 1926, wherein defendant was notified that his contract had expired, to which he assented, stating that he would be pleased to proceed with the sale of stock, the corporation to have the right to stop such sales at any time. That the parties at the time the memorandum was executed contemplated a sale of at least 2,000 units before the expiration of the original contract may fairly be inferred from the above, and supports the finding of the trial court that a reasonable time within which to dispose of this amount of stock expired on that date. It further appears, however, that following his request defendant continued to sell until October 15, 1926, on which date he had disposed of but 1,747 units; and that on October 9, 1926, in response to the company's letter of October 5, 1926, he stated that, according to his understanding with the secretary of the company, "* * * after October 15, 1926, our existing arrangement is to be entirely terminated." Whether the defendant failed to dispose of the 2,000 units within a reasonable time, or within the period contemplated by the parties, or the agreement was terminated by mutual consent before that number had been sold, is not material to the right of the plaintiff to recover.

Contrary to defendant's claim, the advances were not gifts, but loans; and when the defendant failed to perform, as found, or the contractual relation between the parties was terminated by agreement, as shown by defendant's letter, these amounts became due and payable. Williston v. Perkins, 51 Cal. 554; Rosenheim v. Howze, 179 Cal. 309, 176 P. 456; Looney v. Scott, 71 Cal. App. 308, 235 P. 76; Green v. Darling, 73 Cal. App. 700, 239 P. 70; Dugan v. Phillips, 77 Cal. App. 268, 246 P. 566; Noland v. Bull, 24 Or. 479, 33 P. 983. While it is the general rule that where a note is payable on the happening of a contingency, the payee, in order to recover, must show that such contingency has happened (Sanders v. Whitesides, 10 Cal. 88; McLaughlin v. Clausen, 85 Cal. 322, 24 P. 636), as the court said in Hogan v. Globe Mutual, etc., Ass'n, 140 Cal. 610, 74 P. 153, 154, quoting with approval from De Wolfe v. French, 51 Me. 420: "If the debt is understood to be absolute, and the happening of the future event is fixed upon as a convenient time for payment merely, and, for some unforeseen or unthought-of cause, the event never happens, the creditor's right to recover will not be defeated. The law will require the payment to be made within a reasonable time after it is ascertained that the event will not happen. The debt will be contingent or otherwise, depending on the intention of the parties."

[3, 4] The above is peculiarly applicable to the facts of the present case. That the obligation to repay the advances was absolute at the time the same were made admits of no reasonable doubt; and the implied conclusion of the trial court that the event subsequently fixed upon for payment was merely for the convenience of the defendant is fully supported by the evidence. The note for $1,000 was executed on April 6, 1926, and was payable 90 days after its date. As appears from the letters of the same date, this sum the defendant agreed to use exclusively for expenses in connection with the sale of the stock, and to furnish vouchers showing that it had been used for no other purpose; but the evidence shows and the court found that the defendant failed to use any part of it for that purpose. While the parties further agreed that should defendant's authority to sell the stock be terminated the above, with any future advances made by the corporation up to $3,000, should be considered to have been satisfied, nevertheless, having failed to use the money for the agreed purpose, the breach resulted in a failure of consideration for the loan and gave the plaintiff the right

to recover the amount advanced. Civ. Code, § 1689, subd. 2; McDonald v. Pacific Debenture Co., 146 Cal. 667, 80 P. 1090; Morlock v. Fink, 81 Cal. App. 686, 254 P. 578.

[5-7] The allowance of amendments to conform to the proofs rests in the discretion of the trial court. Hancock v. Board of Education, 140 Cal. 554, 74 P. 44. Such amendments may be allowed after the submission of the cause (Lee v. Murphy, 119 Cal. 364, 51 P. 549, 955; Hancock v. Board of Education, supra; Myers v. Holton, 9 Cal. App. 114, 98 P. 197), and are deemed denied (Bank of Italy v. Johnson, 200 Cal. 1, 251 P. 784). In the case at bar a copy of the amendment was served on the day the same was filed, and on February 9, 1928, the order for judgment was entered. The findings and judgment, however, were not filed until February 28, 1928. No request that the cause be reopened for the purpose of permitting the defendant to produce further evidence on the question presented by the amendment was made in the meantime, and it is not contended that all the facts relevant to the issue were not adduced at the trial. Before it can be held that the allowance of such an amendment was an abuse of discretion, it must be shown that the adverse party has been prejudiced thereby (McClure v. Alberti, 190 Cal. 348, 212 P. 204), and no reasonable ground for this conclusion appears in the present case. No judgment can be set aside for error in any matter of procedure unless after an examination of the entire record the court shall be of the opinion that the error complained of resulted in a miscarriage of justice. Const. art. 6, § 4½. The record shows that the findings of the trial court were fully supported by the evidence, and no error appears which in our opinion would warrant a reversal of the judgment or justify the conclusion that the result was a miscarriage of justice.

The judgment is affirmed.

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105 Cal. App. 466

FISCHER et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 7256.

District Court of Appeal, Second District, Division 2, California.

May 2, 1930.

1. Corporations ⟹619.

Arbitration provision in trust agreement for liquidating corporation *held* to require submission to arbitration only controversies involving recognition and carrying out of trust agreement.

Trust agreement contained provision that, in case any dispute arises between trustees and any of creditors or corporation as to amount or validity of any debt or claim, or any other matter under or concerning agreement, every such dispute shall be referred to arbitration of three persons.

2. Contracts ⟹285(2).

Arbitration statutes contemplate controversy either existing or which may subsequently arise out of particular contract (Code Civ. Proc. § 1280).

3. Corporations ⟹619.

Under terms of trust agreement for liquidating corporation and providing for arbitration, corporation's right to accounting on expiration of trust *held* not dispute required to be submitted to arbitration.

4. Prohibition ⟹10(2).

Whether debtor's right to accounting under trust agreement for liquidating corporation should be arbitrated *held* matter within jurisdiction of superior court (Code Civ. Proc. §§ 1283, 1284).

5. Prohibition ⟹10(2).

Where superior court had jurisdiction to determine questions presented on application for prohibition, writ to restrain superior court from proceeding was refused.

Corporation which had conveyed its property to designated trustees for purposes of liquidation after expiration of trust brought action in superior court against trustees for an accounting. Trustees contended that corporation's right to an accounting was dispute required to be submitted to arbitration under terms of trust agreement, and therefore applied for writ of prohibition to restrain superior court from proceeding with case.

Original application by G. I. Fischer and another for a writ of prohibition prayed to be directed to the Superior Court in and for Los Angeles County to restrain proceedings commenced therein, on the ground that the issues are referable to arbitration.

Writ denied.

Loeb, Walker & Loeb, of Los Angeles, for petitioners.

Clyde C. Shoemaker, of Los Angeles, for respondent.

NORTON, Justice pro tem.

This is an application for a writ of prohibition directed to the superior court in and for the County of Los Angeles commanding said court to refrain from further proceedings

in an action therein commenced on the ground that the issues involved in such action are referable to arbitration.

The plaintiff in the suit in question entered into an agreement bearing date May 2, 1929, wherein it conveyed to three trustees all its assets for the purpose of converting them into cash and liquidating its indebtedness. The contract provided that, when the indebtedness of the debtor and all expenses of administration of the trust had been paid in full, the trustees were to pay any balance remaining to the debtor. It further provided that the trust should terminate three months from the date of the execution of the contract unless the term thereof was extended by consent in writing of two of the principal creditors, who were parties to the agreement, or unless the trustees decided to terminate the trust prior to such time. It contained the further provision that, "in case any dispute arise between the trustees and any of the creditors or debtor as to the amount or validity of any debt or claim, or as to any other matter under or concerning this agreement, then every such dispute shall be referred to the arbitration of three persons."

The debtor, Abrasive Engineering Corporation of California, commenced an action in the above superior court in which it seeks an accounting of the administration of the trust and of the properties conveyed by, or received from, the trustees. In its complaint this plaintiff alleges that all of its assets, together with its good will, have been conveyed by the trustees; that the trust terminated on the 2d day of August, 1929, pursuant to the provisions of the contract to that effect; that the trustees are not pursuing or carrying out the provisions of the contract in connection with the liquidation of the affairs of plaintiff, and that, prior to the commencement of the action, and on or about the 12th day of September, 1929, plaintiff in writing demanded of the trustees that they render an account of the administration of the trust, and that the trustees and each of them have failed, neglected, and refused to render any account of any character whatever of their administration of the trust. An application by two of the defendant trustees to stay the action until arbitration was had was denied by the superior court.

The answer of these defendant trustees denies certain of the allegations of the complaint, but, for the purposes of this opinion, it is unnecessary to set forth the scope of these denials. The plaintiff's right to relief will depend upon the proofs adduced at the trial, but its right to be heard should in this proceeding be determined by the allegations of its complaint. For the purposes of this case, we are presented with a situation where all the trust property has been conveyed by the trustees, the trust has expired, and the trustees are no longer operating thereunder, and the matter for decision is whether the demand for an accounting in such circumstances is a dispute as to any matter under or concerning the trust agreement.

[1] A fair construction of the language of the agreement would appear to limit the provision for arbitration to differences of opinion regarding the interpretation of the contract and the administration of the trust. Disputes as to the time when or terms on which the property should be sold and kindred controversies which involve the recognition and carrying out of the trust agreement are those which are to be determined by arbitration. In Young v. Crescent Development Co., 240 N. Y. 244, 148 N. E. 510, the arbitration clause provided for the submission of "all questions that may arise under this contract and in the performance of the work thereunder." The court said: "We know by common experience the class of questions to which this language naturally applies. It applies as stated to questions arising under and in the performance of a contract and such questions are those which involve an interpretation of its provisions for the purpose of determining whether work has been done according to the contract, whether work which has been demanded under the contract is really covered by its provisions or constitutes extra work, when payments become due, and so on. All of these questions involve recognition of the contract and not repudiation of it."

The record in the present case discloses no dispute regarding any matter which is within the fair meaning of the arbitration clause of the contract. In fact, it discloses no dispute of any character except as to plaintiff's right to an accounting upon the termination of the trust.

[2] The arbitration statutes of this state contemplate a controversy either existing or which may subsequently arise out of the contract containing the arbitration provisions. Code Civ. Proc. § 1280.

[3] In the case at bar, no issue is tendered involving the interpretation of the contract, and no controversy has yet developed concerning what has been done under it. The only hint of disagreement in the record would involve conduct in repudiation and not a recognition of the contract, but plaintiffs in this case merely seek an account of the proceedings of the trustees. It is the opinion of the court that plaintiffs have this right, and that it arises from the familiar jurisdiction of courts of equity to compel an accounting of trust relations, and should not be stayed by the provision for submission to arbitration of disputes as to matters under or concerning the contract.

[4, 5] We believe the application for the writ of prohibition should be denied for the further reason that the respondent court has

jurisdiction of the subject-matter of the action, and the jurisdiction to determine the question whether the issue involved in the pending suit is referable to arbitration is vested in the trial court by the provisions of sections 1283 and 1284 of the Code of Civil Procedure. The trial court had the right and power to decide this question, and, if it was not satisfied that the issue was referable, to so decide and to proceed thereupon to try the action. If the trial court decided erroneously, it was error committed in the exercise of its jurisdiction, to be reviewed upon appeal from the judgment.

The writ is denied.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

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105 Cal. App. 187

JOHNSTON v. LIFFMAN.

Civ. 7238.

District Court of Appeal, First District, Division 1, California.

April 12, 1930.

1. Judgment ⟹143(3) — Vacation — Surprise.

Applications for relief from judgment on ground of surprise, inadvertence, and excusable neglect are addressed to trial court's sound discretion.

2. Appeal and error ⟹957(1) — Discretion of court — Default — Vacation.

Order setting aside default will not be disturbed on appeal, in absence of showing of abuse of discretion.

3. Judgment ⟹143(11) — Dismissal — Default — Vacation — Time of trial — Misunderstanding.

Order setting aside judgment dismissing action *held* not abuse of discretion, where plaintiff showed his failure to appear at hearing was due to telephone message advising of postponement.

Plaintiff's attorneys, in reliance on the telephone message, presumably from the clerk of court, failed to appear at the time originally set, and defendant procured an order dismissing the action for want of prosecution. There was a further showing of merits of plaintiff's case and of injury suffered by the dismissal.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by R. G. Johnston against Julius Liffman, doing business under the fictitious name of the Los Angeles Furniture Manufacturing Company. From an order vacating judgment dismissing the action for want of prosecution, defendant appeals.

Affirmed.

H. L. Sacks, of Los Angeles, for appellant.

Goudge, Robinson & Hughes and Francis W. Read, all of Los Angeles, for respondent.

TYLER, P. J.

Appeal from an order vacating an order and judgment dismissing an action for want of prosecution.

Plaintiff, respondent herein, commenced an action on a certain trade acceptance. After the taking of depositions, the case was set for trial on June 24, 1927, and was at that time partially tried. The cause was then continued until June 28, following. Plaintiff failed to appear at this time, and because of such failure the action was dismissed without prejudice. Immediately thereafter, on August 1, 1927, respondent's attorneys served upon the attorney for the appellant a notice of motion to vacate the judgment of dismissal above referred to on the grounds of surprise, inadvertence, and excusable neglect. The notice of motion was based upon certain affidavits. These affidavits showed that the failure of respondent to appear at the time set for the hearing was due to confusion in telephone messages concerning the hearing. The affidavits set forth that one of the attorneys for respondent received a telephone call, presumably from the clerk of the court, on July 27, 1927, informing him that the case would be called the following day, at the hour of 2 o'clock p. m. instead of 10 a. m., as originally set, and that, in the event plaintiff was not ready to proceed, to advise the attorneys for the defendant. On the same day the stenographer employed by respondent received a similar communication. It further appeared that respondent desired to file an amendment and supplement to his complaint, and had served a notice of motion that the same be heard at 2 o'clock p. m. on the 28th day of July, 1927, believing that, pursuant to the telephone calls heretofore mentioned, the case would be called at that time. There was also a showing made of the merits of respondent's case, and of injury by the dismissal, justifying the granting of relief. Counter affidavits were filed by the clerk of the court and appellant's attorney. After the court had considered the affidavits, an order was made vacating the dismissal and setting the case for completion of trial. The order was conditioned upon the payment by respondent of the sum of $25 for the benefit of appellant. It is from the order mentioned that this appeal is taken by defendant.

[1-3] Applications for relief in cases of this character are addressed to the sound discretion of the trial court. In the absence of a showing of abuse in the exercise of such discretion, the order of the lower court setting aside a default will not be disturbed on appeal. Respondent made a sufficient showing for the relief prayed for and also of the merits of his case and of injury by the dismissal to justify the court's order granting him relief.

The law governing this class of cases is so well settled and has been so often declared in the decisions of our appellate courts that no further comment is necessary. Rogers v. Schneider (Cal. Sup.) 270 P. 451.

The order is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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105 Cal. App. 284

CITIZENS' STATE BANK OF SANTA MONICA v. CASTRO et al.

Civ. 5752.

District Court of Appeal, Second District, Division 2, California.

April 18, 1930.

1. Evidence ⟹594 — Uncontradicted testimony — Binding effect.

In action on note, court *held* not bound by indorsee's positive testimony that she did not indorse note.

2. Bills and notes ⟹537(2) — Suit on note — Testimony of indorsee — Question for trial court.

Weight of testimony of indorsee that she did not indorse note *held* for trial court in suit on note, in view of all evidence in case.

3. Witnesses ⟹246(2) — Handwriting expert — Call by court.

Action of court in calling handwriting expert at suggestion of holder's counsel, after indicating opinion that signature on note was not indorsee's, *held* not error (Code Civ. Proc. § 1871).

Under Code Civ. Proc. § 1871, court may appoint handwriting expert when he deems the occasion requires it.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the Citizens' State Bank of Santa Monica against Felix C. Castro, Ella S. Beltzhoover, and another. Judgment for plaintiff, and Ella S. Beltzhoover appeals.

Affirmed.

Bernard Potter, of Los Angeles, for appellant.

Samuel J. Crawford, of Ocean Park, for respondent.

NORTON, Justice pro tem.

[1, 2] This is an appeal from a judgment in favor of plaintiff and respondent against the defendants for the recovery of the balance due upon two promissory notes executed by the defendants Castro and indorsed by the defendant Beltzhoover. The defendant Beltzhoover alone appeals from the judgment. Upon the trial she denied that she indorsed the notes, and contended that the indorsement of her name upon the notes was not in her handwriting. She presents two grounds for the reversal of the judgment: Insufficiency of the evidence to justify the decision and irregularity in the proceedings of the court by which she was prevented from having a fair trial. While Mrs. Beltzhoover testified in the most positive manner that she did not indorse the notes for the Castros, the court was not bound by her testimony, and it was for the court to determine how much weight to accord it in view of all the evidence in the case. From the testimony and all the circumstances and evidence in the case the court was amply justified in concluding that she did indorse the notes, and the findings in that regard are fully supported. There is evidence to show, aside from the opinion evidence on the question of whether the indorsement was in her handwriting, that she negotiated the loan from the plaintiff bank for the Castros upon the understanding and agreement that she would indorse the notes for them; that she brought the notes to the bank with her indorsement upon them, and directed that the amount of the notes be credited to the Castro account; that she took a note from the Castros secured by a chattel mortgage upon the property to secure her indorsement which she placed upon the note given the plaintiff and that she admitted having indorsed the notes.

After a careful reading of the record, we are at loss to understand how any other view could be taken of the case than that finally adopted by the trial court.

[3] The second point for reversal is predicated upon what occurred after plaintiff and appellant had rested their case. After counsel for appellant had concluded his argument, the trial judge, in discussing the case from the bench, indicated that he had been examining the questioned signature indorsed on the notes and comparing it with the exemplars in evidence, and had formed the opinion from his own study of the handwriting that it was not appellant's. Upon this candid disclosure by the judge of the opinion formed by him of the genuineness of Mrs. Beltzhoover's

indorsement upon the notes arising from his independent examination of them during the course of the trial, the attorney for respondent, after some discussion of the evidence with the judge, suggested that if he was in doubt he could appoint a professional expert. The court finally acted upon the suggestion and stated: "In order to avoid any embarrassment I think the best thing to do since counsel have agreed to it is that I have an expert and I will name the expert without either side knowing about who he is prior to his coming into court and testifying." The case was thereupon continued, and in the interim the trial judge selected a handwriting expert, who appeared and testified when the trial was resumed upon the day to which it had been finally continued. If the proceedings resulting in a continuance of the case and the selection of a professional handwriting expert were in some of its features unique, the appellant made no objection thereto, and it does not appear that she was denied any of her legal rights. The professional handwriting expert was produced in open court, sworn, and examined by the court. The appellant was accorded ample opportunity to test the accuracy of his opinion by cross-examination, and to rebut his testimony by other evidence if he chose to do so.

The court had the right to appoint a handwriting expert if he deemed the occasion required it. Code Civ. Proc. § 1871. And we find no irregularity in the proceeding that deprived appellant of a fair trial.

We have considered the other points raised and are satisfied that they are devoid of any merit.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

CHRIST v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.★

Civ. 7338.

District Court of Appeal, First District, Division 2, California.

April 14, 1930.

Rehearing Denied May 9, 1930. Hearing Granted by Supreme Court June 12, 1930.

1. Mandamus ⟹4(1) — Right of appeal — Speedy or adequate remedy.

Right of appeal is not always speedy or adequate remedy sufficient to present issuance of writ of mandamus (Code Civ. Proc. § 1086).

2. Mandamus ⟹154(7) — Petition — Specific demand — Sufficiency.

Petition for mandamus was not insufficient because of failure to allege specific demand, which if made, would have been futile.

The petition of mandamus was to require the superior court to issue a commission for taking of testimony of witnesses on letters rogatory, and alleged that the respondent refused to take any steps whatever to compel witness to attend taking of deposition conceiving that it was without jurisdiction to grant relief so that formal demand for relief prayed for would have been futile.

3. Mandamus ⟹151(1) — Judge — Vacation of position — Issuance of writ.

Fact that judge to whom writ of mandate was directed had vacated position subsequent to issuance of alternative writ was immaterial.

The proceeding in mandamus was directed to court and not to any individual member or to any particular department thereof.

4. Depositions ⟹27 — Jurisdiction — Letters rogatory from foreign jurisdiction.

Superior court had jurisdiction under statute to order taking deposition on letters rogatory issued out of court of record of foreign jurisdiction (Code Civ. Proc. §§ 2021, 2035, 2036a, 2083, 2084).

5. Depositions ⟹39 — Commission to take testimony — Letters from foreign jurisdiction — Action or special proceeding.

Commission to take testimony may issue on letters from foreign jurisdiction showing pendency of either action or special proceeding (Code Civ. Proc. §§ 2035, 2036a).

6. Evidence ⟹81 — Law of foreign jurisdiction — Presumption — Deposition.

Court, in absence of contrary showing, must presume that law of foreign jurisdiction in respect to deposition is the same as that of state.

7. Mandamus ⟹40 — Issuance of writ — Deposition — Letters rogatory — Court of foreign jurisdiction.

Writ of mandate will issue to require superior court to order taking of deposition pursuant to letters rogatory from court of foreign jurisdiction.

Original proceeding in mandamus by Rodolfo Christ against the Superior Court in

★Rehearing denied. Hearing granted. 296 P. 612.

and for the City and County of San Francisco and the Hon. James G. Conlan, as Presiding Judge thereof, to require the issuance of a commission for taking of testimony of two witnesses on letters rogatory issued out of a court of record of Guatemala.

Writ granted.

See, also, 280 P. 136.

George Olshausen, of Berkeley, and John B. Ehlen, of San Francisco, for petitioner.

Orrick, Palmer & Dahlquist, Garret W. McEnerney, and Andrew F. Burke, all of San Francisco, for respondents.

NOURSE, P. J.

This is an original proceeding in mandamus to require the superior court to issue a commission for the taking of testimony of two witnesses upon letters rogatory issued out of a court of record of Guatemala.

The letters rogatory were presented to respondent court showing that the petitioner represented to the Guatemala court that he was about to commence an action against Adolfo Stahl and the American Finance & Commerce Company, for which it was necessary that the depositions of J. Beaumont and Frank L. Jackson, residing in the city and county of San Francisco, be taken. In the proceeding before the Guatemalan court the general nature of the questions to be asked these witnesses was stated, accompanied by a showing of the materiality of their testimony. This showing having been made to the respondent court, an order that the deposition of Frank L. Jackson be taken was made and a subpœna was issued pursuant to said order. Thereafter a motion was made on behalf of said witness to quash said subpœna upon the grounds that respondent court had no jurisdiction to make the order. This motion was granted, and respondent has since refused to take any other steps to compel attendance of said witness for the taking of his deposition in response to the letters issued by the Guatemalan court.

[1] Preliminarily respondents argue that this is not a proper case for mandamus because the petitioner has another remedy by appeal from the order to quash the subpœna. The remedy by appeal, conceding that there is such, is not always an answer to a petition for mandamus. This writ must be issued when "there is not a plain, speedy, and adequate remedy, in the ordinary course of law" (section 1086, Code Civ. Proc.); that the right of appeal is not always a speedy or adequate remedy is well settled. San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 39, 99 P. 359, 17 Ann. Cas. 933.

[2, 3] It is also argued that the petition is insufficient because it fails to allege a specific demand upon the respondent court to issue a new subpœna. Such a demand is excused when it appears that demand, if made, would have been futile. Here the petition alleges that the respondent refuses to take any steps whatever to compel the witness to attend the taking of his deposition and the answer admits this to be true. It thus appears that a formal demand for the relief prayed for would have been futile because the respondent court conceived that it was without jurisdiction to grant this relief. Such a demand was, therefore, unnecessary. 16 Cal. Jur., pp. 771, 772. Further objection is made by way of argument that the writ should not issue because subsequent to the issuance of the alternative writ herein the respondent James G. Conlan vacated the position of presiding judge of the superior court in and for the city and county of San Francisco, and that another judge of that court has been chosen and is now acting as presiding judge thereof. The point is without merit, because this proceeding is directed to the superior court and not to any individual member or to any particular department thereof.

[4] Upon the merits of the case it is argued that the superior court is without jurisdiction to recognize the letters rogatory or to issue a subpœna for the taking of the deposition because it appears on the face of the petition that there is no action pending in the Guatemalan court. The authority to issue the commission upon letters issued out of a foreign jurisdiction is found in section 2036a, Code of Civil Procedure. That section provides that witnesses may be compelled to appear and testify in the same manner and by the same process as may be employed for taking testimony for proceedings pending in this state. Section 2021 of the same Code provides that the testimony of a witness in this state may be taken by deposition in an action any time after the service of summons and in a special proceeding after a question of fact has arisen therein. If this were the only provision for the taking of a deposition of a witness in proceedings pending in this state, the argument of respondent would be sound, but sections 2083 et seq. of the same Code provide a complete method for the taking and perpetuation of the testimony of a witness when no other action is pending. Section 2084 permits the superior court to issue a commission for that purpose upon a petition showing "that the applicant expects to be a party to an action in a court in this state, and, in such case, the names of the persons whom he expects will be adverse parties; or * * * and, The name of the witness to be examined, his place of residence, and a general outline of the facts expected to be proved."

Respondent relies upon section 2035, Code of Civil Procedure, which provides that "any party to an action or special proceeding in a court or before a judge of a sister state, may obtain the testimony of a witness resid-

ing in this state, to be used in such action or proceeding." It is argued that section 2036a must be read in connection with 2035 so that a commission shall not issue upon letters coming from a foreign jurisdiction to a better advantage than upon letters coming from a sister state of the United States, and that under the provisions of section 2035 such a commission cannot issue in any case, except where an action or special proceeding is pending in the sister state. If it were conceded that such should be the proper interpretation of section 2036a, this would not aid the respondent. Under the provisions of section 2035, relating to depositions upon letters coming from a sister state, and under section 2021, relating to proceedings pending in this state, the commission to take a deposition of a witness is authorized whenever an action or a special proceeding is pending. It is true that under section 2021 a commission may not issue in a special proceeding until after a question of fact has arisen, but the term "special proceeding" as used in that section must be interpreted as including all special proceedings other than those to perpetuate testimony which are specially covered by sections 2083 et seq. of the same Code. Thus, when proceedings to perpetuate testimony are instituted under the provisions of the later sections, the deposition is to be issued in the manner therein prescribed, but there is no reason for holding that the term "special proceeding" as used in section 2035 in reference to matters pending in a sister state does not apply to both characters of special proceedings—those referred to in section 2021 and those referred to in sections 2083 et seq. of the Code.

[5] Therefore, if we are to read section 2036a with section 2035, the construction of the latter section must be that a commission to take testimony may issue upon letters from a foreign jurisdiction showing the pendency of either an action or special proceeding as the latter term is used in our Code.

[6] On the record before us we must presume, in the absence of a contrary showing, that the law of Guatemala is the same as that of California. Wickersham v. Johnston, 104 Cal. 407, 38 P. 89, 43 Am. St. Rep. 118; 5 Cal. Jur. 431. We must, therefore, presume that the proceedings instituted in Guatemala are like the proceedings authorized by sections 2083 et seq. of the Code of Civil Procedure, and that it is pending until such testimony is completed and the deposition duly filed with the court out of which the commission issued.

[7] We do not deem it necessary to discuss the authorities cited from federal and other jurisdictions, for they are all based upon statutes in nowise similar to the Code sections above noted. The question presented here is simply one of interpretation of these Code sections in which we are not aided by the citation of any California authorities. We are satisfied from our examination of the Code that the respondent court has full jurisdiction to make the order prayed for, and, such being the case, this writ should issue under the authority of San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 39, 99 P. 359, 17 Ann. Cas. 933.

Let a peremptory writ issue as prayed.

We concur: STURTEVANT, J.; BURROUGHS, Justice pro tem.

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105 Cal. App. 417

RAPOLLA et ux. v. GOULART.

Civ. 281.

District Court of Appeal, Fourth District, California.

April 29, 1930.

1. Appeal and error ⟹901.

Appellants must produce record showing affirmative error.

2. Appeal and error ⟹671(1).

Appellants must prepare record on appeal, so that errors, if any, may be easily recognized.

3. Master and servant ⟹6.

In action involving parol employment contract, parol evidence tending to prove terms of contract *held* admissible.

4. Automobiles ⟹243(1).

In action where question whether automobile passenger was guest of driver was in issue, conversation between driver and passenger relating to automobile trip *held* admissible.

5. Appeal and error ⟹1058(3).

Error in excluding parol evidence regarding parol employment contract *held* not to require reversal, where testimony of other witnesses produced by same party on same point was admitted and uncontradicted.

6. Appeal and error ⟹1058(3).

Erroneous exclusion of testimony does not require reversal, where testimony of other witnesses produced by same party on same subject is admitted and not contradicted.

7. Automobiles ⟹242(6).

In spouse's action for injury to wife, evidence that automobile driver was using husband's automobile with husband's consent

raised disputable presumption that would attach driver's contributory negligence to husband.

8. Automobiles ⟹244(26).

Evidence in action for injury sustained by automobile passenger in collision *held* to support finding that automobile driver was agent of passenger.

9. Appeal and error ⟹1058(2).

Error in sustaining objections to questions calling for conversation to show that automobile passenger was guest of driver *held* cured by subsequent rulings admitting evidence from same witnesses.

10. Automobiles ⟹149.

Operation of automobile more than one-half hour after sunset on public street without headlights burning is negligence per se (California Vehicle Act, §§ 99, 100).

11. Automobiles ⟹192(12).

Automobile passenger as principal, *held* under obligation to warn driver, as agent, of apparent danger.

12. Automobiles ⟹247.

In action for injuries sustained by wife in automobile collision, finding that driver was agent of both husband and wife *held* immaterial.

Finding was immaterial, since any money recovered by husband and wife in the case would be community property, and negligence of either spouse contributing to injury would bar recovery of both; it being admitted that driver was the agent of the husband.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by Joe Rapolla and wife against L. S. Goulart. Judgment for defendant, and plaintiffs appeal.

Affirmed.

G. L. Aynesworth and James W. Campbell, both of Fresno, for appellants.

Ray W. Hays, of Fresno, and C. W. Haswell, of San Francisco, for respondent.

MARKS, J.

Plaintiffs are husband and wife. On June 4, 1928, at about 9 o'clock in the evening, Catherine Rapolla was riding in a Ford delivery truck driven by Alfonso Zargossa, north, on Blythe avenue in the county of Fresno, state of California. Blythe avenue intersects North avenue at right angles. Defendant was driving his automobile in an easterly direction on North avenue, and the two cars collided in the intersection seriously injuring Mrs. Rapolla and damaging defendant's automobile. The plaintiffs brought this action for injuries to Mrs. Rapolla, and defendant, besides denying his negligence and alleging contributory negligence, filed a cross-complaint for damages to his automobile.

It was alleged by plaintiffs that Mrs. Rapolla was riding with Zargossa as his guest. Defendant alleged that Zargossa was driving and operating the Ford truck as the agent of the plaintiffs and was acting within the scope of his employment at the time of the accident.

The trial court found that Zargossa was acting as the agent of the plaintiffs in driving the automobile, and that he was then and there under the control and direction of Mrs. Rapolla. The trial court further found that the defendant was guilty of negligence in the operation of his automobile at the time of the accident, and that Zargossa was also guilty of negligence which directly contributed to, and was the proximate cause of, the accident, and of the damage and injury of the plaintiffs. Upon these findings judgment was entered for the defendant, and the plaintiffs have prosecuted this appeal.

[1, 2] The witnesses in the court below evidently illustrated their testimony with a diagram or map of the scene of the accident and located the relative positions of the cars before and at the time of and after the accident by the use of various signs and marks on this map. It is not reproduced in the record, making it difficult for us to interpret and follow the details of the testimony of some of the witnesses. It is incumbent upon an appellant to produce a record showing error affirmatively, and attorneys should so try their cases, and prepare their records on appeal, that the errors, if any, may be easily recognized by the appellate court.

Plaintiffs complain of certain rulings of the trial court in sustaining objections to questions, the answers to which would tend to show the terms of the contract of employment of Zargossa, and also the conversation between Zargossa and Mrs. Rapolla, which would bear upon the question of whether or not she was his guest on the automobile trip at the time of the accident. The trial court sustained defendant's objections to these questions upon the ground that the evidence sought to be elicited was hearsay, the conversations not having taken place in the presence and hearing of the defendant.

[3, 4] The contract of employment of Zargossa was oral, and evidence tending to prove the terms of this contract must of necessity have been parol. The employment of Zargossa, together with its nature and the scope of his duties, was directly put in issue by the pleadings and was a fact to be determined by the trial court. The terms of a parol con-

tract can only be proved by parol, and this evidence should have been admitted. The same reasoning applies to the conversation between Mrs. Rapolla and Zargossa relating to the automobile trip. Whether or not she was a guest of Zargossa was a fact to be determined by the trial court. The conversation between the two was admissible, as from this conversation, among other things, the trial court would have to draw its conclusion as to whether or not Mrs. Rapolla was a guest in the automobile on this particular occasion. Where a fact, such as the existence of and the construction to be placed upon a parol contract, is an issue in a case such as this, the conversation of the parties in fixing the terms of the contract is admissible, not as an exception to the rule against hearsay evidence, but as the best evidence obtainable upon the question at issue.

The rulings of the court complained of by plaintiffs, which we are considering, occurred principally during the examination of Mrs. Rapolla as a witness. Other witnesses for plaintiffs were allowed to testify concerning these same matters. It appears from the record that about eighteen months prior to the accident in question Zargossa was employed by Joe Rapolla to work on a farm owned by him. Zargossa was paid $60 per month, together with his board and lodging. Joe Rapolla devoted a large part of his time to conducting a meat market. Catherine Rapolla operated another store, and Zargossa took care of the farm. Besides the Ford delivery truck involved in the accident, the plaintiffs owned two other automobiles. Zargossa had driven these automobiles at different times and had assisted Joe Rapolla in the delivery of meats. He had also driven Catherine Rapolla around in the automobile at various times with the knowledge and consent of her husband. Upon these facts the trial court found that at the time of the accident in question Zargossa was acting as the agent of plaintiffs in driving the Ford truck.

[5, 6] This evidence was produced by the plaintiffs. Where the trial court makes an erroneous ruling excluding the evidence of one witness on a given point, but admits testimony of other witnesses produced by the same party on the same point, such evidence not being contradicted, the error is minimized, if not cured, and is not sufficiently prejudicial to require a reversal of the judgment under the facts of this case.

[7] There was evidence before the trial court that Zargossa was using the Ford delivery truck on the night of the accident with the consent of Joe Rapolla. As said in the case of Brown v. Chevrolet Motor Co., 39 Cal. App. 738, 179 P. 697, 698: "Under the recent case of McWhirter v. Fuller, 35 Cal. App. 288, 170 P. 417, and many authorities in other jurisdictions, proof of ownership of the automobile and its use at the time of the accident, under the permission of such owner, established a prima facie case of responsibility for the resulting injuries as against such owner."

The rule is also stated in Shearman and Redfield on Negligence, vol. 1, § 158 (6th Ed.), as follows: "When the plaintiff has suffered injury from the negligent management of a vehicle, car or carriage, it is sufficient prima facie evidence that the negligence was imputable to the defendant, to show that he was the owner of the thing, without proving affirmatively that the person in charge was the defendant's servant. It lies with the defendant to show that the person in charge was not his servant, leaving him to show if he can, that the property was not under his control at the time, and that the accident was occasioned by the fault of a stranger, an independent contractor, or other person, for whose negligence the owner would not be answerable." McWhirter v. Fuller, supra; Squires v. Riffe (Cal. App.) 287 P. 360.

Thus we have a disputable presumption of law that would attach any contributory negligence of Zargossa to the plaintiffs, or if not to Mrs. Rapolla, at least to her husband.

"Against a proved fact, or a fact admitted, a disputable presumption, has no weight; but, where it is undertaken to prove the fact against the presumption, it still remains with the jury to say whether or not the fact has been proven; and, if not satisfied with the proof offered in its support, they are at liberty to accept the evidence of the presumption." Randolph v. Hunt, 41 Cal. App. 739, 183 P. 358, 362.

[8] Until the trial judge found that the evidence in the case successfully overcame this presumption, he was authorized to consider it as evidence and act upon it. The presumption remained before him during the trial, and, he having found in accordance with it, the presumption remains before this court to support his findings. The only evidence offered by the plaintiffs to overcome this presumption was that of Joe Rapolla and Zargossa, which we have heretofore outlined. There is a strong inference from this testimony, if not a direct conclusion, that part of the duties of Zargossa's employment was to drive an automobile for Mrs. Rapolla.

"This court has frequently held that, even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts there still remains in the case a question of fact to be determined by the jury (or by the trial judge where the case is tried without a jury), and that the verdict of the jury or the finding of the trial judge thereon cannot be set aside by this court on the ground that it is not sustained by the evidence. Anderson v. Los Angeles Transfer Co., 170 Cal. 66, 148 P. 212. In so far as the evidence is subject to

opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment. Woodard v. Glenwood Lumber Co., 171 Cal. 513, 519, 520, 153 P. 951; Hassell v. Bunge, 167 Cal. 365, 367, 139 P. 800. 'In reviewing a question of this kind, all the inferences reasonably possible from the evidence favorable to the plaintiff (the prevailing party) must be indulged by this court.' Bandle v. Commercial Bank of Los Angeles, 178 Cal. 546, 547, 174 P. 44, 45." Mah See v. North American Accident Ins. Co., 190 Cal. 421, 213 P. 42, 44, 26 A. L. R. 123; Wilbur v. Wilbur, 197 Cal. 7, 239 P. 332.

Under the authority of these decisions we believe the findings of the trial court as to the agency of Zargossa was supported by the evidence.

[9] The plaintiffs were permitted to introduce evidence as to the conversation between Mrs. Rapolla and Zargossa. Mrs. Rapolla desired to visit a relative on the night of the accident. Zargossa was at her residence, and when Mrs. Rapolla said that she was going to visit this relative, Zargossa replied, "I will take you." The two got into the automobile with Lena Cursi and started on the trip. Mrs. Rapolla and Zargossa were both permitted to testify to this conversation. Any error of the trial court in sustaining objections to questions calling for the conversation was cured by the subsequent rulings admitting the evidence from these same witnesses.

[10] The evidence shows that the automobile in which Mrs. Rapolla was riding left the home of her relative on Blythe avenue and proceeded north on this street to the intersection of North avenue at a rate of speed below twenty-five miles per hour. Commencing at a point about three hundred yards west of its intersection with Blythe avenue, North avenue decended gently to the east. An automobile traveling this road was plainly visible for considerable distance before reaching Blythe avenue. Mrs. Rapolla and Zargossa both saw defendant's car descend the grade. Zargossa testified that when he had about reached the south line of North avenue he saw defendant's car a few yards west of the west line of Blythe avenue. Both cars proceeded without stopping to the point of the collision, neither car traveling at a speed of over fifteen miles per hour. Defendant testified that the headlights of plaintiffs' car were not lighted, and that he did not see this automobile until just about the time of the collision. His testimony on this point was corroborated by the testimony of other witnesses. It was denied by several witnesses for plaintiffs. The court, however, had sufficient evidence before it to find that at the time of the accident, which was more than one-half hour after sunset, Mrs. Rapolla was riding in a car without its headlights being illuminated. The operation of an automobile at such time and place without its headlights burning is negligence per se (sections 99, 100, California Vehicle Act [St. 1923, p. 546]).

[11] Plaintiffs ask us to hold that under the facts of this case Mrs. Rapolla was under no legal obligation to warn Zargossa of any danger apparent at or near the intersection, as she was a guest in the automobile and had a right to suppose the driver would exercise due care and caution for the protection of both of them, citing the rule laid down in the case of Central of Georgia R. R. Co. v. Watkins (C. C. A.) 37 F.(2d) 710, to the effect that an invited guest riding in an automobile has no duty to direct the movements of a driver unless the guest has knowledge of a danger unknown, or not obvious, to the driver. Krause v. Rarity (Cal. App.) 285 P. 879. We do not believe that this statement of the law is applicable under the facts of the case we are considering. In the first place, the trial court found that Zargossa was the agent and servant of plaintiffs, which takes the case without the rule. In the second place, the court was justified in concluding that the Ford truck was traveling without headlights at the time of the accident. While it may not be necessary for a guest to warn a driver of a perfectly apparent danger that he could or did observe, still, if it became apparent to the guest that the driver did not observe the danger, it became her duty to take reasonable precautions for her safety and warn him. It would be negligence for one to knowingly ride with a driver who could not see, and equally negligent for one to knowingly ride with a driver who refused to see. It is also equally negligent for one to ride with a driver while knowing that he was obviously violating the law by driving an automobile on the highway at night without lights. As was said in the case of Randolph v. Hunt, supra: "If the owner of an automobile lends his machine to another, and on invitation becomes a passenger therein, in the absence of any agreement to the contrary the owner has the right, and, indeed, it is his duty to prevent, if possible, the driver from operating the machine in a reckless and dangerous manner and in violation of law. He cannot sit idly by and refrain from remonstrance at least while knowing that the driver is thus endangering the lives of others. If he has the opportunity to restrain the driver, and fails to take advantage of it, he should be held responsible for the consequences. This is the just view, and it is supported by the authorities. The general rule is stated in 28 Cyc. 38, as follows: 'Where an injury is inflicted by the use or operation of a motor vehicle upon the public highway the owner thereof is liable to respond in damages therefor if the vehicle was being operated

by such owner or was under his control. * * * In all cases where the owner is present he will be responsible for injuries sustained by third persons unless the operator disobeys instructions as the owner is in law in control of the vehicle.' "

[12] Plaintiffs complain of the findings of the trial court that Zargossa was the agent of both of them because the evidence shows that he was hired by Joe Rapolla. Any money recovered by the plaintiffs in this case would be community property, and the negligence of either spouse contributing to the injury would bar the recovery of both. McFadden v. Santa Ana R. R. Co., 87 Cal. 464, 25 P. 681, 11 L. R. A. 252; Dunbar v. San Francisco R. R. Co., 54 Cal. App. 15, 201 P. 330. As the plaintiffs were husband and wife at the time of Zargossa's employment and at the time of the accident, and if, as found by the court, the driving an automobile for Mrs. Rapolla was one of the duties of his employment, it makes no difference whether he was the agent of one or both of the plaintiffs. The negligence of the agent within the scope of his employment is the negligence of the principal, and the contributory negligence of either or both of the plaintiffs would bar their recovery.

The rulings of the trial court complained of by the plaintiffs are not sufficiently prejudicial to require a reversal of the judgment, and the findings and judgment are supported by competent evidence.

Judgment affirmed.

We concur: BARNARD, Acting P. J.; OWEN, Justice pro tem.

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105 Cal. App. 328

LEDSON v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 7223.

District Court of Appeal, First District, Division 1, California.

April 22, 1930.

1. Master and servant ⟹417(7).

Upon conflicting medical testimony whether abscessed testicle was caused by injury from truck operated by employee, finding of Industrial Accident Commission was conclusive.

2. Master and servant ⟹417(7).

Findings of Industrial Accident Commission are subject to review only in so far as they have been made without any evidence to support them.

Proceeding under the Workmen's Compensation Act by Lowell Ledson, claimant, opposed by Mowat & Edelman, a corporation, employer, and the Pacific Indemnity Company, insurance carrier. To review an order of the Industrial Accident Commission denying an award, claimant brings certiorari.

Affirmed.

Samuel J. Jones, of San Francisco, for petitioner.

Edward O. Allen, of San Francisco, for respondents.

TYLER, P. J.

Certiorari to review an award of the Industrial Accident Commission. It is claimed that the evidence does not justify the findings of fact that the disability complained of was not caused by an injury arising out of applicant's employment or that it was not caused by industrial injury.

The facts, briefly stated, show that petitioner was on March 5, 1929, in the employ of respondent Mowat & Edelman, a corporation, and such corporation was insured against workmen's compensation liability with the respondent Pacific Indemnity Company. The injury alleged by petitioner to have been suffered by him consistent in his being struck across the groin by the tailgate of a Ford truck which he was operating in the course of his employment and from which he was about to dump a load of dirt. Petitioner reported to his employer the fact of his injury on the day that it had occurred, but he continued in his work. Two days later he was troubled with sharp pains and was instructed by his employer to go to a hospital for an examination. An examination was had, and the physician who made the same discovered a swelling in his testicles, but concluded that this condition was not due to industrial employment, but rather to an infection. Thereafter his testicles commenced to swell, but petitioner remained in his employment until March 23, 1929, at which time he entered a hospital for treatment. Subsequently an abscess of the right testicle developed, and petitioner underwent an operation, and the diseased testicle was removed.

[1, 2] On April 22, 1929, petitioner filed with respondent Industrial Accident Commission his application for adjustment of claim for compensation for injuries sustained in the course of his employment. At the hearing, petitioner testified that his injury was caused by being struck in the right groin and right testicle in the manner hereinabove recited. Upon the question of the cause of the condition from which petitioner was suffer-

ing, the medical testimony was in direct conflict. Evidence was produced by petitioner to the effect that the origin of the abscess was not caused by any sexual disease or chronic condition, but could have been caused from the injury claimed to have been suffered by petitioner, as it could have been produced as a result of the rupture of a blood vessel in the testicle. These physicians, however, admitted on cross-examination that the abscess might have been the result of some foci of infection carried from nearby parts and originating from causes other than traumatic injuries. A physician called by respondents testified that an abscess very rarely resulted from a trauma to the testicle, but rather from a focus of infection in some other part of the body. He further testified that, if the condition had been caused by direct violence to the testicle through a blow or strain, the symptoms would have manifested themselves immediately and been evidenced by discoloration of the tissues, which were absent in the instant case. He was therefore of the opinion that the injury complained of was not industrial in character. The commission adopted this view, and found that the evidence did not establish as a fact that the applicant received an injury arising out of and in the course of his employment, nor did it establish as a fact that the disability complained of was caused by an injury arising out of his employment. It was accordingly ordered that applicant take nothing from defendants by reason of the claim asserted in the proceeding. A petition for rehearing was made and denied, and the present proceeding followed. It is here claimed that the evidence does not justify the conclusion of the commission. It is elementary that the findings of the Industrial Accident Commission are subject to review only in so far as they have been made without any evidence whatever in support thereof. The jurisdiction of an appellate court in cases of this character is limited strictly to determining whether there is evidence sufficient to sustain the award. It is not the function of the courts to determine the credibility of the witnesses or the weight to be attached to their testimony. With these subjects we have nothing to do, as the commission is the final arbiter on questions of fact. It may be that a different conclusion could have been reached by the commission, and, had it been so reached, that it would have been fully supported by the evidence. Whatever our views may be upon the subject are of no consequence, as we have no power to disturb the findings of the Commission when supported by evidence. Its conclusion upon a question of fact upon conflicting evidence is final.

The award is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

105 Cal. App. 374

SINGER v. INDUSTRIAL ACCIDENT COMMISSION OF STATE et al.*

Civ. 7185.

District Court of Appeal, First District, Division 1, California.

April 26, 1930.

Rehearing Denied May 20, 1930. Hearing Denied by Supreme Court June 23, 1930.

1. Master and servant ⚷417(7).

Jurisdiction of appellate court in case of appeal from award of Industrial Commission is limited to determining whether evidence sustains award.

2. Master and servant ⚷417(7).

Findings of Industrial Commission supported by evidence, though conflicting, cannot be disturbed on appeal.

3. Master and servant ⚷405(4).

Finding of Industrial Commission that hernia was not caused or exacerbated by injury in course of employment *held* without support.

4. Master and servant ⚷403.

Employee claiming compensation has burden of establishing fact of injury.

5. Master and servant ⚷403.

Employer contending that injury to employee is not new one, but result of former accident, has burden of proof.

6. Master and servant ⚷348.

Law favors payment of compensation to injured employee.

Certiorari to Industrial Accident Commission.

Compensation proceedings by Jacob Singer, claimant, opposed by the Hobart Estate Company, employer. To review an award of the Industrial Accident Commission in favor of the employer, claimant brings certiorari.

Award vacated.

Sawyer & Sawyer, of San Francisco, for petitioner.

Edward O. Allen, of San Francisco, for respondent Industrial Accident Commission.

Ray Vandervoort and McCutchen, Olney, Mannon & Greene, all of San Francisco, for respondent Hobart Estate Co.

TYLER, P. J.

Certiorari to review an award of the Industrial Accident Commission.

Petitioner was employed as a woodsman by respondent Hobart Estate Company at its mills. He was self-insured. He claimed to have suffered a hernia while in the act of prying logs apart, during the course of his

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. Hearing denied by Supreme Court.

employment. Application for adjustment of claim for compensation was filed with the Industrial Accident Commission. A hearing was had, and the commission found that the hernia complained of was not caused or exacerbated by injury arising out of and in the course of employment, and an award was made in favor of the employer. A rehearing was asked for and denied, and the present proceeding followed. At the hearing, petitioner was the sole witness to the facts out of which the injury arose. The only other witness was a physician employed by respondent Hobart Estate Company at its plant.

It is here claimed that the award denying compensation is without any evidence to support it. It is in substance as follows: Petitioner entered the employ of respondent Hobart Estate Company on or about the 5th day of May, 1929. His work consisted in hauling and cutting logs. On the third day of his employment he attempted to pry certain logs apart with a large pole. While thus engaged he experienced a pain in his groin which felt like some one sticking him with a needle. He lowered his trousers to make an examination, but saw nothing and proceeded with his work. A few days later he reported the matter to a fellow employee. About a week later he was transferred to a different camp, at which time he informed the superintendent of his trouble and expressed a desire to see the doctor employed by the company. On his way to the new camp he consulted this physician and informed him of his condition. The physician made a cursory examination and discovered a slight inguinal hernia about the size of the end of his thumb. He informed petitioner that he would perform an operation for the sum of $100. The applicant, being destitute of funds, did not avail himself of this offer. At the hearing the physician testified that while it was his duty to look after industrial injuries suffered by employees of the company without charge to them, he justified his demand upon petitioner on the ground that he was not certain that the hernia was of recent origin, and when asked for his reason in so concluding he testified that it was on account of applicant's delay in reporting his injury. He admitted that he was informed that the applicant had received an injury some three days after he entered the employ of the company, and had suffered some pain for about ten days. He also admitted that the applicant did not know he had received a hernia. He further testified that he could not say, from the examination he had made, whether the hernia was a new or an old one. This, in substance, is the entire evidence in the case.

[1-6] It is, of course, elementary that the jurisdiction of an appellate court in cases of this character is limited strictly to determining whether there is evidence to sustain the award. Where the findings of the commission are supported by evidence, though conflicting, we have no power to disturb them. Here, however, there is no conflict and a careful reading of the record shows that relief was denied upon the sole ground that petitioner having delayed reporting his injury to his employer for the short period above stated, it was impossible to determine at what time he developed the hernia. The facts do not sustain this conclusion. While it is true that the burden is upon the applicant to establish the fact of injury, still, where the injury is proven, and the employer contends that it is not a new one, but is the result of a former accident, the burden is upon him to prove his contentions. Delay of a few days, as here, in reporting the accident, does not establish nonexistence of a new injury. A workman, as most frequently happens, is unfamiliar with the development of injuries of this character and certain symptoms mean little or nothing to him unless they are objective and definitely pronounced. In such a situation the employer is bound by the surrounding facts and circumstances of the case, and where the applicant testifies in relation thereto and his story of how the accident happened is reasonable and not disputed, and such testimony conclusively shows an injury adequately accounted for, it is not overcome by the fact that it might, by some possibility, have resulted from some other cause not shown to exist. While awards cannot be based upon mere guess or conjecture, here there was proof that the origin of the hernia was recent, and when suffered was accompanied by pain; that it was immediately preceded by accidental strain; that it did not previously exist, and the rupture and strain were in close relation. This evidence, without more, is sufficient to compel a finding that the suffered hernia was proximately caused by the accident as testified to. In denying the applicant award, the commission departed from its former ruling in a case involving identical facts. In Jorgensen v. Healy-Tibbitts Const. Co., 2 Cal. Ind. Acc. Com. 56, where it appeared that an employee was engaged in heavy lifting and suddenly felt a sharp pain in his groin, though it was not definitely established whether the hernia was new or of old origin, it was held that such evidence was sufficient to establish a finding that the hernia was proximately caused by accident arising out of the employment. So here, the undisputed facts are sufficient to make a reasonable man conclude in the applicant's favor upon the vital points, and is adequate to prove his case. It was therefore binding upon the commission, and the latter could not, upon mere conjecture or guesswork, deny compensation. The law favors the payment of compensation. The statute upon which the claim is based was de-

signed to protect, in proper cases, a workman against economic insecurity, and mere conjecture on the part of the commission should not deprive him of this benefit.

For the reasons given the award is vacated and set aside.

We concur: KNIGHT, J.; CASHIN, J.

SAN FRANCISCO IRON & METAL CO. v. ABRAHAM et al. ★

Civ. 7040.

District Court of Appeal, First District, Division 2, California.

April 29, 1930.

Rehearing Denied May 29, 1930. Hearing Granted by Supreme Court June 26, 1930.

1. Attachment ⟹7.

Plaintiff in action for deceit *held* not entitled to an attachment (Code Civ. Proc. § 537).

2. Attachment ⟹47(4).

Plaintiff's count for money had and received *held* evidence on issues as to whether plaintiff was entitled to attachment, but was not conclusive.

3. Attachment ⟹245.

Plaintiff's verified complaint on hearing of motion to dissolve attachment stood as an affidavit.

4. Attachment ⟹5.

Plaintiff by pleading count for money had and received waived deceit and affirmed original contract by terms of which no liability existed, and hence precluded right to attachment.

By the contract which plaintiff affirmed by pleading count for money had and received, defendant transferred all his interest in partnership to plaintiff, who assumed all the obligations of the partnership, but by the terms of the agreement defendant did not bind himself to repay to plaintiff the amount of partnership expenditures.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the San Francisco Iron & Metal Company against Nathan Abraham and others. From an order discharging an attachment, plaintiff appeals.

Affirmed.

Louis E. Goodman, of San Francisco, for appellant.

Bianchi & Hyman, of San Francisco, for respondents.

STURTEVANT, J.

This is an appeal by the plaintiff from an order made discharging an attachment. On the hearing of the motion the parties introduced in evidence the plaintiff's verified complaint, its affidavit for an attachment, its undertaking, plaintiff's verified amended complaint, defendants' notice of motion to discharge, defendants' affidavit, and the affidavit of L. H. Silberman, the vice president of the plaintiff.

From the foregoing papers the following facts appear: Prior to November 1, 1926, N. Abraham was the owner of a store and doing business under the name of N. Abraham & Co. On that date Lou H. Silberman and Harry Silberman, as the agents of plaintiff, and N. Abraham formed a partnership and thereafter conducted the business of the store under the name of N. Abraham Mercantile Company. As for the contribution of the new partner or partners, the plaintiff paid into the funds of the copartnership $60,093.31. The new firm continued to transact business until the 1st day of December, 1927. At that time it was in financial embarrassment and the defendant proposed to give or take. By agreement of the parties, the defendant transferred to the plaintiff all of his interest and the plaintiff assumed all of the obligations of the partnership, but by the terms of the dissolution agreement no sum of money was stipulated as payable from either party to the other. The plaintiff's complaint is in two counts. The first count specifically pleads a cause of action as for deceit. The second count pleads a cause of action as for moneys had and received. It was stipulated at the trial that both counts are but different methods of pleading one transaction. It nowhere appears that the plaintiff rescinded the partnership contract, offered to rescind it, nor, even at this time, offers to place the defendant in statu quo.

[1] The foregoing facts show that the plaintiff's grievance is a tort and under our statute it was not entitled to an attachment. Code Civ. Proc. § 537; Hallidie v. Enginger, 175 Cal. 505, 509, 166 P. 1. Moreover, searching the entire record, nothing appears showing any contract under which the defendant became indebted to the plaintiff "* * * upon a contract express or implied, for the direct payment of money. * * *" Code Civ. Proc. § 537; Willett & Burr v. Alpert, 181 Cal. 652, 662, 185 P. 976; Sturtevant v. K. Hovden Co., 60 Cal. App. 696, 698, 214 P. 244; Cal. Packing Corp. v. Kato, 45 Cal. App. 491, 493, 188 P. 57.

[2-4] The plaintiff points to the count as for money had and received, asserts that count

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes
★Rehearing denied. Hearing granted. 296 P. 82.

sounds in contract, and therefore claims that in any event it was entitled to take out a writ of attachment. In making this claim it is assuming that the court is passing on a demurrer, whereas the proceeding before the court is a motion to dissolve an attachment. The question is not what the plaintiff has pleaded, but what in truth and in fact is its grievance. The count for moneys had and received was evidence on the issue before the court, but no more conclusive than any other item of evidence before the court. The plaintiff's complaint on the hearing of the motion before the court stood as an affidavit. Jacobs, Malcolm & Burtt v. Railway Co., 71 Cal. App. 42, 44, 234 P. 328. That is, the hearing on the motion before the court was similar to a hearing on a motion to dissolve an injunction. That the plaintiff's verified pleading stands as an affidavit on a motion to dissolve an injunction is made clear by the authorities. Falkinburg v. Lucy, 35 Cal. 52, 60, 61, 95 Am. Dec. 76; Hefflon v. Bowers, 72 Cal. 270–272 13 P. 690; Hiller v. Collins, 63 Cal. 235, 237; Christopher v. Condogeorge, 128 Cal. 581, 585, 61 P. 174. Moreover, by pleading the count in assumpsit the plaintiff waived the tort and affirmed the original contract. But by the terms of that contract the defendant never bound himself to repay to the plaintiff the amount of its expenditures. Bechtel v. Chase, 156 Cal. 707, 711, 712, 106 P. 81. Therefore it was not entitled to a writ of attachment. We think that the trial court was clearly right in making the order dissolving the attachment.

The order is affirmed.

We concur: NOURSE, P. J.; BURROUGHS, Justice pro tem.

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105 Cal. App. 286

BOWEN et al. v. KIZIRIAN et al.

Civ. 274.

District Court of Appeal, Fourth District, California.

April 18, 1930.

1. Death ⚷42 — Action — Heirs — Joinder.

There can be but one action brought and one recovery had by heir for damages for wrongful death (Code Civ. Proc. § 377).

Under Code Civ. Proc. § 377 heir may sue for death of one caused by wrongful act of another, but all heirs entitled to recover must join in one action.

2. Death ⚷18(1) — Action — Heirs — Loss.

Recovery for wrongful death cannot be had on account of heir who has not suffered loss (Code Civ. Proc. § 377).

3. Death ⚷58(2) — Action — Pecuniary loss — Proof.

Failure of one heir in action for wrongful death to prove loss will not defeat recovery by another heir whose pecuniary loss has been proved (Code Civ. Proc. § 377).

4. Death ⚷24 — Wrongful death of mother — Contributory negligence of father — Recovery by minor.

That recovery by minor for wrongful death of mother might indirectly benefit contributorily negligent father would not preclude recovery by minor (Code Civ. Proc. § 377).

5. Death ⚷24 — Father's contributory negligence — Imputation to minor.

In action by father and minor child for mother's wrongful death, father's contributory negligence *held* not imputable to minor who was in no way connected with such negligence (Code Civ. Proc. § 377).

6. Death ⚷24 — Mother's wrongful death — Contributory negligence of father — Recovery by minor.

Minor could recover for mother's wrongful death in automobile collision, notwithstanding contributory negligence of father in driving automobile (Code Civ. Proc. § 377).

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Allen B. Bowen and June Charlotte Bowen, a minor, by her guardian ad litem, Allen B. Bowen, against Simon Kizirian and another. From a judgment for June Charlotte Bowen, the named defendant appeals.

Affirmed.

B. W. Gearhart and Lindsay & Gearhart, all of Fresno, for appellant.

Gallaher & Jertberg, of Fresno, for respondent.

BARNARD, J.

This action arose out of a collision between two automobiles, one driven by Allen B. Bowen, in which his wife, Hazel E. Bowen, was a passenger, and the other driven by one of the defendants, who was accompanied at the time by the other defendant, who was the owner of the car. As a result of the accident, Hazel E. Bowen was almost instantly killed.

This action was brought under the provisions of section 377 of the Code of Civil Procedure by Allen B. Bowen, both individually,

and as guardian ad litem of June Charlotte Bowen, an infant of the age of twenty-one months, the daughter of Allen B. Bowen and his deceased wife. The case was tried without a jury, and the court found that the collision was the result of negligence on the part of the defendant Simon Kizirian, coupled with the contributory negligence of the plaintiff, Allen B. Bowen. Recovery was therefore denied to Bowen in his individual capacity, but the court awarded damages to the minor plaintiff in the sum of $1,000. The court found that the said minor was free from any negligence proximately contributing to or causing the death of the deceased; that the deceased was free from negligence proximately causing or contributing to the accident and her resultant death; that the negligence and carelessness of the appellant, Simon Kizirian, directly and proximately caused the death of the deceased; that the negligence of the plaintiff Allen B. Bowen proximately contributed to the death of the deceased; and that the respondent minor, by reason of the death of the deceased proximately caused by the negligence of appellant, was damaged in the sum of $1,000. The defendant Simon Kizirian has appealed upon the judgment roll alone, and the sole question presented is whether, under the provisions of section 377 of the Code of Civil Procedure, the contributory negligence of the plaintiff Allen B. Bowen bars recovery by the respondent minor for the damages sustained by her.

While there is a conflict in the decisions of the highest courts of other states upon the question now before us, this divergence in opinion is in part due to differences in statutes in the respective states. In Earley v. Pacific Electric Railway Co., 176 Cal. 79, 167 P. 513, L. R. A. 1918A, 997, the court said:

"It would not be without interest, but at the same time it is wholly unnecessary to follow these learned counsel in their analyses of the varying statutes and the decisions of the courts upon them. For when the last word shall have been said in such a consideration, the paramount fact will still remain that rights under our section 377 of the Code of Civil Procedure are to be defined not by what other courts have said touching their own statutes, but from the meaning and intent of our own law derived from a reading of it."

While this language was used in connection with the interpretation of this section of the Code in a respect other than that now before us, it is equally applicable to the present problem.

[1] It is the contention of the appellant that since the recovery in such an action as this is for a single gross amount in an inseparable cause of action, in which all the heirs must join, it must follow that the contributory negligence of one of the heirs will bar a recovery on the part of any other heir. It is settled that there can be but one action brought and one recovery had for such damages as were sought in this action. Daubert v. Western Meat Co., 139 Cal. 480, 69 P. 297, 73 P. 244, 96 Am. St. Rep. 154. The judgment itself must be for a single lump sum, but it does not follow that each heir shall share equally in the amount recovered. It is well settled that the proceeds of such an action are not to be distributed in the manner provided by the laws of succession, but such proceeds are to be shared by the heirs upon the basis of the pecuniary loss of each. Estate of Riccomi, 185 Cal. 458, 197 P. 97, 98, 14 A. L. R. 509. In the case just cited the court said:

"How perfectly absurd it would appear to be to hold that where the whole amount of a recovery is given solely on account of the pecuniary injury to the surviving wife, one-half thereof must go to a surviving father or mother or brother or sister of decedent who has suffered no pecuniary injury whatever."

[2] Nor can there be any recovery on account of any heir who has not suffered loss. Burk v. Arcata & Mad River R. R. Co., 125 Cal. 364, 57 P. 1065, 73 Am. St. Rep. 52; Estate of Riccomi, supra. While the verdict should be for a single lump sum, it has been held proper to look to the jurors' answer to special interrogatories, in order to determine how they arrived at the total. Griffey v. Pacific Railway Co., 58 Cal. App. 509, 209 P. 45. It is the purpose of the statute to provide a single cause of action for all the heirs, and, while the statute does not provide for a distribution of the proceeds among those entitled thereto, it has been held that even a verdict for separate damages to each of two heirs would not be reversed. Robinson v. Western States Gas Co., 184 Cal. 401, 194 P. 39, 43. In that case the court said:

"The defendant has no interest in the division which the plaintiffs may make among themselves, or which may be made for them, of the damages recovered. The statute contemplates a single recovery for the benefit of the family of the deceased, or those of his heirs who are dependent upon him for support. Whether it is divided among them after recovery or not, or how it is divided, are matters of no concern to the defendant. If the damages are not excessive, as is in effect admitted by the failure to object on that account, the defendant has no reason to complain, or at least his reason is not sufficient to warrant a reversal of the judgment, because of this defect in the form of the judgment."

[3] It is established that the failure of one of the plaintiffs to prove loss will not defeat recovery by another of the plaintiffs whose pecuniary loss has been proved. And this, notwithstanding the fact that under the statute, as interpreted by our courts, only one action may be brought and only one judgment recovered. So far as the interpretation of

this statute is concerned, no reason appears why the rule should be any different where the evidence discloses that one of the parties is not entitled to recover, not on account of a failure to prove pecuniary loss, but because of the intervention of another rule, such as contributory negligence. In Estate of Riccomi, supra, it is said it would be absurd to hold that because two heirs must join in one action, the one proving damage must share the proceeds with the one suffering no injury. It would seem equally absurd to hold that an innocent party cannot recover because another party, with whom he is required by law to be joined as plaintiff, is not innocent. We find nothing in the fact that all of the heirs must join in the action, and that there must be but one recovery that would prevent a recovery by this plaintiff, because of any contributory negligence on the part of her coplaintiff.

[4-6] Neither is it necessary to so hold, on the theory that a recovery on the part of the child might indirectly benefit the father, and thus permit him to recover in spite of his own wrong. No such reason applies as in the case where a husband is suing for the death of a minor child, in which case it has been held that, since the wife represents the community, her negligence is the negligence of the husband, and will prevent a recovery on the part of the community. Keena v. United Railroads of S. F., 57 Cal. App. 124, 207 P. 35. In the instant case, the child is in no way connected with any negligence on the part of the father, and such negligence is not to be imputed to her. Zarzana v. Neve Drug Co., 180 Cal. 32, 179 P. 203, 205, 15 A. L. R. 401. This last case quotes Beach on Contributory Negligence, as follows:

"The rule of imputed negligence, as applied to persons non sui juris, is an anomaly. The English law on this point presents an extraordinary illustration. On the one hand, it is held that the negligence of the person having charge of a child is the negligence of the child, and imputable to it, when the child comes into a court of justice and asks damages for an injury negligently inflicted upon it by the defendant. But, per contra, when a donkey is carelessly run down in the highway, where he is negligently exposed, the defendant is liable and though oysters are negligently placed in a river bed, it is an injury redressible at law in damages for a vessel negligently to disturb them. It appears, therefore, that the child, were he an ass or an oyster, would secure a protection which is denied him as a human being of tender years in such jurisdictions as enforce the English or the New York rule in this respect."

The court then holds as follows:

"Following in the wake of the preponderating weight of authority, we may well and wisely, although somewhat tardily, declare that the rule of imputed negligence as applied to actions by children in their own right no longer prevails, if it ever did prevail, in this jurisdiction."

To sustain the contentions of the appellant would, in effect, change this rule and make the negligence of a father imputable to the child, in cases brought under section 377 of the Code of Civil Procedure, in variance with the general rule established in this state. We think it is possible to so interpret this section as to make it harmonize with other well-established principles of law. This is especially true, since the damages suffered by a child, arising from the death of its mother, are entirely separate and distinct from those of a husband occasioned by the loss of his wife. Valente v. Sierra Railway Co., 158 Cal. 412, 111 P. 95. Not only is this true, but the damages suffered by the child include not only those suffered during minority, but those arising after arrival at majority, during the probable duration of the life of the mother. Valente v. Sierra Railway Co., supra. Every presumption is in favor of the judgment, and, if it were necessary, it would have to be presumed that the damages awarded herein were those found by the court as reasonably certain to arise after the minor here in question attains her majority. But, irrespective of this, and if the damages awarded be assumed to cover the period before majority, as well as after, the father has no such interest in the amount awarded as would bar recovery on the part of the minor. Until the minor reaches majority the amount recovered will be in the control of the court in the guardianship proceedings, and the father cannot profit thereby. Under the law he is not even relieved from his duty to support the child, regardless of whether or not the child receives this award. While it was necessary for this suit to be filed by a guardian ad litem, and it happens that the father acted as such, the recovery is in his representative capacity only, and he is in no degree interested therein.

A further consideration is that any statute should be so interpreted, when possible, as to give effect to all parts thereof. Code Civ. Proc. § 1858. The statute here in question closes with these words: "In every action under this and the preceding section, such damages may be given as under all the circumstances of the case, may be just." While it may be justice to deny compensation to one whose own negligence has contributed to his injury, to refuse recovery to one who is both innocent and too young to be otherwise, would hardly seem to come under that head. To so hold would require not only a strict interpretation of this statute, but a disregard of its final provision, and the reading into the section of elements not put there by the Legislature.

Although used in connection with a different statute, we think the following language

from a Minnesota case applies to the facts here:

"We see no principle of law on which it can be said that the negligence of one beneficiary can prejudice other beneficiaries. There is no partnership or community of interest between them; one is in no sense the agent or representative of the others. His negligence should not be imputed to them and it should detract nothing from them. * * * His negligence is not a bar to their right." Kokesh v. Price, 136 Minn. 304, 161 N. W. 715, 717, 23 A. L. R. 643.

The theory of contributory negligence is often a harsh one, preventing a recovery even though the negligence is but slight in comparison. We feel there is nothing in the theory requiring its extension to the extreme of denying a recovery to an innocent minor, under the circumstances in this case. Nor is this required by the Code section here involved. The purpose of the statute is, of course, to require that one action only be brought, but in our opinion it no more makes the right of recovery of one plaintiff dependent upon the freedom of a coplaintiff from any legal disability, than upon the ability of a coplaintiff to prove that he has suffered a pecuniary loss. Although the trial court in its findings separated the damages of the two plaintiffs and allowed recovery only to one not in fault, the resultant judgment was for a lump sum, was for the total of the amount shown by the evidence to be properly allowable to both, and is not in conflict with the provisions of this section.

The judgment is affirmed.

We concur: MARKS, Acting P. J.; BEAUMONT, Justice pro tem.

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105 Cal. App. 315

HAMMOND LUMBER CO. v. WEEKS et al.

Civ. 6276.

District Court of Appeal, Second District, Division 2, California.

April 21, 1930.

1. Estoppel ⟹52.

Estoppel is not favored.

2. Estoppel ⟹118.

One claiming estoppel must prove its dominant elements; leaving nothing to surmise or questionable inference.

3. Evidence ⟹148.

Evidence as to conversation over telephone is in main governable by rules applicable to ordinary oral statements.

4. Mechanics' liens ⟹281(1).

Evidence in materialman's action to foreclose lien *held* insufficient to establish estoppel of materialman to assert lien.

The owner's alleged conversation on telephone was only evidence relied on by him to establish materialman's estoppel to assert lien, and servants of the materialman denied having a telephone conversation with owner telling him that contractor's bill had been paid.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by the Hammond Lumber Company against W. S. Weeks, J. Pludow, and others. Judgment for defendants, and plaintiff appeals.

Reversed.

R. L. Horton, of Los Angeles, for appellant.

Arthur Goodrick, of Los Angeles, for respondents.

CRAIG, Acting P. J.

The respondents were awarded judgment in an action of appellant against themselves and others, and this is an appeal therefrom.

One W. S. Weeks contracted with respondents for the erection of a house and garage upon their property in the county of Los Angeles, and purchased from the appellant lumber company certain sash, doors, hardware, and materials for use in said structures. Respondents made and executed to Weeks a deed of trust in the sum of $1,250 as security for the payment of any amount for which he might become indebted through such purchases, and the same was delivered to, and held by, appellant until completion of the work. Respondent J. Pludow, being informed that his account had been satisfied, and that one S. C. Briggs had purchased the deed of trust, was desirous of verifying this report and, to quote his testimony, he "called up Hammond Lumber Company on the telephone and told them I was Pludow, the owner of that house, and I wanted to know, because I am going to make another payment to this contractor, if they are paid. They couldn't answer me right away on the 'phone. They told me they would connect me with the trust department, which they did. A girl answered the 'phone then and she asked me what I wanted, and I explained to her that I wanted to know as far as their bills are concerned, because I wanted to make another payment to Weeks. They held me on the 'phone for fifteen minutes, and then they came back and said, 'as far as we are concerned, we are all paid up; you can go ahead and pay Weeks whatever is necessary.'"

Prior to this conversation, Briggs accompanied Weeks to appellant's offices, informed a bookkeeper that he was purchasing the deed of trust, and was advised that the balance due on the Pludow job was $825, which he paid; he had agreed to pay $1,050 for the security, and Weeks was therefore at the same time given a check for $225, whereupon appellant released it to the purchaser. Respondent, believing that appellant's claim had been paid in full, also delivered to Weeks a check for the remainder concededly earned by the latter.

Thereafter the lumber company filed a lien against the property in question for the sum of $208.64, and subsequently instituted the present suit for its foreclosure. Upon the trial it was strenuously asserted by appellant's witnesses that no member of its office force had received a telephone inquiry such as that to which respondent testified, or had given to any person the information stated. It appears that one Sherman, appellant's accountant, had visited the property and reported to his employer as to the completion of the work and the amount remaining due it, but it was testified that at the time of the settlement with Briggs and Weeks this report had not reached the proper department so as to be entered in the account, and that as a matter of fact the books did not at the time of such settlement show its true status. A Miss Quirk testified that she had full charge of appellant's trust or securities department, and that any inquiry as to the Weeks account would have come directly to her, but that she had received no call regarding the same; that under no circumstances would she have taken the responsibility of determining or giving information as to its condition, and that she did not do so; both this witness and Sherman swore that Sherman was the only one who possessed or could have given the required data, and he positively testified that he received no inquiry and gave no report to Mr. Pludow at that time; that Briggs had merely paid the amount then on the books, leaving unsatisfied a hardwood floor estimate, the material for which had not been installed. Further, he swore: "When Mr. Weeks stated he had a buyer for the trust deed and had the man with him and he wanted to know how much he owed us up to that time, I went back to the bookkeeping department and showed him the ledger balance at that time. But on the job card, which I took out of the file when he came into the office, I observed down at the bottom that there was a hardwood floor that was to be put in on the job"; and that Weeks had said: "I will take care of that out of more money that I have coming from Pludow, coming from the contract, before the lien rights run by"; that the flooring was delivered on the same date as the conversation here recited. It also appears that thereafter, upon inquiry of the owner as to appellant's reason for filing its lien, Sherman informed him that they regretted the annoyance, but that Weeks had double-crossed them.

From the foregoing it appears that, while Briggs paid the account as it then appeared, a subsequent amount representing additional material was thereafter added thereto, and that, although respondent may have been informed by some unknown person that his account had been adjusted in full, such was not the fact, and he made no personal request of the proper parties or at appellant's office for a statement. We think this evidence wholly insufficient to establish the fact of payment as to the balance claimed, and that authorities relied upon by respondents do not support their plea of estoppel upon the part of appellant to assert it. Eastman v. Means, 75 Cal. App. 537, 242 P. 1089, involved conversations between the appellant therein and several witnesses who testified, and which as corroborated were received in evidence. The court, however, there merely held this proof sufficient prima facie as to the identity of the appellant. Likewise, in Smith v. Hollander, 85 Cal. App. 535, 259 P. 958, it was said that the circumstances warranted admission in evidence of the conversation. No authority is cited, nor has a careful search disclosed one, tending to approve a rule that one may upon no evidence other than a telephonic conversation with an unidentified party, and uncorroborated as to believed identity, legally sustain grounds for estoppel or release from liability.

[1, 2] That a release from any indebtedness was intended by appellant, or even asserted by respondents, is not urged. Estoppel is not favored, and it is incumbent upon one who advances it to prove its dominant essentials, leaving nothing to surmise or questionable inference. Lorenz v. Rousseau, 85 Cal. App. 1, 258 P. 690; General Motors Accept. Corp. v. Gandy, 200 Cal. 284, 253 P. 137.

[3] While doubt may exist as to the competency of a telephonic conversation, its admissibility may under the circumstances of a particular case be justified. Mayr v. Goldschmidt, 63 Cal. App. 381, 218 P. 621. However, evidence as to a conversation over the telephone is in the main governed by rules applicable to ordinary oral statements. Testimony of one that he talked with another whom he did not see is, standing alone, but a conclusion, and, when denied, it falls far short of being sufficient to hold the person assumed responsible under an alleged agreement to forego substantial rights. Planters' C. O. Co. v. Western Union Tel. Co., 126 Ga. 621, 55 S. E. 495, 6 L. R. A. (N. S.) 1180; Stewart v. Fisher, 18 Ga. App. 519, 89 S. E. 1052; Barber v. City Drug Store, 173 Iowa, 651, 155 N. W. 992; Lord Elec. Co. v. Morrill, 178 Mass. 304, 59 N. E. 807; Mankes v. Fish-

man, 163 App. Div. 789, 149 N. Y. S. 228; Williamson-Halsell-Frasier Co. v. King, 58 Okl. 120, 158 P. 1142.

[4] The argument upholding the judgment of the trial court on the theory of estoppel in favor of respondents has no support except in this alleged conversation on the telephone. Since there was no other conversation between the parties on the subject, applying the rule as above stated, that contention is eliminated. We think the evidence in this case was insufficient to bring respondents within the bounds of settled rules entitling them to relief.

The judgment is reversed.

We concur: IRA F. THOMPSON, J.; NORTON, Justice pro tem.

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105 Cal. App. 410

GURSKY v. ROSENBERG.

Civ. 7010.

District Court of Appeal, First District, Division 1, California.

April 29, 1930.

1. Mortgages ⟹278.

Agreement to assume debt secured by trust deed is not established by recital in deed that conveyance is subject to trust deed.

2. Bills and notes ⟹247.

Obligation of third party indorsing note after maturity was but that of guarantor.

3. Subrogation ⟹1.

Subrogation is allowed only in favor of one who under some duty or compulsion pays debt of another.

4. Subrogation ⟹1.

Subrogation is not allowed in favor of one who pays debt in performance of his own covenant.

5. Subrogation ⟹18.

Maker paying balance due on note *held* not entitled to subrogation to rights of holder against indorser, where indorser made no promise and assumed no obligation to maker.

The evidence disclosed that the maker executed note and gave trust deed on property owned by him and later conveyed property to grantee, who took subject to the trust deed. The indorser on purchasing property indorsed note after maturity at request of holder, but it was not shown that the indorser agreed to assume the debt.

6. Appeal and error ⟹1061(3).

Where plaintiff has failed to make out case which would support finding in his favor and defect is incurable, granting nonsuit based on insufficiency of evidence without formal motion, while irregular, is without prejudice.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Nathan Gursky against Jacob Rosenberg. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Dozier & Kimball, of San Francisco, for appellant.

Tobin & Tobin and Charles R. Collins, all of San Francisco, for respondent.

PER CURIAM.

Appeal by the plaintiff from a judgment of nonsuit.

The action was commenced on December 14, 1926, to recover the sum of $4,889.50 with interest thereon from April 13, 1926, on which date the plaintiff paid the amount to the San Francisco Bank, a corporation.

According to the complaint the plaintiff and Nathan Bronstein with their wives on November 9, 1920, executed to the bank their note for $8,000, payable one year after date, with interest, and secured the same by a trust deed of certain real property owned by them. The note provided that "in case any change is made in the title to all or any part of the property described in the deed of trust securing this note the whole of said principal sum shall forthwith become due and payable at the election of the holder of the note." It was alleged that on August 4, 1921, the above-named owners of the property conveyed by grant deed to Sadie S. Gunzberger; that as part of the consideration the grantee agreed to pay the above note, the deed providing that the same was made "subject to deed of trust in the sum of $8,000"; that on November 10, 1921, Sadie S. Gunzberger and her husband executed a grant deed, conveying the same property to defendant Jacob Rosenberg, who, as part of the consideration therefor, agreed to pay the above note, and that the deed contained the following provision: "subject to incumbrances in the sum of $8,000." That on November 29, 1922, the defendant by grant deed conveyed the property to Edward Blonquist and his wife, who as a part of the consideration agreed to indorse the note; that on January 26, 1923, the

defendant with Blonquist and his wife and Blanch and William Flynn, to whom the Blonquists had conveyed the property, "in order to have the said * * * San Francisco Bank permit said note to run and not demand its immediate payment, did endorse jointly and severally the said promissory note although the same was wholly due, owing and unpaid and had passed its maturity * * * did write their respective names on the back of said promissory note, * * *" and further caused to be written on the back thereof and over their signatures the words, "For value received I hereby waive demand and notice of demand, protest and notice of protest and nonpayment"; that on April 9, 1926, the note being due and unpaid, the property was sold by the trustee in the manner provided by the trust deed, and after applying the proceeds there remained a balance of the note unpaid, namely, $4,889.50, which the plaintiff on April 13, 1926, following its demand, paid to the bank.

The defendant denied that he or Mrs. Rosenberg assumed or agreed to pay the note, and further denied that his signature was placed on the back of the instrument for the purpose of obtaining an extension of the time for payment.

[1] At the trial the note with the indorsements thereon was placed in evidence, but other than by the production of the deeds mentioned there was no attempt to prove and no evidence that Mrs. Gunzberger or the defendant, as part of the consideration for the conveyance to them or either of them, agreed to assume or pay the debt secured by the trust deed; and the rule is well settled that such an agreement is not established by the recital in the deed that the conveyance "is subject to" a mortgage or other encumbrance upon the property. Hibernia Sav. & Loan Society v. Dickinson, 167 Cal. 616, 140 P. 265; Andrews v. Robertson, 177 Cal. 434, 170 P. 1129.

After the plaintiff rested his case the defendant moved for a nonsuit upon the ground that no proof of such assumption had been made; whereupon the plaintiff, as stated by his counsel, sought to show "that at the time that defendant * * * endorsed the note it was upon the agreement and for the consideration that the bank was to allow the note to run indefinitely," further stating that his whole argument would be based thereon; and in this connection it was stipulated that plaintiff and his counsel if sworn would testify that the defendant stated to them "that he bought the property after the note was due, * * * that the bank would call the loan, and he did not want the loan called, and he endorsed the note in order to let it run." In addition an officer of the bank testified in substance that after the transfer of the property to the defendant the latter indorsed the note at the request of the bank in the manner alleged. The witness could not remember the conversation had with the defendant at the time the indorsement was made, but stated that it was the bank's custom to require indorsements from grantees whenever a change was made in the title of the property mortgaged or deeded in trust to secure its loans, and that this course was followed in the present case. The witness further testified that as far as he could recollect no promise was made by the defendant or his coindorsers other than that which was legally implied from their indorsements. As he stated, "We simply took a straight endorsement and their waiver of protest," and further that the bank gave no promise to extend the time of payment for a definite period. The defendant was also called as a witness for the plaintiff pursuant to section 2055 of the Code of Civil Procedure, and admitted his indorsement, but denied the same was made pursuant to an agreement with the bank.

[2-5] Defendant contends that in the absence of a definite extension of time for the payment of the debt his indorsement was not binding. But, however this may be, it is clear that in any event his obligation was but that of a guarantor (Crooks v. Tully, 50 Cal. 254; First Nat. Bank v. Babcock, 94 Cal. 96, 29 P. 415, 28 Am. St. Rep. 94; Rogers v. Schulenburg, 111 Cal. 281, 43 P. 899; 19 Cal. Jur., Negotiable Instruments, § 68, p. 880); and subrogation is allowed only in favor of one who under some duty or compulsion, legal or moral, pays the debt of another, and not in favor of him who pays a debt in performance of his own covenant (37 Cyc., Subrogation, p. 374). Here the defendant so far as shown made no promise and assumed no obligation to the plaintiff, and there was no privity of contract between them. Consequently, payment by the plaintiff of the balance of the note was in performance of his own obligation, which gave him no right of subrogation to the rights of the bank against the defendant. March v. Barnet, 121 Cal. 419, 53 P. 933, 66 Am. St. Rep. 44; Sacramento Bank v. Pacific Bank, 124 Cal. 147, 56 P. 787, 45 L. R. A. 863, 71 Am. St. Rep. 36; Rogers v. Meyers, 68 Ill. 92; Jones on Mortgages (8th Ed.) § 1119.

The motion for a nonsuit was not renewed after the making of the stipulation mentioned and the bank official had testified. The plaintiff contends that the motion was insufficient to support the order granting the nonsuit.

[6] The record shows sufficiently that the court and counsel assumed that a motion in form based upon all the testimony was made, and they proceeded accordingly. Moreover, where it appears that the plaintiff has totally failed to make out a case which would support a finding in his favor, and the defect is incurable, as was true here, the granting of a nonsuit based upon the insufficiency of the evidence without a formal motion, while ir-

regular, is without prejudice. Daley v. Russ, 86 Cal. 114, 24 P. 807; Fontana v. Pacific Can Co., 129 Cal. 51, 61 P. 580; Warner v. Warner, 144 Cal. 615, 78 P. 24; Estate of Higgins, 156 Cal. 257, 104 P. 6.

The record discloses no evidence which would support a judgment for the plaintiff, and the judgment appealed from is accordingly affirmed.

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105 Cal. App. 210

BIGE v. STATE INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 7048.

District Court of Appeal, Second District, Division 1, California.

April 14, 1930.

1. Master and servant ⚷405(1) — Workmen's compensation — Evidence — Sufficiency — Reports — Documents — Publications.

In compensation case, finding based on contents of reports, documents, and publications was supported by evidence (Workmen's Compensation, Insurance and Safety Act 1917, § 19(c).

2. Master and servant ⚷385(16) — Workmen's compensation — Surgical operation.

Employee receiving surgical operation for hernia received some compensation (Workmen's Compensation, Insurance and Safety Act 1917, §§ 3(3), 9(a).

3. Master and servant ⚷376(2) — Workmen's compensation — Serious disease — Aggravation — Hernia.

Injury consisting of aggravation into disabling condition of pre-existing hernia was "aggravation of a disease existing prior to * * * injury" (Workmen's Compensation, Insurance and Safety Act 1917, § 3(4).

> Workmen's Compensation, Insurance and Safety Act 1917, § 3(4), St. 1917, p. 833, provides that, in case of aggravation of disease existing prior to injury, compensation shall be allowed only for such proportion of disability due to aggravation of such prior disease as may reasonably be attributed to injury.

Proceeding under the Workmen's Compensation Act by Adlai E. Bige, opposed by E. A. Morrison, Inc., and the State Compensation Insurance Fund. An order adverse to claimant was entered by the Industrial Accident Commission, and claimant brings certiorari.

Affirmed.

Stanley Moffatt, of South Gate, for petitioner.

Edward O. Allen, of San Francisco, for respondent Industrial Accident Commission.

HOUSER, J.

On an application presented to the respondent commission for adjustment of compensation for an industrial injury sustained by petitioner herein, and which admittedly "occurred in the course and arising out of his employment," the commission found that the injury consisted of "aggravation into a disabling condition of a pre-existing right indirect inguinal hernia," for which the applicant had been adequately compensated "by the furnishing of a surgical operation for the radical cure of said hernia"; and thereupon ordered that the applicant "take nothing further."

[1] Petitioner contends that, with the exception of that part of the finding to the effect that the injury to him occurred "in the course of and arising out of his employment," the said finding was unsupported by any evidence relating thereto. However, as from the record herein it appears that each of the several parts of said finding was based upon the contents of certain reports, documents, publications, etc., which by the terms of section 19(c) of the Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831, 849, as variously amended) the Commission was entitled to receive and consider in evidence, the contention of petitioner in that regard cannot be sustained.

[2, 3] The principal complaint of petitioner is directed to the situation that, although by the finding of the commission the injury sustained by petitioner "occurred in the course of and arising out of his employment," for the reason, as stated in the award, that the applicant had been furnished "a surgical operation for the radical cure of said hernia," the compensation already awarded to him was considered adequate.

By the terms of subsection (3) of section 3 and subsection (a) of section 9 of the Workmen's Compensation, Insurance and Safety Act, compensation to an injured employee, includes surgical and hospital treatment. It is therefore manifest that the applicant received *some* compensation. 27 Cal. Jur. 526; citing Union Iron Works v. Industrial Acc. Com., 190 Cal. 33, 210 P. 410.

Subsection (4) of section 3 of the act provides that: "The term 'injury,' as used in this act, shall include any injury or disease arising out of the employment. In case of aggravation of any disease existing prior to such injury, compensation shall be allowed only for such proportion of the disability due to the aggravation of such prior disease as may reasonably be attributed to the injury."

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

In that connection, the question presented to this court for its determination is whether an injury which consisted "of an aggravation into a disabling condition of a pre-existing * * * hernia" represented an injury which was an "aggravation of a *disease* existing prior to such injury." From a consideration of the subsection of the act to which attention has been directed, together with the text and the authorities cited in 18 Corpus Juris, page 1139, it would seem clear that the word "disease," as used in said subsection of the statute, was broad enough in its meaning and significance to include a physical condition such as is shown to have existed with reference to the petitioner herein at the time the injury was sustained by him. It therefore follows that, since within the terms of the statute the applicant was awarded "compensation" for an injury which resulted from aggravation of a pre-existing hernia, the award made to petitioner by the commission should be affirmed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

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105 Cal. App. 358

WISSBURG v. LOCKWOOD.

Civ. 44.

District Court of Appeal, Fourth District. California.

April 22, 1930.

Appeal and error ⟹719(6).

Alleged insufficiency of evidence to support trial court's findings *held* not reviewable, where bill of exceptions failed to assign such error (Code Civ. Proc. § 648).

Appeal from Superior Court, San Diego County; C. J. Luttrell, Judge.

Action by A. L. Wissburg against Emma Dewey Lockwood. Judgment for plaintiff, and defendant appeals.

Affirmed.

Wm. K. Brown and Edward J. Kelly, both of San Diego, for appellant.

Adam Thompson, Renwick Thompson, and Gordon Thompson, all of San Diego, for respondent.

OWEN, Justice pro tem.

The plaintiff instituted suit against the defendant for the sum of $4,750 for services performed as an attorney at law. Two causes of action were contained in the complaint: First, that the agreed price of said services was $5,000, and that $250 had been paid; second, that the services were reasonably worth the sum of $5,000, and that $250 had been paid.

The defendant's answer denied the allegations of both counts of the complaint, and set up affirmatively and by way of cross-complaint an allegation of damage to her in the sum of $25,000, by reason of the plaintiff's failure to carry out, and his violation of, an agreement wherein plaintiff, as her attorney, was authorized to effect a settlement of certain claims and demands defendant held against a third person.

The trial court awarded the plaintiff the sum of $3,230 after deducting all sums paid, as the reasonable value of plaintiff's services, and found against the defendant on all of the allegations of her cross-complaint.

The transcript on appeal contains 708 pages all but 33 pages of which are called a bill of exceptions. There is no attempt anywhere in this voluminous bill of exceptions to set forth any specifications of the insufficiency of the evidence to support the findings. While we have examined the record and find substantial evidence to justify the decision of the trial court, we are confronted with the fact that the requirements of section 648 of the Code of Civil Procedure were ignored in the preparation of the bill of exceptions, and the decision of this court must rest on the latter ground.

"The question of the sufficiency of the evidence to sustain the findings cannot be considered on appeal from a judgment where the bill of exceptions relied on contains no specifications of insufficiency of evidence." Millar v. Millar, 175 Cal. 799, 167 P. 394, 395, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184; Beeson v. Schloss, 183 Cal. 618, 192 P. 292; Mills v. Brady, 185 Cal. 317, 196 P. 776; Carter v. Canty, 181 Cal. 749, 186 P. 346.

The judgment is affirmed.

We concur: BARNARD, Acting P. J.; MARKS, J.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

209 Cal. 448

WILLS v. CITY OF LOS ANGELES et al.★

L. A. 11558.

Supreme Court of California.

May 7, 1930.

As Modified on Denial of Rehearing June 5, 1930.

1. Deeds ⚷150.

Where deed conveyed land to city for street, clause prohibiting use for street railroad *held* void, leaving grant unrestricted (Civ. Code, § 1441).

Civ. Code, § 1441, provides that a condition in contract, fulfillment of which is impossible or unlawful within meaning of article on object of contracts, or which is repugnant to nature of interest created by contract, is void.

2. Municipal corporations ⚷62.

Contracts involving municipality's proprietary or business functions are valid, and those curtailing legislative or administrative authority are invalid.

In Bank.

Appeal from Superior Court, Los Angeles County; Harry A. Archbald, Judge.

Suit by Madeline Frances Wills against the City of Los Angeles and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Hare & Walden, of Los Angeles, for appellant.

Erwin P. Werner, Sam H. Erwin, Jess E. Stephens, Lucius P. Green, and Gibson, Dunn & Crutcher, all of Los Angeles, for respondents.

PRESTON, J.

Plaintiff, her mother and brother, on March 28, 1899, conveyed to the city of Los Angeles for street purposes a strip of land across lots 1, 2, 3, and 4 in block E of Fort Hill tract as per official map, with the object of promoting the construction thereunder of what is known as Broadway tunnel in said city. The validity of the following provisions of said deed furnishes the sole issue uoon this ap-

★Rehearing denied.

peal: "1. That no right or franchise for a street railroad over the said right of way be given by party of the second part, and that the same shall not be used for street railway purposes; and also 2. It is expressly understood and provided that upon the breach of any of the above conditions this deed shall be null and void, and the parties of the first part shall have the right to enter upon the premises conveyed and to hold and own the same as fully as if this conveyance had not been made."

This deed was duly recorded on April 18, 1899, and thereafter the projected tunnel was constructed and became a portion of Broadway street leading from Temple street through said tunnel to Sunset boulevard. On October 6, 1925, defendant railway corporation applied to the city for a franchise to construct tracks on said street leading to and through said tunnel, which franchise was duly granted on January 22, 1926. Thereafter said corporation built a roadway and constructed double tracks thereon for the purpose of operating its street railway cars in said tunnel and under said land described in said deed. Thereafter, and on February 25, 1926, plaintiff, having succeeded to the remaining estate in said lots, served notice upon the city declaring the forfeiture of all rights held and purported to be held by it under and by virtue of said deed, and declaring said conveyance to have become null and void because of said violation of the conditions thereof hereinabove set forth. This notice was followed on March 17, 1926, by the present suit in the form of an ordinary action to quiet title, with the usual prayer that it be declared that defendants have no estate or interest in said property, and that they be enjoined from asserting any interest therein. Defendants filed separate answers, traversing the allegations of the amended complaint. The cause was tried upon a written stipulation of facts, substantially as hereinabove set forth. The court held said provisions void; judgment passed for defendants; and plaintiff has appealed.

We thus have before us solely the question of the right of plaintiff and appellant to equitable relief under the provisions of said deed.

Appellant bases her claim for a reversal of the judgment on the well-understood doctrine that contracts of a city or state, when exercising other than governmental functions and within its charter powers, are construed by the same rules that govern the contracts of private parties. This principle is expressed in Brown v. Town of Sebastopol, 153 Cal. 704, 709, 96 P. 363, 365, 19 L. R. A. (N. S.) 178, as follows: "But it is a well-settled principle, applicable alike to the states and the United States, that whenever a government descends from the plains of sovereignty and contracts with parties, such government is regarded as a private person itself, and is bound accordingly. A state in its contracts with individuals must be judged and must abide by the same rules which govern individuals in similar cases, and when such a contract comes before a court, the rights and obligations of the contracting parties will be adjudged upon the same principles as if both contracting parties were private persons." See, to the same effect, Dillon on Municipal Corporations (5th Ed.) § 979, vol. 3; 18 Cal. Jur. p. 1000, § 272.

[1] But this doctrine has no application to a situation where property is conveyed outright for street purposes with a condition imposed to the effect that it may not on penalty of forfeiture be used for certain well-known street purposes, for example, for street railway traffic. The control of the streets of the city is a purely governmental process, involving the exercise of legislative authority under the police and other powers conferred by law. It is too obvious for extended argument that one individual who has conveyed his property for a governmental purpose may not, on penalty of forfeiture, sit in judgment over the exercise of that governmental function. If a certain governmental use does the remaining property of the dedicator a special injury, provided against in the document of dedication, the doors of the law court alone, if any, are open to him. Equitable relief such as here sought cannot for a moment be applied. The control of the streets and the proper location and regulation of street railways thereon are the chief concerns of a city. No individual can by contract reserve the right to control the use of a street when once the dedication for that purpose is made.

The doctrine is everywhere to the effect that such conditions in the dedication are repugnant to the grant, and therefore void, leaving the grant in full and unrestricted operation. The principle announced in section 1441 of the Civil Code seems applicable here, to wit: "A condition in a contract, the fulfillment of which is impossible or unlawful, within the meaning of the article on the object of contracts, or which is repugnant to the nature of the interest created by the contract is void."

In Finch v. Riverside, etc., Co., 87 Cal. 597, 598, 25 P. 765, it is said: "The dedication of a street to public use authorizes any ordinary use for street purposes; and the use of a street in a city or town for the tracks of a street-car company is of this class, and is therefore authorized."

Elliott on Roads and Streets (4th Ed.) vol. 1, p. 186, § 163, uses this language: "A condition or limitation which would render the dedication ineffectual can not be annexed; thus, a man can not reserve possession to himself, nor reserve a right to do anything in the

way (street) which will destroy its character as a public way."

Dillon on Municipal Corporations (5th Ed.) vol. 3, pp. 1697–1698, § 1075, disposes of the question as follows: "And the conditions imposed must always *be consistent with the purpose* to which the lands are dedicated, and with the control thereof by the proper public authorities. Thus, the proprietor cannot confer upon a county or extraneous corporation the control of streets in a city, and deprive the proper municipal corporation of the control given to it by law. If an *invalid* condition is annexed to the dedication, it has been held that *the condition only is void*, and that the grant or dedication is not effected thereby."

[2] A few further citations may here be given which exemplify the distinction between contracts which merely involve the proprietary or business functions of the municipality and those which attempt to curtail or prohibit its legislative or administrative authority. The former being valid, the latter are uniformly invalid. In 44 Corpus Juris, pp. 73, 74, § 2129, it is said: "Since it (the city) cannot surrender its governmental or legislative functions, a municipality cannot make contracts which will embarrass or control its legislative powers and duties, or which amount to an abrogation of its governmental function or of its police power. * * *"

The case of State ex rel. Townsend v. Board of Park Commissioners, 100 Minn. 150, 110 N. W. 1121, 9 L. R. A. (N. S.) 1045, expresses the doctrine in these words: "It is also elementary that a municipality, acting through its legislative body, has no power to enter into contracts which curtail or prohibit an exercise of its legislative or administrative authority over streets, highways, or public grounds, whenever the public good demands that it should act." Said case specifies the kind of cases in which the city will be bound by its contracts by use of the following language: "Contracts involving proprietary or business functions are upheld. * * *" In an extended note to this case, the annotator states the doctrine as follows: "The authorities are well settled upon the proposition that a municipality cannot, by contract or otherwise, lawfully devest itself of the free exercise by it of its legislative functions. Applying this principle to the question under consideration, it is clear that it cannot, in receiving land either by dedication or by contract, make any agreements with the dedicator or grantor in reference to the property so acquired which will thereby devest or embarrass it in the exercise of its legislative powers."

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.

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209 Cal. 325

In re BUTTON'S ESTATE.

S. F. 13342.

Supreme Court of California.

April 18, 1930.

1. Wills ⟹133.

Words, "Love from 'Muddy,'" near end of letter propounded as will from deceased to former husband to whom she was known by that name, was valid signature (Civ. Code, § 1277).

Although Civ. Code, § 1277, requires holographic will to be signed by testator, it makes no requirement that testator must use his legal or true name.

2. Wills ⟹133.

That signature, "Love from 'Muddy,'" appeared on margin instead of end of letter propounded as will, did not render letter invalid as will.

The text of the letter occupied the entire page, and deceased had written the signature in question on the margin of the last page, thereby plainly indicating an intention to close the letter with her signature.

3. Wills ⟹130.

That only 24 words of 700-word letter were claimed to constitute will did not invalidate letter as testamentary disposition.

The deceased, shortly before her suicide, had written the letter in controversy to her former husband, and the only words referring to property which were claimed to constitute a testamentary disposition consisted of a single sentence as follows: "You can have the house on 26th ave. and all the things of value so you won't be out any money on burying me."

4. Wills ⟹130.

That "will" was not mentioned in 700-word letter did not disprove writer's intention to make testamentary disposition.

5. Wills ⟹72.

To constitute "will," intention must appear that writer by document itself intended

to make disposition of property effective only after death.

[Ed. Note.—For other definitions of "Will (Testament)," see Words and Phrases.]

6. Wills ⟹77.

Gift of property by letter shortly before suicide *held* intended to take effect only after death, as regards letter's validity as will.

The reference in the letter to deceased's property, claimed to effect a testamentary disposition, followed immediately after a request that her body be cremated, and the whole letter indicated that she had then formed the intention of taking her life, and arranging her affairs after death.

7. Wills ⟹130.

That words, "You can have the house * * * and all the things of value," were in letter, not formal will, did not invalidate testamentary disposition.

8. Wills ⟹130.

That letter to writer's former husband, willing him her property, contained affectionate expressions toward their children, did not nullify gift to husband.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Application by Ralph James Button for the probate of a letter offered as the will of Grace Edna Button, deceased. From an order denying probate, the proponent appeals. A guardian ad litem was appointed to represent Ralph James Button, Jr., and another, minor children, as contestants on the appeal.

Reversed.

Superseding the opinion of the Court of Appeal, 277 P. 758.

Marshall Nuckolls and Monroe B. Kulberg, both of San Francisco, for appellant.

Charles T. White, of San Francisco (Edwin T. Cooper, of San Francisco, of counsel), for respondent.

CURTIS, J.

This is an appeal from an order denying probate of a document in the form of a letter claimed by the proponent to be the last will and testament of Grace Edna Button, deceased. The letter in question was unquestionably entirely written and dated by the deceased Grace Edna Button during her lifetime. It was found in the same room in which her dead body was discovered after the deceased had presumably taken her own life. It was dated, "San Francisco, Calif. August 25—1928," and was addressed to "Dear, dear Daddy." The letter consisted of four pages written on both sides of two leaves of paper. On the left margin of the last page were written the words, "Love from 'Muddy.'" It is conceded that the letter addressed to "Dear, dear Daddy" was written and addressed to the proponent, who at one time had been the husband of the deceased, but a final decree of divorce had been granted to the parties on April 4, 1928. There were living at the date of the death of said deceased two children of said parties who had been born during said marriage, one Ralph James Button, Jr., who was then fourteen years of age, and the other, Robert Henry Button, who was eight years old. The letter was evidently written in contemplation of death, and its contents show an unmistakable purpose on the part of the decedent to take her own life, which purpose was successfully accomplished shortly after, and on the day, the letter was written. The letter contains expressions of deep affection of the writer for her former husband and her two sons. In it she reproaches herself, and expresses deep regret that she had failed to respond to her domestic responsibilities and thus to bring happiness to the family circle. She implores her former husband to care for, protect, and train their two boys, that the latter may "grow up strong men for Uncle Sam." A few excerpts from this letter will indicate the feelings of the deceased toward her former husband and her two children: "I can only think of you, you, you, you, and I am ruining our boys' lives." "Keep your loving arms around them (the boys) and protect them as I know you will and always have." "I wish I could meet you in heaven just to be near you and the children." "I'd like to go down that 'long long trail' with you and our dear boys." In the body of the letter and toward the end of the second of its four pages is found the following paragraph: "I'm wearing you out dear and when I am gone you can just breathe one long sigh of contentment. I'd like to be cremated. You can have the house on 26th ave. and all the things of value so you won't be out any money on burying me."

This provision the proponent contends is testamentary in character and that by it the deceased intended to and did devise to him the house situated on Twenty-Sixth avenue in the city of San Francisco, together with other articles of value belonging to her. No one appeared in the trial court to contest the petition of proponent, but said court nevertheless denied said petition. After the taking of this appeal the trial court appointed a guardian ad litem to represent said minors on the hearing of this appeal, and said guardian has appeared herein and filed a brief in reply and in opposition to the brief of the proponent and appellant.

[1] It is first contended by said guardian that the letter, which the proponent claims is the last will of the decedent, does not conform to the demands of section 1277 of the Civil Code, in that it is not signed as required by the terms of said section. This section of the Code defines an olographic will, and among other requirements of the section is the provision that it must be signed by the testator. We have already called attention to the fact that the letter was not signed at the end or at the close thereof, but that on the left margin of the last page of the letter the words "Love from 'Muddy'" were written. It is not disputed but that these words were written by the deceased herself. The evidence further shows without conflict that the deceased was affectionately known by the proponent and by her children as "Muddy" and that they called her by that name. While the section of the Code just referred to requires that an olographic will must be signed by the testator, it makes no requirement that in signing it the testator must use his legal or true name. In Kimmel's Estate, 278 Pa. 435, 123 A. 405, 31 A. L. R. 678, it was held that the signature "Father" to an olographic will in the form of a letter was sufficient, and that the instrument so signed was the valid will of the deceased. In Wells v. Lewis, 190 Ky. 626, 228 S. W. 3, a letter signed "Ant nanie" was admitted to probate as the last will and testament of Nannie Rogers. We might also refer to the following cases embodying similar rulings: Barnes v. Horne (Tex. Civ. App.) 233 S. W. 859; Knox's Estate, 131 Pa. 220, 18 A. 1021, 6 L. R. A. 353, 17 Am. St. Rep. 798, and Cartwright v. Cartwright, 158 Ark. 278, 250 S. W. 11. The cases of Kimmel's Estate, supra, and Wells v. Lewis, supra, are cited with approval by this court in the case of Estate of Henderson, 196 Cal. 623, 635, 238 P. 938, 942, holding that: "The subscription to the second paragraph, 'Your loving mother,' if a material consideration here, is a sufficient signature." We think from the facts in this case, as the same are construed and understood in the light of the foregoing authorities, that the signing of the name "Muddy" to the letter in question by the decedent was a sufficient signature to meet the requirements of section 1277 of the Civil Code.

[2] The guardian ad litem makes a further objection to the signature of the deceased, and contends that, as it was written not at the end or close of the letter, but on the margin of the last page thereof, it was not written for the purpose or with the intent that it should there serve as a "token of execution" or as a signature to said letter. The decisions of this court and those of other jurisdictions so far as they have been called to our attention negative this claim on the part of the guardian. Estate of Manchester, 174 Cal. 417, 421, 163 P. 358, L. R. A. 1917D, 629, Ann. Cas. 1918B, 227; Estate of Streeton, 183 Cal. 284, 191 P. 16; Estate of Bernard, 197 Cal. 36, 239 P. 404; Estate of Henderson, 196 Cal. 623, 238 P. 938.

The rule enunciated by these decisions is correctly stated in the Estate of Henderson, supra, at page 635 of 196 Cal., 238 P. 938, 942, in the following words: "Where a will has been signed by the testator, it is sufficient even though the signature is not in the place on the instrument where usually such a writing is signed, viz., at the end of the document. Estate of McMahon, 174 Cal. 423, L. R. A. 1917D, 778, 163 P. 669. Of course, this statement is subject to the qualification that the signature of the testator, if not subscribed to the will—that is, if it is not at the end of the instrument, the usual place for the signature in such cases—then it must so appear from the document itself that the signature was thus placed 'with the intent that it should there serve as a token of execution' as to afford 'a positive and satisfactory inference' to that effect." The court further says in the case just quoted from, and following the quotation set out above, "That the instant case fully exemplifies the test thus stated is a proposition too obvious to require further consideration." We feel that these words may be fittingly applied to the facts in the present action. That the deceased wrote the word "Muddy" on the margin of the last page of the letter for the purpose of finishing and closing the letter with her signature seems so apparent to us that it would be a waste of words to present any argument to support this statement. The photostatic copy of the letter attached to the transcript on appeal before us shows that the deceased in writing the letter had used the entire last page of the paper for the written portion of the letter, and that the only unused portion of the page was a narrow space along the left margin of this page. On this she wrote, "Love from 'Muddy.'" No other conclusion can be reached from these facts than that the deceased by writing her name on the margin of the last page of the letter intended thereby to sign the letter as effectually as if she had signed the same at the end or close thereof.

[3, 4] The further contention is made by the guardian ad litem that the letter of the decedent is not testamentary in character, and therefore cannot serve the purpose of the last will of the deceased. In this connection the guardian ad litem calls attention to the fact that the letter contains over seven hundred words and but twenty-four of them are claimed to constitute a will; that nowhere in the whole letter does the writer mention the word "will"; and that nowhere outside of said twenty-four words is there to be found any language indicating in the faintest degree that the writer intended to make a will by the terms of which she was disinheriting her two

sons. That the writer of the letter devoted by far the greater portion thereof to matters other than that of disposing of her property cannot, we think, have any bearing upon the question as to whether or not that portion of her letter which does deal with her property constitutes a testamentary disposition of said property. The letter was undoubtedly intended by the decedent to be a farewell letter to the man who had formerly been her husband. It would have been indeed strange, in view of the circumstances under which the letter was written, had the decedent simply mentioned her property and designated the person or persons whom she desired to have the same upon her death. The fact that she referred to many personal and family matters with which she was deeply concerned in the same letter in which she stated that the proponent could have the house and other things of value belonging to her would not in any way render this disposition of her property ineffectual, nor would it in any manner change the character of such disposition. That she did not mention the word "will" in any part of her letter is neither conclusive nor even persuasive that she did not intend to make a testamentary disposition of her property. "No particular words are necessary to show a testamentary intent. It must appear only that the maker intended by it to dispose of property after his death." Mitchell v. Donohue, 100 Cal. 202, 208, 34 P. 614, 615, 38 Am. St. Rep. 279; Estate of Spitzer, 196 Cal. 301, 237 P. 739. That she did not refer to her property nor indicate any intention to dispose of it in a manner which would result in disinheriting her two boys except in the twenty-four word paragraph above quoted presents no good or legal reason why this paragraph of her letter should not be given effect and construed according to its clear intent. If in one part of her letter she has expressed an intent to make a testamentary disposition of her property, it is a matter of little or no consequence that she did not in other portions of her letter make reference to such intent. This is especially true when there is nothing in her whole letter which in the slightest degree conflicts with or casts doubt upon her intention as expressed in the above-mentioned paragraph.

[5] On the other hand, the proponent contends that the letter clearly shows an intention on the part of the deceased to make a testamentary disposition of her property. In order for a document to be the last will and testament of a deceased person, it must, in addition to meeting all other legal requirements, clearly show that the decedent intended it to take effect only after his death, and it must satisfactorily appear therefrom that the decedent intended by the very paper itself to make a disposition of his property in favor of the party claiming thereunder. Estate of Meade, 118 Cal. 428, 50 P. 541, 62 Am. St. Rep. 244; Major's Estate, 89 Cal. App. 238, 264 P. 542; Estate of Beffa, 54 Cal. App. 186, 188, 201 P. 616; Estate of Spitzer, 196 Cal. 301, 307, 237 P. 739, 742. The latter two of the foregoing cases express the rule as follows: "It is undoubtedly the general rule enunciated by the leading case of Habergham v. Vincent, 2 Ves. Jr. 231, and oft repeated, that the true test of the character of an instrument is not the testator's realization that it is a will, but his intention to create a revocable disposition of his property to accrue and take effect only upon his death and passing no present interest."

[6] We are of the opinion that the document in question, the letter written by the deceased, and particularly that paragraph thereof quoted above, meets the test prescribed by the rule announced in the foregoing cited cases. That she intended that it should take effect only after her death is manifest. The purported disposition of her property follows a request that her body be cremated. She undoubtedly had then formed the intent to take her life, and the whole letter shows unmistakable evidence that it was written with the avowed purpose of arranging her affairs after death. Having intended that the letter, or at least that portion thereof which deals with her property, should take effect only after her death, the only remaining question is whether the decedent in any part of said letter has made, or intended to make, a disposition of that portion of her property referred to in her said letter.

[7] The fact that the words, which the proponent claims to be a testamentary disposition of her property, were contained in a letter and were not set forth in a formally prepared will, does not detract from their testamentary character. The books are full of cases holding that letters under proper circumstances may be testamentary in character, and accordingly they have been proved and judicially determined to be testamentary dispositions of the property of the testator. A partial list of such cases will be found in the note to Estate of Kelleher, Deceased, 54 A. L. R. 913, 926.

"You can have the house * * * and all things of value" are words of gift as direct and certain as if the testatrix had said, "I give you the house and all things of value." They perhaps might not have been used by a trained lawyer had he been called upon to draw the decedent's will, but to a layman they have practically the same legal significance as if the word "gift" had been used. The contents of the letter show that she felt that she had been a burden to her former husband and that she exceedingly regretted that fact. She was asking a further favor of him that

he might attend to the final disposition of her body after her death by means of cremation, and that this last request of hers might not be an additional burden upon him, she gave him the house and other articles of value, "so you won't be out any money in burying me." The record does not disclose the value of the house and other property mentioned in her letter, but evidently she considered that they were of sufficient value to meet the expense of her funeral. If it be assumed that the value of the property given the proponent exceeded, even to a considerable extent, the expense of cremating the body of the deceased, that fact could not be held to change the plain meaning of the words, or defeat the disposition which she had thereby made of her property. It may well be that she gave the property to her former husband, not only to reimburse him for the expense incident to the final disposition of her body, but also to provide a home for her boys, whose custody and care she had committed to the proponent, their father.

[8] The argument is made that as the letter is filled with expressions of love for her two sons that it is not reasonable to suppose that she would disinherit them in favor of her divorced husband. If this were all that the letter contained, there might be some force to the argument. But the letter further shows, not only that the decedent had a deep and abiding affection for her former husband, but that she relied exclusively upon him to care for her two boys when she was gone. It also shows that she had every confidence in the proponent that he would act as a true father to her children, for after requesting him to "keep your loving arms around them and protect them," she added, "I know you will and always have." What would be more natural for the mother under these circumstances than to give to the man, the father of her children, for whom she had such a deep affection, and into whose care she had so confidently intrusted the future welfare of her sons, the little property that she possessed that he might be the better able to carry out the trust imposed in him? It is not necessary, however, for us to resort to further argument as to the intent of the decedent. We are satisfied that the plain terms of the letter, written under the circumstances shown, can leave no doubt, but that the decedent intended to give, and did give to the proponent the property mentioned in the letter, and that this gift having been made with the intent that it should take effect upon her death is clearly a testamentary disposition of the property of the deceased in favor of the proponent.

This disposes of all points of any merit raised on the appeal. The judgment is therefore reversed, with directions to the trial court to enter an order admitting to probate the letter in question as the last will and testament of Grace Edna Button, deceased.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; SEAWELL, J.; SHENK, J.

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209 Cal. 398

CALIFORNIA PACIFIC TITLE & TRUST CO. v. BOYLE.

S. F. 13777.

Supreme Court of California.

April 25, 1930.

1. Municipal corporations ⚷864(3).

City and county of San Francisco, with purpose of acquiring large tract, total cost to exceed revenue of one year, could yearly purchase land in small parcels without violation of Constitution and charter (Const. art. 11, § 18).

Under Const. art. 11, § 18, city may not incur indebtedness or liability exceeding in any year income and revenue provided for such year, and, under charter of city and county of San Francisco, city and county are required to submit proposition of bonded indebtedness, where cost of land sought to be acquired exceeds income and revenue provided for city and county for any one year.

2. Municipal corporations ⚷63(1).

Wisdom of entering into contract whereby city yearly acquires small parcel of land desired *held* within discretion of municipality and not reviewable by court.

In Bank.

Application by the California Pacific Title & Trust Company for writ of mandate to be directed to Thomas F. Boyle, as Auditor of the City and County of San Francisco, to compel the auditing and approval of a demand in payment of the purchase price of certain property for park purposes.

Writ granted.

James P. Sweeney and Henry E. Monroe, both of San Francisco, for petitioner.

Frank L. Fenton, of San Francisco, for respondent.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, amici curiæ, for petitioner.

PER CURIAM.

In June of 1926 the board of supervisors of the city and county of San Francisco duly

passed and approved a resolution reciting that public interest and necessity require the acquisition by the city and county of San Francisco, a municipal corporation of certain lands, therein described by metes and bounds, amounting to approximately 550 acres. The resolution further recited that the said property is suitable, adaptable, necessary, and required for the public use of the city and county of San Francisco as and for a public park; that it is necessary that a fee-simple title be taken for such use, and the city attorney was ordered to commence proceedings in eminent domain against the owner of the described lands. The lands described in this resolution embrace, more or less, the area that is popularly known as McLaren Park in the Mission District of San Francisco, and the total value of said lands is probably in excess of $2,000,000.

This resolution, it is admitted by all concerned in this proceeding, was never acted upon by the city attorney and no proceedings in eminent domain were ever brought, or any other proceedings taken pursuant thereto. The board of supervisors, however, did not entirely abandon the project to acquire a park in that section of the city and county. Each year, commencing with the fiscal year 1926–1927, the board of supervisors has appropriated various sums of money for the acquisition of various separate parcels of land in the general area in question. The apparent purpose of the board of supervisors was, and probably still is, to acquire during each year various parcels of the land in the general area, and after a number of years have elapsed, and all of the land in the general area has been acquired, to create a large park. The sum of $100,000 was appropriated and set aside for the purchase of such lands in the budget for the fiscal year 1926–1927; the sum of $150,000 in the budget for the fiscal year 1927–1928; the sum of $150,000 in the budget for the fiscal year 1928–1929 and the sum of $150,000 in the budget for the present fiscal year of 1929–1930.

On November 26, 1928, a proposition was submitted to the voters at a general election to incur a bonded indebtedness for $2,000,000 for the acquisition and improvement of the entire tract in question. This proposition was defeated.

Despite this defeat of the project to buy all the lands at once, the board of supervisors included in the 1928–1929 budget and in the 1929–1930 budget an appropriation entitled "Purchase of lands for public purposes in Mission District, $150,000." The board of supervisors regularly adopted a resolution, and the same was approved by the mayor, permitting such expenditures. On September 24, 1928, the clerk of the board drew a warrant on respondent herein, Thomas F. Boyle, auditor, in the sum of $125,553 in favor of petitioner, said sum to be payment in full for certain parcels of land in the general area of McLaren Park. Respondent Boyle refused to audit and approve the warrant, and still continues to refuse to audit and approve the warrant. Petitioner therefore requests a peremptory writ of mandate commanding respondent to audit and approve the demand.

In his answer and return to the petition, respondent sets forth the facts above enumerated and contends that the park project will take many years to complete and that the total cost will exceed the income and revenue of said city and county for each fiscal year. Respondent also contends that the board of supervisors is attempting to purchase property on the installment plan, and that, under the authority of certain cases to be hereinafter discussed, all expenditures for the above purposes are without authority and violate certain provisions of the California Constitution and the city and county charter. Article 11, § 18, of the state Constitution provides, in part: "No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity, which shall not exceed forty years from the time of contracting the same."

Article XVI, section 29, of the charter of the city and county of San Francisco provides in part:

"When the supervisors shall determine that the public interest requires the acquisition of any land or lands or the construction or acquisition of any permanent building or buildings, improvement or improvements, the cost of which, in addition to the other expenses of the city and county will exceed the income and revenue provided for the city and county for any one year, they must by ordinance submit a proposition or propositions to incur a bonded indebtedness for such purpose or purposes to the electors of the city and county at a special election to be held for that purpose only."

[1] The main question presented to us by this proceeding is: Can a city and county, with the apparent purpose of acquiring a large tract of land, the total cost of which would exceed the income and revenue of any one year, purchase land for public use in small parcels in the general area yearly, or does such a procedure violate the sections of the Constitution and charter above enumerated?

These sections have been a fruitful source of litigation. From an early date it has been held that so-called "contingent" installment contracts do not violate the constitutional provision quoted supra, nor do they violate city charters containing provisions similar to the one under consideration here. A leading case on the subject is McBean v. City of Fresno, 112 Cal. 159, 44 P. 358, 359, 31 L. R. A. 794, 53 Am. St. Rep. 191. In that case the city of Fresno entered into a contract with McBean by which he agreed to take care and dispose of the sewage of the city for a period of five years for the sum of $4,900 per annum. For three years both parties to the contract fulfilled its conditions. The fourth year the city refused payment upon the ground that the contract was void, because it violated the state Constitution and the charter of Fresno. The court thus discusses the purport and intent of the constitutional provision under consideration: "In the constitutional provision under consideration, the framers had in mind the great and ever-growing evil to which the municipalities of the state were subjected by the creation of a debt in one year, which debt was not, and was not expected to be, paid out of the revenues of that year, but was carried on into succeeding years, increasing like a rolling snowball as it went, until the burden of it became almost unbearable upon the taxpayers. It was to prevent this abuse that the constitutional provision was enacted. * * * Each year's income and revenue must pay each year's indebtedness and liability, and no indebtedness or liability incurred in one year shall be paid out of the income or revenue of any future year. The taxpayers of municipalities are thus protected against the improvident creation of inordinate debts, which may be charged against them and their property in ever-increasing volume from year to year." The court then points out that all creditors deal with a municipality with knowledge of this limitation of power and with knowledge of the fact that, if the yearly revenue is not sufficient, the creditor cannot recover against the city because the security or assets to which he may look for payment have been exhausted. It was held that the contract under consideration did not violate the provisions mentioned above; the theory of the ruling is stated as follows:

"When it is come to consider the contractual relations between the city and appellant, it is at once seen that the city cannot be liable in any one year for more than four thousand nine hundred dollars, an amount far within the revenue derived to the sewer fund; and, further, that it cannot become liable for this amount at all until faithful service rendered by the contractor each year. * * * We base our views upon the conviction that, at the time of entering into the contract, no debt or liability is created for the aggregate amount of the installments to be paid under the contract, but that the sole debt or liability created is that which arises from year to year in separate amounts as the work is performed."

After a full review of the authorities it was held that the contract was valid, operative, and binding upon the city.

In Smilie v. Fresno County, 112 Cal. 311, 44 P. 556, the county had entered into an installment contract for the building of a courthouse, payments to be made as work was completed, out of the revenues of two succeeding years. The revenue of neither year singly was sufficient to bear the total cost, but the payments falling due each year were within the income limit of that year. Upon the authority of the McBean Case, supra, it was held that, since each year's revenue was adequate to pay each year's indebtedness, the contract was not violative of the Constitution or charter.

Another leading case on the point is Doland v. Clark, 143 Cal. 176, 76 P. 958, 960. There the city of Sacramento entered into two contracts for the purpose of having installed a certain telegraph system for the use of the police and fire departments. Payments were to be made monthly covering a period of five years. Monthly payments were for the rent of the instruments for that month, the city being given the privilege of purchasing the system for a stipulated sum, the amount paid as rentals to be applied on the purchase price. It was contended that the contracts were void for the reason that the total rental for the five-year period exceeded any one year's income. The court held otherwise, stating:

"It was evidently the intention of the framers of the Constitution to make the income and revenue of each year pay the indebtedness and liabilities incurred during such year, and that the revenues and income of a subsequent year should not be applied to pay liabilities of a past fiscal year. In this case the contracts were made during the fiscal year ending June 30, 1900. It is evident that they did not create any liability at the time they were executed, except a contingent future liability. The language of the stipulation is that there were no funds at the time said alleged contracts were made and amended. At the time they were made, as amended, there was nothing due upon them, and there could not be, in the nature of things, any rent due until after the * * * fiscal year—July 1, 1900. * * * The monthly rental under both contracts was $690. This amount would not become due until the appellant had performed his contracts and put the systems contemplated by the contracts in operation. The amounts to become due on completion of the contracts by appellant might never become a liability upon the city. A sum payable upon a contingency is not a debt, nor does it become

a debt until the contingency happens. * * * There may be ample funds to pay the rental when it accrues, as provided in the contracts, if it ever should accrue."

From these cases, and others that might be cited, it appears that, before it will be held that a contract is violative of the constitutional or charter provisions under consideration, it must appear that, at the time the contract was entered into, the city became obligated to pay in that year more than its income for that year, and that an installment contract dependent upon services or materials to be furnished in the future does not violate the provisions mentioned, if the services or material furnished in any one year, for which a charge can be made, do not exceed the income and revenue for that year. In the case under discussion, it seems clear to us that the city and county of San Francisco has not exceeded its income or revenue for any one year by the purchase of individual parcels of land for a public purpose for a sum within the income and revenue of that year, even though it is the intent to ultimately acquire a large tract, the purchase price of which, in toto, would exceed the yearly income or revenue for any one year.

The above cases would be conclusive on the point were it not for a series of fairly recent cases which have, to an extent, limited the doctrine there enunciated. Three of these cases are sufficient to illustrate the nature of this limitation. They are Chester v. Carmichael, 187 Cal. 287, 201 P. 925, 928; City and County of San Francisco v. Boyle, 195 Cal. 426, 233 P. 965, 969; and Mahoney v. City and County of San Francisco, 201 Cal. 248, 257 P. 49.

In the Carmichael Case, supra, certain parties deeded to the city of Sacramento certain lands for park purposes, subject to certain conditions subsequent to the effect that the city must expend $5,000 in the improvement of the park, the total cost of such improvements to be about $50,000. Failure to expend the above sum was to result in a forfeiture of the city's interest. The project would materially benefit other lands of the grantors in the vicinity. It was held that, in effect, this was an attempt to purchase the property on the installment plan. The court pointed out that, although the city could not be compelled to spend the $5,000 each year, if they did not, the entire interest of the city would be forfeited. The grantors had completely fulfilled their part of the contract on the date of the conveyance. The city must either expend the money from its future revenues to complete the work, or lose the property, together with all moneys already expended. The court therefore held that a debt was created at the time the contract was entered into for all sums subsequently to be paid, and, therefore, the constitutional provision was violated.

The court thus distinguishes the McBean Case and the others cited, supra: "Here [the Carmichael Case] the full liability to the grantors was created upon the acceptance of the deed; the entire consideration therefor having been furnished. The cases cited [McBean Case, etc.] involved contracts for the furnishing to a city in the future of service, materials, etc., and it is held that no indebtedness or liability within the meaning of the constitutional provision is incurred until the furnishing of the service, materials, etc., the consideration for the payment to be made. The distinction is clear, and is recognized by many decisions. It is concisely stated in Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 20, 19 S. Ct. 77, 43 L. Ed. 341, as follows: 'In the one case the indebtedness is not created until the consideration has been furnished; in the other * * * the debt is created at once, the time of payment being only postponed.'"

In City and County of San Francisco v. Boyle, supra, the following situation was presented: The city and an exposition company entered into an agreement which the parties denominated a lease. By the terms of this agreement, the exposition company, as lessor, agreed to erect, on certain lands designated, an exposition building at a total cost of $1,200,000. The agreement further provided that the exposition company leased this building to the city for a period of seventeen years subject to certain conditions, one of which was the payment of the sum of $100,000 to the exposition company by the city. It was the appropriation of that $100,000 that was under consideration by the court. The agreement had certain other provisions necessary to an understanding of the case. A payment of $185,000 yearly by the city was to be made to the exposition company, and this payment was to be made yearly even though the building were not completed. The city agreed that, during the term of the agreement, it would include in each of its annual budgets such amount as was required by the lease. The city was given an option to purchase the property, the above payments to be applied on the purchase price. Also, all sums received by the city as rentals for the building were to go to the exposition company during the lease period and were to be applied upon the purchase price if the option to purchase was exercised by the city.

The court interpreted this agreement and held it was not a lease, even though so denominated, and held it was, in effect, an installment contract for the purchase of the land and building. The court said: "It also quite clearly appears that the so-called option on the part of the municipality to purchase the said property becomes in effect an increasing compulsion upon it to consummate such purchase, since not to do so would result in the irrevocable loss to the municipality, not

only of the primary and succeeding annual payments, which it is bound to make under this agreement, but also of the entire usufruct of the property during the period of its occupation."

The court then, following the Carmichael Case, supra, held that the agreement violated the constitutional provision.

Somewhat the same problem was presented for consideration in Mahoney v. City and County of San Francisco, supra (the so-called Spring Valley Case), where an alleged lease was under consideration. Under the terms of this "lease" large and undetermined sums had to be spent by the city in improvement and upkeep of the property. This "lease" likewise contained an option to purchase and a forfeiture clause.

The court properly found that the agreements were in fact not leases, but were, in effect, agreements to purchase the land on the installment plan. The court held that the doctrine of the Boyle and the Carmichael Cases, supra, was controlling, and that, therefore, the lease was void. At page 263 of 201 Cal., 257 P. 49, 56, the court used the following language:

"We do not understand that the force and effect of the constitutional restrictions may be avoided—however beneficial such an avoidance may appear to be to the municipality by permitting it to carry forward its plans—that expenditures may be incurred for improvements and for other public uses for which the municipality is liable, and which, though not definitely fixed or even estimated, will inevitably exceed the income and revenue provided for the fiscal year in which the contract is entered into, or any future year, because, perchance, the question of the ability of the municipality to meet its obligations is left in a state of doubt or uncertainty occasioned by the phraseology of the contract, or upon the theory that the possible occurrence of an event which in all probability will not happen may happen, or the possible failure of a condition which must from the logic of the situation be performed will not be performed. If this be the rule of construction, the restriction provisions of the Constitution and charter would become practically nullities, and there would be no opportunity for the taxpayers to be heard as to the incurring of indebtedness or liability that would become a charge upon the future income or revenue of municipal and public corporations."

The court at some length discusses the McBean and other cases cited supra, and distinguishes them substantially as was done in the Carmichael Case.

We have no hesitancy in holding that the doctrine of the Carmichael, Boyle, and Spring Valley Cases, supra, has no application to the state of facts here presented. In all three of the cases cited there was a direct or indirect obligation on the city to pay the total purchase price at the time the contract was entered into, even though the payments were to be made over a period of years. In the case at bar, each year the city purchases certain parcels of land, paying the full purchase price thereof. There is no obligation to buy any other land. The city owns the land purchased, absolutely, and has the complete usufruct thereof. No objection could be made to such a purchase, if it were not for the fact that it appears to be the intention of the city to purchase an entire tract over a period of years. Each year the city gets the full consideration for that year's expenditures. In the event they do not purchase the additional land, the amount invested in the other parcels is not lost, for the city retains the land which it has purchased. The distinguishing characteristic between the two lines of authority already considered is very concisely stated by the United States Supreme Court in Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 S. Ct. 77, 85, 43 L. Ed. 341, as follows: "In the one case the indebtedness is not created until the consideration has been furnished; in the other, the debt is created at once, the time of payment being only postponed."

[2] Respondent makes much of the fact that the voters defeated a bond project to purchase the entire tract at an election for that purpose. Respondent contends that this conclusively shows that the proposed park, in the opinion of the voters, was not necessary. It could, with equal logic, be contended that the voters were not in favor of a bond issue for the purchase of the park, but were in favor of the purchase of the site in the manner then being followed, that is, by yearly purchases out of revenue. In any event, we are not called upon to decide this point. The wisdom or political expediency of entering into such contracts has been left to the discretion of the municipality and may not be reviewed by the courts.

It is not necessary to pass upon the other questions presented by respondent. This proceeding is for a writ of mandate in reference to the payment of $125,550, duly appropriated and designated. What may or may not have happened in prior years, with reference to exceeding the budget allowance, is not now before us for decision.

It is ordered that a peremptory writ of mandate issue herein as prayed.

AMES et al. v. OCCIDENTAL LIFE INS. CO. et al.*

Sac. 4361.

Supreme Court of California.

May 1, 1930.

Rehearing Granted May 29, 1930.

1. Usury ⚷126.

Generally, plea of usury is personal to borrower.

2. Usury ⚷132.

Generally, plea of usury does not exist in favor of creditor claiming usury in transaction of his debtor with another creditor.

3. Usury ⚷132.

Grantors taking second deed of trust, by conduct *held* to have waived right to relief on plea of usury between grantee and lender taking first trust deed (Usury Act).

The conduct of grantors which constituted waiver of right to relief on plea of usury, under Usury Act (St. 1919, p. lxxxiii), consisted in taking a junior lien with knowledge of prior lien and with knowledge of alleged usury having waited more than period of limitations before instituting suit claiming usury, in foreclosing security with knowledge of facts and purchasing equity of redemption without a hint of usury, and, after senior claim had become due, in securing reduction in rate of interest thereon.

In Bank.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by E. I. Ames and another against the Occidental Life Insurance Company and another. Judgment for defendants, and plaintiffs appeal.

Affirmed.

E. Neal Ames, of Los Angeles, and Farnsworth, Burke & Maddox, of Visalia, for appellants.

Hurt & Howard and William A. Farner, all of Los Angeles, for respondents.

PRESTON, J.

Plaintiffs and appellants on July 1, 1924, exchanged real property with one Greenhaw and wife. Plaintiffs' property was clear. The Greenhaw property was incumbered. Plaintiffs, however, agreed that the Greenhaws might place a first deed of trust upon the property they were buying for $15,000, which was done. Plaintiffs took a second deed of trust on the property for $4,750, the balance due them on the exchange. The Greenhaws, so it is alleged, were to do certain things with the money so secured on the first deed of trust, in which respondent Title Company was named as trustee, respondent insurance company being the lender. The Greenhaws made one or two payments on account of interest, then defaulted, and later went through bankruptcy. Plaintiffs paid the interest called for on the loan for a time; later they secured a reduction in the rate of interest.

On the due date of the obligation, to wit, July 11, 1927, they entered into a new arrangement with respondent lender whereby a new period of forbearance was created to run for three years and the rate of interest was decreased, since which time plaintiffs have assumed the validity of the transaction and have impliedly, if not expressly, assumed payment of the obligation, having paid the interest according to said new arrangement, but having paid nothing as yet on the principal. Said extension will expire on July 11, 1930; hence this cause has been hurried to decision anent the approach of said day.

On January 28, 1929, plaintiffs brought the present action for legal and equitable relief, having for its object the purging of the transaction between the lender and the Greenhaws of its alleged usurious taint; also the recovery of all interest paid by them (plaintiffs) and praying that the amount be trebled. Prayer is also made for all equitable relief permitted in such case according to plaintiffs' interpretation of the so-called Usury Act (Stats. 1919, p. lxxxiii). Respondents demurred generally and specially to the complaint. The demurrers were sustained by the court below without leave to amend. Judgment passed for defendants, from which plaintiffs have prosecuted this appeal.

The claim of usury in the transaction resulting in the first deed of trust is based upon the following allegations: The note was for $15,000, with interest at 7½ per cent. per annum, which shows nothing objectionable on its face, but it is averred that in getting this loan respondent insurance company, to hide a usurious demand or bonus of some $4,500, in addition to the interest named in the note, required the borrowers to purchase an outside lot owned by it for $5,000, when in truth and in fact said lot was worth but $500. The lot appears as parcel No. 2 in the above-mentioned deeds of trust. It is further alleged that the Greenhaws knew that they were being charged a usurious rate of interest by this transaction, but plaintiffs, although they knew of the purchase of the lot, did not know, at the time of the taking of their deed of trust, the price at which it was held in the transaction.

Presumably at least, however, it must here be stated plaintiffs did know of the true facts soon thereafter, and continued to have such knowledge for more than four years next

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing granted. 291 P. 182.

prior to the beginning of this action. Plaintiffs, of course, also knew them at the time they paid the several items of interest and at the time they entered into said new arrangement with respondent lender for an extension of time and reduction of interest. Not only is this true, but in 1926 plaintiffs foreclosed their second deed of trust and became the purchasers of the property at the sale thereunder and were, at the time they instituted this action, the holders of the equitable title thereto, subject only to the said deed of trust held by respondent lender.

The question presented on the appeal is: May the plaintiffs, in the face of the foregoing facts, be heard to urge the existence and presence of usury in the transaction between the Greenhaws on the one hand and respondent insurance company on the other?

[1, 2] Plaintiffs assert that they recognize the general rule that the plea of usury is personal to the borrower. Matthews v. Ormerd, 140 Cal. 578, 74 P. 136; Esposti v. Rivers Bros. (Cal. Sup.) 279 P. 423; 27 R. C. L., p. 281, § 83. They admit also that as a rule the plea does not exist in favor of a creditor claiming usury in a transaction of his debtor with another creditor. 27 R. C. L., supra. But they allege that their claim comes within at least two exceptions to the above rule: First, that of junior incumbrancers; and, second, that of creditors complaining against an insolvent debtor. Respondents reply alleging laches, the three and four-year statutes of limitation, absence of right on the part of plaintiffs to assert the plea of usury, and, finally, the waiver of any such right, if in fact it theretofore existed. They also could make the claim that plaintiffs have not offered to do equity by tendering the principal or any other amount due respondents under the original transaction.

[3] For the purposes of disposition of this cause, we prefer to rest our conclusion upon the proposition that by their conduct plaintiffs waived any right to relief to any extent upon the plea of usury. This arises from a consideration in the aggregate of the facts. With knowledge of a prior lien of $15,000, they accepted a junior claim for $4,750. With knowledge of the alleged usury they waited more than the period of limitation before instituting suit. With knowledge of the facts, in 1926, some three years prior to suit, they foreclosed their security and purchased the equity of redemption at their own sale without a hint of usury in the first lien. With such knowledge, they also procured, after the debt fell due, a new term of forbearance for a period of three years, and impliedly, if not expressly, agreed to pay the debt, thereby securing a reduction in the rate of interest, and since that time they have paid according to said new arrangement the accruing interest charges. Now to grant at this time either the legal or equitable relief prayed for to plaintiffs is to allow them to play fast and loose concerning the previous usurious transaction, while holding the respondent lender to its contract, made to its detriment, upon the faith of plaintiffs' acknowledgment of the debt as genuine. The principle is akin to the rule governing waiver of fraud, where with knowledge thereof a party accepts favors from the perpetrator or commits other acts respecting the subject-matter inconsistent with his present claim of fraud.

The questions of the right of a junior incumbrancer or lien claimant to purge the senior transaction of its usury or the right of one creditor to claim the benefit of the Usury Act in a transaction between the debtor and another creditor, where the debtor is insolvent, we prefer to leave until an occasion arises where they are fairly involved.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; TYLER, Justice pro tem.; SEAWELL, J.; FINCH, Justice pro tem.

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209 Cal. 383

HOFFMAN v. DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF INDUSTRIAL ACCIDENTS AND SAFETY, et al. ★

S. F. 13510.

Supreme Court of California.

April 24, 1930.

Rehearing Denied May 22, 1930.

1. Master and servant ⟹387—Employer could not be held guilty of serious and willful misconduct for violating orders of Department of Industrial Relations, where there was no evidence he knew of orders (Workmen's Compensation Act, § 6, as amended).

Building contractor, whose employee was injured, could not be held guilty of serious and willful misconduct, making him liable for penalty under Workmen's Compensation Act, § 6 (St. 1917, p. 834, as amended by St. 1919, p. 912, and by St. 1923, p. 375), for violating certain safety orders issued by Department of Industrial Relations, where there was no evidence that he ever saw or heard of such orders.

2. Master and servant ⟹115(3)—Where two stories of building are erected, statute requiring temporary floors to protect workmen requires that temporary floors be laid (St. 1921, p. 452).

Where two stories of building have been erected, it then becomes necessary, under St.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied.

1921, p. 452, requiring temporary floors to protect workmen, to lay temporary floors.

3. Master and servant ⚷115(3)—Space which need not be covered with temporary floors to protect workmen constructing building is space for elevator shaft or similar space; "space required for the proper construction" (St. 1921, p. 452, § 1(b).

Phrase "except such space as may reasonably be required for the proper construction of such building," in St. 1921, p. 452, § 1 (b), requiring temporary floors to protect workmen constructing building applies to elevator shaft or similar space which is ordinarily kept clear and used from basement to roof as passageway for hoisting and lowering of materials.

4. Master and servant ⚷115(3)—Building contractor could not justify his violation of statute requiring temporary floors to protect workmen by showing ignorance of law (St. 1921, p. 452).

Building contractor could not justify his violation of St. 1921, p. 452, requiring temporary floors to protect workmen, by showing that he did not know existence of law.

5. Evidence ⚷65—Employer was presumed to know law requiring temporary floors to protect workmen constructing building (St. 1921, p. 452).

Employer was presumed to know law under St. 1921, p. 452, requiring temporary floors to protect workmen constructing building.

6. Master and servant ⚷405(6)—Evidence justified finding building contractor's acts violating statute requiring temporary floors to protect workmen constituted serious and willful misconduct, making him liable for penalty (St. 1921, p. 452, § 1(b); Workmen's Compensation Act, § 6, as amended, and § 31(b).

Evidence justified finding of Department of Industrial Relations that acts of building contractor, whose employee was injured when floor on which he was standing gave way, which floor violated St. 1921, p. 452, § 1 (b), requiring temporary floors to protect workmen by covering span exceeding thirteen feet with boards two inches thick not supported by intermediate brace and not laid tightly together, constituted serious and willful misconduct, making him liable for penalty under Workmen's Compensation Act, § 6, St. 1917, p. 834, as amended by St. 1919, p. 912, and by St. 1923, p. 375, and section 31(b) (St. 1917, p. 860).

RICHARDS, J., dissenting.

In Bank.

Proceeding under the Workmen's Compensation Act by Paul Broschinsky, claimant, for injuries, opposed by Leo Hoffman, employer. The Department of Industrial Relations, Division of Industrial Accidents and Safety, awarded compensation, and the employer applies for certiorari to review the award.

Affirmed.

Superseding opinion in 284 P. 451.

For opinion of District Court of Appeal, herewith adopted, see 276 P. 1060.

George D. Collins, Jr., of San Francisco, for petitioner.

G. C. Faulkner and Edward O. Allen, both of San Francisco, for respondent.

Herbert C. Kaufman, of San Francisco, for beneficiary.

F. W. Sawyer, of San Francisco, for Paul Broschinsky.

Daniel W. Burbank, of San Francisco, amicus curiæ.

WASTE, C. J.

The above cause was transferred to this court after decision by the District Court of Appeal, in order that further consideration might be given to the contention of the petitioner that the Industrial Accident Commission acted in excess of its jurisdiction in finding that the employer was guilty of "serious and willful misconduct," and in imposing the additional 50 per cent. compensation permitted by the Workmen's Compensation Act in such cases. Such further consideration convinces us that the award was proper, and that the decision of the District Court of Appeal correctly disposes of that question. The opinion of the District Court of Appeal, written by Mr. Justice Sturtevant, and concurred in by the late Mr. Presiding Justice Koford and by Mr. Justice Nourse, is therefore adopted as the opinion of this court in the cause:

This is a proceeding brought to review an award heretofore made by the respondents in a proceeding brought before the respondents by Paul Broschinsky in an endeavor to obtain the compensation payable to him as an employee because of injuries sustained by him in an accident which befell him when, in the course of his employment, the floor on which he was standing gave way and he fell to the ground below. Through an abundance of precaution, he named as defendants Leo Hoffman and his insurance carrier, the Metropolitan Casualty Company, and he also named Charles S. Hoffman and Ludwig W. Fleigner, doing business as Golden Gate Iron Works, and their insurance carrier, the State Compensation Insurance Fund. This multiplicity of defendants arose because of the debatable question whether Leo Hoffman was but the agent of Golden Gate Iron Works and the latter was, in truth and in fact, applicant's employer, or whether Leo Hoffman was an independent contractor and the applicant was

his employee. The respondents adopted the latter theory, and dismissed all defendants except Leo Hoffman and his carrier.

The case then proceeded against the remaining defendants. That Leo Hoffman, as employer, and Metropolitan Casualty Company, as his carrier, were liable to the applicant, was not disputed. But the respondents held that the employer was guilty of "serious and willful misconduct," and that the compensation payable should be increased 50 per cent. It also held that the employer's carrier was liable for the sums based on section 9 of the Workmen's Compensation Act (St. 1917, p. 836, as amended by St. 1919, p. 913, and St. 1925, p. 640), but that the penalty of 50 per cent. added under section 6 of said act (St. 1917, p. 834, as amended St. 1919, p. 912, and St. 1923, p. 375) should be borne solely by the employer. They made this segregation of liability in conformity with the statute. Sections 6 and 31b (St. 1917, p. 860). The employer has filed in this court his petition praying to have annulled that portion of the award so made against him, claiming that he was not guilty of "serious and willful misconduct," and, as he carried insurance, the burden should rest on his carrier and that he should have been dismissed. The accident occurred while the applicant was acting as helper in the erection of a steel-frame apartment house at Palo Alto, Cal. The Golden Gate Iron Works had the contract to furnish the material and erect the frame. Leo Hoffman had the contract to do the erecting for the Golden Gate Iron Works. The building being erected was one consisting of five stories and a roof. It had no excavation under it, but commenced at the ground level. Immediately before the accident happened the work had progressed to a point where the first and second stories had been erected, a temporary plank floor had been laid over the beams, and columns for the third story had been assembled on the temporary floor and the workmen were engaged in distributing those columns in piles for the purpose of putting the columns in place. In some places the span between the beams was over 13 feet. At the particular place where the accident occurred the span from center to center was 15 feet 2 inches. Through a mutual arrangement between Leo Hoffman and the general contractor, the wooden floor joists, consisting of pine boards 16 feet long, 12 inches wide and 2 inches thick, were delivered on the job by trucks, and Leo Hoffman had the privilege of hoisting the planks and distributing them on any floor and using them as temporary flooring. In accordance with this arrangement, his employees had, the day before the accident, hoisted and distributed the planking, and in this manner had constructed the temporary floor. Neither at the span where the accident occurred nor in any other span, so far as the record discloses, was an intermediate beam or other device used to support the temporary flooring. The employer testified that to insert an intermediate beam of wood might necessitate the use of a saw, but that there was no saw on the job, and he had never seen a saw on an erecting job. As to whether the planks were laid close together there was much dispute. In this regard the evidence is clear to the effect that the columns projected somewhat above the beams of the floor, and bolts projected from the columns and beams in places. Because of these two facts, no floor was laid from one column to the opposite column on any given string of columns, and the planking alongside of the columns was distant, according to the evidence, from 1½ inches to 3 inches, thus leaving a space of possibly 16 inches instead of 12 inches in the event that a plank should break.

Paul Broschinsky went to work on the day of the accident. During that day the men were engaged in distributing the columns for the third story. At about 3 o'clock in the afternoon, while so engaged, Paul Broschinsky and another fellow laborer, J. Jensen, both happened to step on the same plank at the same time. As they did so the plank broke. Jensen succeeded in catching hold of a support and did not fall to the ground. However, Paul Broschinsky was not so fortunate, and he fell to the ground, suffering the injuries which are the subject-matter of this claim. An examination of the broken plank disclosed that it was a piece of timber sawed from immediately adjacent to a knot, and the board so produced was apparently clear on one side, but it had the rings of a knot on the other side. This board had been placed on the temporary floor knot side down. Evidence was introduced that from time to time the respondents had issued certain safety orders, and that those orders had been posted on some of the buildings which were being erected by Golden Gate Iron Works. There is no evidence that this petitioner, Leo Hoffman, was engaged on any one of said buildings, nor that he ever saw or heard of the orders or the contents thereof. There is no claim that any one of the orders was posted on the building on which this accident arose. There was evidence that on a date three or four months prior to the accident, while erecting another building, one of the agents of the respondents had occasion to bring to the attention of Leo Hoffman that he was violating chapter 334 of the Statutes of 1921, p. 452; that is, the particular statute other provisions of which are involved in this application.

[1] The petitioner claims that it may not be said that he was guilty of "serious and willful misconduct" because he violated certain safety orders issued by the respondents. That claim, we think, is well founded. As we have shown above, there is no evidence that

he ever saw or heard of such orders. He did not willfully violate an order which, so far as the record shows, he had never seen nor heard of.

[2, 3] As to chapter 334, Statutes 1921, p. 452, the petitioner claims he did not violate any of its provisions. This claim is based on the fact that no column of the third story had been erected at the time of the accident, and therefore the duty to lay temporary floors had not arisen. This point involves a construction of the statute. It is not necessary to quote the entire statute. It is not claimed that the statute applies to a building of one or two stories. It is not claimed that the statute applies to a higher building at any instant of time before the second story has been erected. But after that instant it then becomes necessary to lay a temporary floor. This is so for two reasons: The clear purport of the statute is to create a device, not for the absolute prevention of accidents, but for lessening the injury to the human body that may fall, and lessening the effect of falling missiles which may fall and hit a human body. The statute by its terms seeks to limit those falls to two stories. Two stories having been erected, it then becomes necessary to lay temporary floors. The floors having been laid, the next act is to assemble on that floor the columns to be incorporated into the next story. Although no one of those columns has been erected, the matter of arranging for the erection of them and for the assembling of them creates a potential danger which the statute is aimed to protect against just as effectively as against acts done in the actual erection of one or more of them. There is only one exception as to the zone which need be covered with a temporary floor—"except such space as may reasonably be required for the proper construction of such building." Section 1, subd. (b), c. 334, Stats. 1921, p. 452. That expression, we understand, applies to the elevator shaft or similar space which is ordinarily kept clear and used, from the basement to the roof, as a passageway for hoisting and lowering of materials. But such space, so excepted, is not involved in this case.

From the facts which we have hereinabove enumerated, we think it is clear that there was evidence that the building on which the accident occurred, and the stage to which the erection had progressed, came within the provisions of chapter 334, Statutes 1921, p. 452; and we also think it is clear that there was evidence that this petitioner had violated the provisions of said act by covering a span exceeding 13 feet with boards which were only 2 inches thick, and which were not supported by an intermediate brace, and which were not laid tightly together. Chapter 334, Stats. 1921, § 1, subd. (b).

[4] In the next place, he claims that he was not guilty of "serious and wilful misconduct" even though he violated the provisions of chapter 334 of the Statutes of 1921, p. 452. He rests that claim on several different contentions. He claims that he did not know of the contents, and that nobody called the contents of said statute to his attention. However, as we have shown, the contents of the statute were called to his attention. Furthermore, "in neither a criminal nor civil cause, in any circumstances, can one justify his act by the naked showing that he did not know of the existence of the law." 10 Cal. Jur. 760, § 72.

[5, 6] He then asserts that, even though he violated the statute, that mere violation of the statute is not "serious and wilful misconduct." He quotes from Helme v. Great Western Milling Co., 43 Cal. App. 416, page 421, 185 P. 510, 512, as follows: "'Wilful misconduct' means something different from and more than negligence, however gross. The term 'serious and wilful misconduct' is described by the supreme court of Massachusetts as being something 'much more than mere negligence, or even gross or culpable negligence,' and as involving 'conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its possible consequences.' (In re Burns, 218 Mass. 8 [Ann. Cas. 1916A, 787, 105 N. E. 601].) The mere failure to perform a statutory duty is not, alone, wilful misconduct. It amounts only to simple negligence. To constitute 'wilful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury." He also cites and quotes from E. Clemens Horst Co. v. Industrial Acc. Comm., 184 Cal. 180, 188, 189, 193 P. 105, 108 (16 A. L. R. 611) as follows: "'Serious misconduct' of an employer must, therefore, be taken to mean conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees. * * * Next, as to whether such serious misconduct was 'wilful.' It has frequently been said that wilful misconduct involves the knowledge of the person that the thing which he is doing is wrong. [Citing cases.] Conceding that knowledge is required, it seems to us that in order to prove the requisite knowledge, it is not necessary for the evidence to show positively that the person was notified of the unsafe condition of his premises, but that it is sufficient if it appears that the circumstances surrounding the act of commission or omission are such as

'evince a reckless disregard for the safety of others and a willingness to inflict the injury complained of.' "

With the rule of law as stated by the petitioner, we fully agree. However, we think that the facts of this case bring it within, rather than exclude it from, the rule quoted. It will be conceded that the violation of one statute may be far more serious than the violation of another statute, and that the violation of the same statute under one set of facts may not be serious, whereas under a different set of facts it will be quite serious indeed. When, as here, men are at work at high elevations standing on narrow beams or temporary floors, if an accident happens, the possibilities of danger are many, and the probability is strong that, if injury occurs, it will be deplorable. It is therefore plain that the violation of the provisions of chapter 334, Statutes 1921, under the facts of this case, could be said to be "serious misconduct." The employer was presumed to know the law. 10 Cal. Jur. 760. Moreover, there was some evidence that he actually did know it. There was evidence that some of the spans were more than 13 feet, and over which the law required that the temporary floors be laid; that under those long spans it was necessary to insert an intermediate brace; that, to lay the boards tightly together between the columns as well as over the rest of the floor, the planks must be cut to set in between columns; and that they must be supported from below so as to fill the gaps and avoid the protruding nuts and bolts; and that to do these things the employer knew that the crew needed, but that it did not have and never had had, a saw. As the crew had no saw, the employer knew that it could not lay the temporary floors in compliance with the law, and that any failure to do so was fraught with danger to the life and limb of every member of the crew. These facts the petitioner did not attempt to deny, but he attempted to justify his noncompliance with the terms of the statute by making a showing as to what others did and a showing of the inconvenience of a full compliance. In view of these facts, we have no hesitancy in saying that there was evidence before the respondents from which they had the right to say that, in the instant case, there was on the part of the petitioner "the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences." In re Burns' Case, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787. It follows that the finding that the acts of the employer constituted "serious and wilful misconduct" was not in excess of jurisdiction.

The award is affirmed.

We concur: PRESTON, J.; SEAWELL, J.; CURTIS, J.; SHENK, J.

RICHARDS, J.

I dissent.

The facts of this case are fairly stated in the majority opinion herein, with the exception that there should be added thereto and emphasized the facts that the undisputed evidence before the commission disclosed that the defect and consequent weakness of the particular piece of planking which broke under the combined weight of the petitioner's employees was not known either to himself or to them, and that this was due to the circumstances that such defect was only and not easily observable upon the underside of said piece of planking, and that, so far as the upper side thereof disclosed, it was apparently as sound as the other pieces of plank which composed such temporary flooring. The further fact should be noted that the petitioner herein did not personally direct the laying of such flooring, nor personally participate therein, and that whatever "serious and wilful misconduct" is to be attributed to him by reason thereof was, in so far as the evidence herein disclosed, the "serious and wilful misconduct," if any, of his employees. His only noncompliance with the provisions of the act of 1921, upon the basis of which the respondents herein can sustain the charge of serious and willful misconduct on the part of the petitioner, consisted in the fact that he caused or permitted such flooring to be laid over portions of the space to be covered thereby wherein the distance between the beams which were to support said flooring was in excess of thirteen feet without an intermediate beam sufficient to support such temporary flooring where the span was in excess of thirteen feet. It may not be questioned that the omission of the petitioner to support this particular part of said flooring with an intermediate beam would have been such an act of negligence upon his part as would have amply sufficed to sustain the finding of the Commission with respect to a compensatory award, but whether or not such omission would in and of itself be sufficient to justify a finding that the petitioner was thereby guilty of such serious and willful misconduct as would support the added award of the penalty complained of is the question to be decided. This court has had occasion in certain earlier cases to discuss and define the meaning of the phrase "serious and wilful misconduct" as the same is used in the provisions of the Workmen's Compensation Act here under review. In the case of E. Clemens Horst Co. v. Industrial Acc. Comm., 184 Cal. 180, 188, 193 P. 105, 108, 16 A. L. R. 611, this court in undertaking to define these terms adopted the view expressed by Bevin in his treatise on "Workmen's Compensation" at pages 394 et seq., to the effect that " 'to constitute "serious misconduct," it is probable that the Legislature intended to signify conduct that an average workman in being guilty of either would

know, or ought to know, if he turned his mind to consider the matter, to be conduct likely to jeopardize his own and his fellow workman's safety.' In our opinion [says this court], the serious misconduct of an employer under our statute may be similarly defined. There should be no difference in principle between the degree of care required of an employer and that exacted from an employee. 'Serious misconduct' of an employer must therefore be taken to mean conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees." The court in that case, having found that the employer in providing places and conditions of the employment which were patently unsafe was guilty of "serious misconduct," proceeded to discuss the question as to whether such serious misconduct was "wilful," and in so doing the court said: "It has frequently been said that willful misconduct involves the knowledge of the person that the thing which he is doing is wrong. [Citing cases.] Conceding that knowledge is required, it seems to us that in order to prove the requisite knowledge, it is not necessary for the evidence to show positively that the person was notified of the unsafe condition of his premises, but that it is sufficient if it appears that the circumstances surrounding the act of commission or omission are such as *'evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of.'*" In Helme v. Great Western Milling Co., 43 Cal. App. 416, 421, 185 P. 510, 512, it is said: "'Willful misconduct' means something different from and more than negligence, however gross. The term 'serious and willful misconduct' is described by the Supreme Judicial Court of Massachusetts as being something 'much more than mere negligence, or even gross or culpable negligence,' and as involving 'conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences.' In re Burns, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787. The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. Smith v. Central, etc., Ry. Co., 165 Ala. 407, 51 So. 792." In denying a rehearing in the above case this court reserved its opinion on the question as to "whether every failure to comply with a requirement of the Industrial Accident Commission or the statute is necessarily gross negligence or wilful misconduct. On these questions we reserve expression of opinion." Upon a maturer consideration of this question, I am satisfied that the foregoing quotation from the case of Helme v. Great Western Milling Co., supra, furnishes a correct interpretation of the meaning to be given to the terms "serious and wilful misconduct," as the same are used in the Workmen's Compensation Law. The question as to whether the acts or omissions of the employer in violation of the requirements of the Workmen's Compensation Act constitute serious and willful misconduct depends upon the circumstances of each particular case. In that connection it may be stated as a sound principle to be applied to penal provisions of the nature here under review that such provisions are to be strictly construed and are not to be given application so as to impose penalties upon employers who are otherwise subject to the compensatory remedies provided for in the Workmen's Compensation Act, without a clear showing before the commission of such acts and conduct on the employer's part as evince not only actual knowledge of the law, but such an intentional disobedience thereof as would amount to a reckless disregard of the safety of his employees. I am unable to find in the facts of this particular case such a sufficient showing of willful and intentional disregard of the safety of his employees as would suffice to justify the findings and conclusion of the commission that the petitioner was guilty of such serious and willful misconduct as to bring him within the penalty prescribed by the Workmen's Compensation Act and imposed upon him in this particular case. The award of the Commission, in so far as it undertakes to impose such penalty, should therefore, have been annulled.

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209 Cal. 435

BARBEE v. APPELLATE DEPARTMENT OF SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 12326.

Supreme Court of California.

May 5, 1930.

Mandamus ⚷3(11), 4(1).

Remedy of unsuccessful litigant in District Court of Appeal is petition for rehearing or for hearing in Supreme Court, and not mandamus.

In Bank.

Petition by Stella Barbee for mandamus to be directed to the Appellate Department of the Superior Court of the State of California in and for Los Angeles County and

Victor R. McLucas and others, Judges thereof.

Petition denied.

A. Brigham Rose, of Los Angeles, for petitioner.

PER CURIAM.

The petition for an alternative writ of mandate is denied, on the ground that the remedy of the petitioner is a petition for a rehearing before the District Court of Appeal and a petition for hearing in this court in the event of denial of such petition for rehearing.

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105 Cal. App. 408

MILBURN v. KENNEDY et al.

Civ. 4061.

District Court of Appeal, Third District, California.

April 28, 1930.

Appeal and error ⟹102.

Order sustaining demurrer to complaint *held* not appealable (Code Civ. Proc. §§ 956, 963).

Such an order can be considered on appeal only if judgment is entered and appeal is taken from the judgment under the provisions of Code Civ. Proc. §§ 956, 963.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by T. L. Milburn against Frank D. Kennedy and another. From an order sustaining a demurrer to the complaint, plaintiff appeals.

Appeal dismissed.

Raymond F. Body, of Los Angeles, for appellant.

R. L. Carlisle, of Los Angeles, for respondents.

PLUMMER, J.

The plaintiff instituted this action to recover the sum of $3,230 alleged to be due from the defendants as broker's commissions. The defendants' demurrer to the plaintiff's complaint was sustained, without leave to amend. From the order sustaining the defendants' demurrer, the plaintiff has taken this appeal. The notice of appeal is in the following words, omitting the title:

"You, and each of you, will please take notice that the plaintiff, T. L. Milburn, hereby appeals from the order made on the 24th day of March, 1927, sustaining the defendants' demurrer to plaintiff's complaint without leave to plaintiff to amend his said complaint." No judgment appears to have been entered in favor of the defendants following the entry of the order just referred to.

A reference to section 963 of the Code of Civil Procedure shows that no appeal lies from an order sustaining a demurrer. Had a judgment been entered and appealed from, then under the provisions of section 956, Code of Civil Procedure, the order of the court sustaining the defendants' demurrer could have been considered.

The plaintiff having attempted an appeal from a nonappealable order, it follows that this court has no jurisdiction, and the merits of the case as argued by counsel need not be considered.

The appeal is dismissed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

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105 Cal. App. 471

CALIFORNIA LINOLEUM & SHADES SUPPLIES, Inc., v. SCHULTZ.

Civ. 6868.

District Court of Appeal, Second District, Division 2, California.

May 3, 1930.

1. Corporations ⟹182.

Stockholder has no vendible interest in and cannot transfer good will of business of corporation.

2. Contracts ⟹202(2).

Contracts in restraint of trade are not favored.

3. Injunction ⟹61(2).

Where copartnership incorporated and later corporation sold good will and agreed not to engage in similar business, copartner, who signed agreement as corporation's president, could not be restrained from engaging in similar business.

4. Injunction ⟹121.

Facts pleaded in action to restrain president of corporation, signing agreement, from engaging in similar business, *held* to show that complaint could not be amended to state action against president individually.

Facts pleaded showed that a copartnership consisting of three members incorporated, and that one partner became president of the corporation and in his capaci-

ty as president signed agreement whereby the corporation sold its business and good will and agreed not to engage in business in competition with the purchaser, but the agreement did not purport to bind the president individually.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by California Linoleum & Shades Supplies, Incorporated, against Gus Schultz. Judgment for defendant, and plaintiff appeals.

Affirmed.

Lorrin Andrews, of Los Angeles, for appellant.

James M. Gammon, of Los Angeles, for respondent.

NORTON, Justice pro tem.

This is an appeal from a judgment entered in favor of defendant after an order sustaining a demurrer to plaintiff's complaint without leave to amend. The demurrer was upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

The complaint discloses that the gist of plaintiff's cause of action arises out of a state of facts which, succinctly stated, is as follows: That plaintiff and appellant is a corporation engaged in the business of manufacturing window shades, awnings, and linoleums in Los Angeles county; that the California Window Shades Company was a corporation located in the same county and engaged prior to the sale thereof to plaintiff in a similar business as that of plaintiff; that prior to the incorporation of the California Window Shade Company the business in which it was engaged was conducted by the defendant and two other individuals as a copartnership; that the California Window Shade Company sold its business and the good will thereof to the plaintiff and appellant and agreed in the contract of sale that it would not engage in the same business in the county of Los Angeles as long as plaintiff was engaged in said business.

The plaintiff further alleged in his complaint that the partnership referred to herein incorporated the California Window Shade Company and transferred their business to it merely for the purpose of more conveniently handling it, and "that while it was in form a corporation, yet in truth and in fact it was a copartnership." The issued capital stock was issued to the three copartners in equal shares and they constituted the board of directors of the corporation.

The complaint seems to proceed upon the theory that the copartnership continued to exist after the formation of the corporation and that the sale of the good will and the business formerly conducted by the partnership by the California Window Shade Company was in fact a sale of the partnership interest. However, there are no facts alleged supporting such an inference. From the facts alleged it appears that after the corporation was formed, the copartnership was absorbed by it and its business carried on and conducted by it; that its stock was issued and officers elected, the defendant being the president and Van Stigt, one of the copartners, secretary thereof; that the contract of sale of the business and good will purchased by plaintiff was executed by it and that plaintiff dealt with it as a corporation.

The defendant was not a party to the contract of the selling corporation with the plaintiff. He signed the contract of sale in his representative capacity only as president of the California Window Shade Company, and that contract did not, by its terms or otherwise, purport to bind defendant not to engage in business again in competition with plaintiff nor to bind any person except the selling corporation.

[1] It is well settled in this state that a stockholder has no vendible interest in the good will of the business of the corporation and cannot transfer such good will, and if he attempts to enter into such an agreement it is void as being not within the statutory exception, and therefore in restraint of trade. Merchants' Ad-Sign Co. v. Sterling, 124 Cal. 429, 57 P. 468, 46 L. R. A. 142, 71 Am. St. Rep. 94. However, appellant seeks to avoid this established rule and alleges that the corporation form was in this case a mere convenience through which the stockholders thereof conducted a copartnership business, asserting that equity will, in such case, where necessary to circumvent fraud, protect the rights of third persons, disregard the corporate entity and deal with it as identical with its stockholders. In a proper case a court of equity will, as maintained by appellant, sweep aside the corporate fiction in order to forestall fraud and accomplish justice, but the facts pleaded by appellant in his complaint present no such case and would not justify such a view, and the facts pleaded show that there exists no basis for the assumption that the copartnership relation was continued after the formation of the selling corporation and that appellant dealt with the vendor as a copartnership, and, as stated before, the contract was with the corporation only and purported to bind it alone. The defendant signed it in his capacity as president of the corporation and it did not bind him personally. Lynch v. McDonald, 155 Cal. 704, 102 P. 918.

[2] Contracts in restraint of trade are not favored in law beyond the extent to which they are authorized by statute and then the scope is not to be extended by a construction which imports into them a meaning which cannot be found in the language of the con-

tract. Joerger v. Pacific Gas & Elec. Co. (Cal. Sup.) 276 P. 1017; Payne v. Comm. National Bank, 177 Cal. 68, 169 P. 1007, L. R. A. 1918C, 328.

[3, 4] In this case the court cannot read into the contract an agreement that defendant should not engage in a similar business to that which the selling corporation sold to plaintiff, for there is no language in the contract permitting such a construction and it does not appear from the contract that it was so contemplated. The legitimate aim and object of the contract as disclosed by its language has not been defeated or violated by the defendant engaging in a similar business as plaintiff, and the court will not disregard the corporate entity as suggested by plaintiff to accomplish a purpose which the agreement does not show to have been within the intention of the parties. It appears from the facts pleaded that the complaint cannot be amended to state a cause of action.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

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105 Cal. App. 496

MAGGI v. POMPA.★

Civ. 6986.

District Court of Appeal, First District, Division 2, California.

May 5, 1930.

Rehearing Denied June 4, 1930. Hearing Denied by Supreme Court July 3, 1930.

1. Master and servant ⟹301(3).

Person paying special police officer is not responsible for officer's acts while carrying out official duties.

2. Evidence ⟹83(2).

In action against employer for wrongful act of special police officer, it was presumed officer's acts were performed in line of public duty.

3. Municipal corporations ⟹189(3).

Special patrol officer who collected and paid salary to special policeman *held* not liable for injuries negligently inflicted by policeman while acting in line of public duties.

The special policeman was appointed by the police commissioners of San Francisco under San Francisco Charter, art. 8, c. 3, § 1, which gives the board power at its discretion to appoint, and at pleasure to remove, special police officers, and makes it the duty of every patrol special to see that peace is kept and to prevent violation of the law. While patrolling his beat, the officer attempted to make an arrest for disturbing the peace, and in doing so fired shot which struck plaintiff, who was an innocent bystander.

4. Master and servant ⟹330(3).

Evidence, in action for injuries inflicted by policeman, *held* insufficient to show defendant, paying special policeman's salary, directed him in making arrest.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by John N. Maggi against Peter Pompa. Judgment for plaintiff, and defendant appeals.

Reversed.

Hearing denied by Supreme Court; SEAWELL, J., voting for a transfer.

James F. Brennan, of San Francisco, J. J. McMahon, of Los Angeles, and P. J. Murphy, of San Francisco, for appellant.

Daniel A. Ryan, Thomas C. Ryan, James R. Loofbourow, and George F. Snyder, all of San Francisco, for respondent.

NOURSE, P. J.

Plaintiff sued for damages for injuries inflicted upon him by the defendant Cesena, a special police officer. The cause was tried before a jury, and resulted in a verdict for $15,000 in favor of plaintiff. Defendant Pompa appeals upon typewritten transcripts.

At the request of one Tony Pompa, the defendant Cesena was appointed a special police officer by the police commissioners of the city and county of San Francisco on November 13, 1923, and was assigned to beat No. 97. Prior to his appointment, Cesena was examined and recommended to the police commissioners by Capt. Layne, a captain in the regular police force assigned to the special duty of the supervision of patrol specials of the city and county. On December 10, 1923, the defendant Peter Pompa was appointed a patrol special. These special officers received their entire compensation from the property owners of the territory which they patroled, but in this instance the defendant Pompa assumed the burden of collecting from the property owners, and from these collections paid to Cesena a regular monthly salary of $125.

On the evening of October 31, 1925, while patrolling the beat assigned to him, Cesena attempted to place under arrest one Semenza on a charge of disturbing the peace. Semenza resisted arrest, a fight ensued, during which Cesena drew his gun and shot at Semenza. Semenza ran, and Cesena took two other shots at him, one of which struck the plaintiff, who was an innocent bystander, causing the injuries which are the subject of the complaint.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes
★Rehearing denied. Hearing denied by Supreme Court.

[1] On this appeal respondent's whole case rests upon the doctrine of respondeat superior. If the full relation of master and servant existed between Cesena and appellant at the time of the occurrence, then the appellant would be liable to the respondent for the injuries sustained by him, because it is conceded that in attempting to make an arrest for a mere misdemeanor Cesena was not authorized to shoot at the offender, and his act in so doing was therefore negligent. The precise relation of the parties is this: Both the appellant and Cesena were employees of the property owners for the special purpose of protecting their property, and both were quasi public officials charged with the duty of maintaining law and order under the rules of the board of police commissioners.

The question of the liability for the wrongful acts of those who occupy this dual relationship of special police officers commissioned by public officials has brought about a wide difference of opinion in the authorities. One line of cases holds that there can be no recovery against one who has procured the appointment of such a police officer and who pays him for his services, while the other line holds directly contrary. There seems to be, however, an agreement of the authorities that such officers are deemed to be prima facie public officers for whose wrongful acts the "employer" is not responsible, unless it is shown that the latter has directed the acts causing the injury or has personally co-operated therein. 18 R. C. L., p. 786.

The rule in this state is given in Redgate v. Southern Pacific Co., 24 Cal. App. 573, 581, 141 P. 1191, 1194, where it is said: "It has been frequently held, under statutes similar to the above quoted, that special officers appointed thereunder derive all their powers from the appointment made by the civil authorities, here by the Governor of the state. The authority to make arrests, with which plaintiff was clothed, was in terms given by the statute and in no sense can be said to arise from the relation of master and servant, or principal and agent, existing between the special officer and the company at whose application he was commissioned; and the fact that he is 'to serve at the expense of such company' does not affect his status as that of a police officer. The rule of respondeat superior has no application where there is no evidence tending to show that the company was instrumental in causing the arrest or subsequent prosecution. The foregoing views are fully supported by the following cases, cited by appellant: Adler v. White City Construction Co., 147 Ill. App. 20; Samuel v. Wanamaker, 107 App. Div. 433, 95 N. Y. S. 270; Hershey v. O'Neill (C. C.) 36 F. 168, under the New York statute; Wells v. Washington Market Co., 19 App. D. C. [8 Mackey] 385; Tolchester Beach Imp. Co. [of Kent County] v. Steinmeier, 72 Md. 313, 8 L. R. A. 846, 20 A. 188." The same principle is carried through the cases relating to the responsibility of a public officer, such as officers of the regular police force, for the acts or omissions of subordinate members of the same force. Thus in Michel v. Smith, 188 Cal. 199, 201, 205 P. 113, 114, the Supreme Court, in holding that a sergeant of police was not responsible for the negligence of a member of his squad, said: "A public officer is not responsible for the acts or omissions of subordinates properly employed by or under him, if such subordinates are not in his private service, but are themselves servants of the government, unless he has directed such acts to be done, or has personally co-operated therein. 23 Am. & Eng. Ency. of Law, 382; Story on Agency, 319; Robertson v. Sichel, 127 U. S. 507-515, 32 L. Ed. 203, 8 S. Ct. 1286. See, also, note to 12 Ann. Cas. 184."

In passing it is interesting to note that the court drew the distinction between "employments" of this nature and the relation of a sheriff or constable to his deputies, saying: "The deputy is not the agent or servant of the sheriff but is his representative, and the sheriff is liable for his acts as if they had been done by himself." And so it was held that neither the chief of the police department nor the sergeant who had direct control over the patrolman who committed the acts complained of was responsible in damages for these acts, "unless it can be shown that he has directed such acts or personally co-operated therein." Page 203 of 188 Cal., 205 P. 113, 115.

In harmony with the rule of the Redgate Case we find the text in 39 C. J. p. 1273, § 1461, which reads: "Unless it is otherwise provided by statute, a private person or corporation is not responsible for the acts of a special police officer, appointed by public authority, but employed and paid by the private person or corporation, when the act complained of was performed in carrying out his duty as a public officer." In support of the text many cases are cited, and then the writer follows with a statement of the contrary rule, to which he cites an equal number of cases. Thus the California rule is followed in Healey v. Lothrop, 171 Mass. 263, 50 N. E. 540; Buman v. Michigan Central R. Co., 168 Mich. 651, 134 N. W. 972, Ann. Cas. 1913D, 107; Pennsylvania R. Co. v. Kelly (C. C. A.) 177 F. 189, 30 L. R. A. (N. S.) 481; New York, etc., R. Co. v. Fieback, 87 Ohio St. 254, 100 N. E. 889, 43 L. R. A. (N. S.) 1164.

The application of the foregoing rule to the case at hand seems plain. The status of special police officers appointed by the police commissioners is fixed by the San Francisco Charter, article 8, chapter 3, section 1, which

provides that the board of police commissioners shall have power "4. At its discretion, upon the petition of any person, firm or corporation, to appoint, and at pleasure to remove, special police officers. Such officers shall be subject to all the rules and regulations of the board." The rules and regulations of the police department relating to special police officers were received in evidence. They divide such special officers into two classes—those appointed to regular beats were designated as "patrol specials," all others were known as "special officers." The defendant Cesena came under the designation of patrol special, and as such was subject to rule 4, which reads in part that it shall be the duty of every patrol special to see that the peace is kept, and to prevent violation of the law "they shall make arrests when the occasion requires and must see that their prisoners are at once taken to the nearest police station or jail." Rule 6 provides that in cases of emergency all such officers shall be subject to be called upon by the board to perform such duties as may be assigned to them by the proper police authorities.

[2, 3] It is apparent from these provisions of the charter and of the rules of the board of police commissioners that the defendant Cesena was a public officer, appointed by public authority, and that the appellant herein had no power either to employ or to discharge him, and had no power to control or to direct him in the performance of his duties as such patrol officer. Such being the case, the defendants were entitled to the instruction which they requested, reading: "I instruct you that special police officers, publicly commissioned, are deemed prima facie public officers, for whose wrongful acts the employer is not liable," because, when it appeared that Cesena was a public officer, his codefendant was entitled to the presumption that the acts done by Cesena were in the line of his public duty, and the burden was then upon the respondent to rebut this presumption. This principle is stated in 39 C. J. p. 1356: "Where an officer is commissioned at the request of a corporation to guard its property and is paid by it, acts done by him will be presumed to have been performed in his capacity as officer in the absence of evidence to show the contrary." In support of the text are Roll v. Springfield Consol. R. Co., 225 Ill. App. 411; New York R. R. Co. v. Fieback, 87 Ohio St. 254, 100 N. E. 889, 43 L. R. A. (N. S.) 1164. The prejudice suffered by the appellant in the refusal to give the foregoing instruction was emphasized by the modification of the first instruction requested by the appellant. In this instruction the appellant requested, and the court instructed the jury, in the language of rule 4 of the board of police commissioners, that it was the duty of the patrol special to see that the peace was kept and to prevent violation of the law; to make themselves familiar with the provisions of the Penal Code, the rules of the board of police commissioners and the orders of the board of supervisors and the board of health; to make arrests when occasion arises, and see that the prisoners are taken to the nearest police station or jail. The court, however, struck from the requested instruction the following language: "I instruct you if you find that defendant Cesena committed the acts referred to in plaintiff's complaint while complying with either one or more of the mandates of the above rules, then his acts were those of a police officer and no liability, therefore, can attach to defendant Pompa and your verdict must be in defendant Pompa's favor." If we are correct in accepting the Redgate Case as determining the rule in this state, then it necessarily follows that the appellant was not liable for any injuries to respondent arising from the acts of Cesena which were committed while the latter was complying with the rules and regulations of the board of police commissioners, and, as this was unquestionably the theory upon which the appellant defended against that liability, he was entitled to have that theory submitted to the jury under proper instructions.

Bearing in mind the presumption that the acts of the special officer will be presumed to have been performed in his capacity as officer until the presumption is dispelled by evidence, the importance of the rejected instruction is apparent. If, as insisted by the appellant, no competent evidence was offered to dispel this presumption, then the presumption alone was of such weight as evidence as to require a verdict for appellant. If, on the other hand, as insisted by respondent, some evidence was offered for that purpose, then there was merely a conflict in the evidence upon an issue vital to appellant's case upon which he was entitled to an instruction covering the theory upon which he defended.

[4] As the cause must go back for a new trial, we should add that it is not sufficient, as contended by respondent, that the appellant paid the monthly wages to Cesena, or that he gave general directions to Cesena as to the streets which he was to patrol and the general conduct of his duties; these directions being nothing more than directions to follow the rules and regulations of the board of police commissioners. The undisputed evidence here is that before the commission of the acts complained of the appellant informed Cesena that Semenza was looking for him and proposed to fight him; that Cesena asked appellant if he should arrest Semenza, and "Pompa said no." There is no other evidence of any direction on the part of appel-

lant which in any way contributed to the acts complained of. Therefore, whether the shooting occurred while Cesena was engaged in the performance of his duties as a special police officer under public authority or while he was engaged with Semenza in a private quarrel, there is no evidence tending to show either that the appellant directed the acts to be done or that he personally co-operated therein within the principle of Michel v. Smith, supra.

For these reasons, the judgment is reversed.

We concur: STURTEVANT, J.; BURROUGHS, Justice pro tem.

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105 Cal. App. 449

CROSSIN v. ELYSIAN SPRINGS WATER CO.

Civ. 4065.

District Court of Appeal, Third District, California.

May 1, 1930.

1. Principal and agent ⚷28.

Agreement by agent to distribute bottled water for principal *held* not to constitute employment from year to year (Civ. Code, § 2012).

The agreement provided that the agent was to have exclusive right to distribute bottled water to customers of principal over certain route in certain territory for period of one year or for such time as the agent should faithfully comply with requirements of agreement. The agent's compensation depended on his skill and ability to build up route.

2. Principal and agent ⚷34.

Where agent purchased route to distribute bottled water for principal, agency *held* not coupled with interest which principal could not terminate (Civ. Code, § 2356).

3. Principal and agent ⚷33.

Where agent purchased route to distribute principal's bottled water for year, such time would be considered reasonable time for agent to recoup expenditures, as regards principal's right to revoke agency.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Charles C. Crossin against the Elysian Springs Water Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Rohe & Freston, of Los Angeles, for appellant.

Rollin L. McNitt, of Los Angeles, for respondent.

PLUMMER, J.

This is an appeal by the plaintiff from a judgment entered in favor of the defendants after sustaining a demurrer interposed to plaintiff's second amended complaint. The second amended complaint, omitting matters not necessary to mention, alleged that in the month of July, 1922, plaintiff, in an interview with officers of the company, offered to purchase from one Clary all of the business, patronage, and good will of Clary in certain territory wherein said Clary had been delivering water bottled by the defendant; that the defendant, through its officers and agents, advised the plaintiff of a better proposition, to wit, that one C. Floyd Kinne, who was operating in the Hollywood territory of Los Angeles, desired to cease operating, and would sell the good will and business and delivery truck for the sum of $2,500; that on or about the 18th day of August, 1922, the plaintiff agreed with Kinne to purchase from Kinne the customers' good will and patronage of said route and truck of said Kinne for the sum of $2,500; plaintiff thereupon communicated to defendant the information that he and Kinne had reached an agreement, and on August 19, 1922, at the special instance and request of the defendant's officers, the plaintiff repaired to the business establishment of defendant and entered into a contract, a copy of which was annexed to the complaint, marked "Exhibit A," and that at said time the plaintiff paid to Kinne the sum of $2,500; that at said time Kinne was serving approximately 250 customers on the Hollywood route and 165 customers outside, referred to as the "West Adams District." The complaint further sets forth that the plaintiff continued to conduct the business of said route and operate the same and continued to deliver water bottled by the defendant up to and until the 7th day of October, 1925, when the defendant refused to further continue the supplying of the plaintiff with water and further refused to recognize the right of the plaintiff to deliver water over said route. The complaint further alleges that the contract between the defendant and Kinne, entered into on the 27th day of March, 1922, provided that, if at any time within four months thereafter said Kinne desired to withdraw therefrom, the defendant would pay to the plaintiff the sum of $2,500, and that the sum of $2,500

paid by the plaintiff to Kinne for the route over which said Kinne had theretofore delivered water, and for the truck and equipment, was really paid for the uses and purposes of the defendant. The complaint further alleges that the plaintiff had succeeded in building up the route from 250 customers to 600, so that the gross receipts from the route had been increased from $250 per month to approximately $900 per month, and the net receipts from $125 per month to approximately $300 per month. The complaint further alleges that, by reason of the cancellation of the contract on the part of the defendant, the plaintiff had been damaged in the sum of $10,500.

The agreement attached to the second amended complaint as Exhibit A, entered into between the plaintiff's assignor and the defendant, contained the following stipulations material to be considered (we quote the language of the agreement): "This agreement made on the 27th day of March, 1922, between the Elysian Springs Water and Bottling Company, hereinafter known as the 'Company,' and Floyd C. Kinne, hereinafter known as the 'distributor.' The Company desires to have their Spring water and carbonated beverages sold and distributed in certain territory hereinafter described. The distributor desires to have the exclusive right to that privilege. In consideration of $1.00, the receipt whereof is hereby acknowledged, and other valuable considerations, the Company agrees to give the distributor the exclusive right to sell and distribute Elysian Springs water and carbonated beverages in that certain territory in the City of Los Angeles hereinafter described. The agreement to continue for one year from date, subject to requirements hereinafter enumerated, and to continue in force thereafter so long as the distributor shall faithfully perform the terms of this agreement." The agreement further provided that the distributor should furnish motortrucks of sufficient capacity to promptly deliver and distribute water to the different customers. Provision is then made in the contract as to the prices at which the water shall be delivered to the distributor and the prices to be charged the customers. Statements of account to customers were to be made in the name of the company, and remittances for the same, direct to the company, the company agreeing to keep accurate records of all receipts from distributor's customers, crediting the same to the distributor. The distributor agreed to devote his entire time exclusively to the business of distributing the products of the company. The agreement contained the following paragraph: "The Company agrees, if four months from date the distributor wishes on that date to give up this contract, the Company will, within reasonable time, dispose of the route and return to the distributor the amount he has paid for route and traffic truck, the truck to be turned over in good condition, allowing for reasonable wear." The agreement further provided that the ownership of the route was to remain with the company, as well as all records, lists, etc., pertaining thereto, which were to be made and kept by the distributor.

Whatever rights Kinne had under this contract and the truck or trucks and equipment owned by Kinne, and used by him in the distribution of water, were sold and delivered to the plaintiff in this action. While the second amended complaint does not set out the agreement dated August 19, 1922, entered into between the plaintiff and the defendant relative to the distribution of water, the transcript does contain the same, and it is identical in language in all material particulars with the agreement from which we have been quoting.

It thus appears from the pleadings that the plaintiff had been acting as a distributor for the defendant's products from some time during the month of August, 1922, until about the 7th of October, 1925, a period of about 3 years and 2½ months.

[1, 2] The complaint further alleges that the plaintiff misunderstood to some extent the property he was buying, in that it was the understanding of the plaintiff that he was to become the owner of the route, the customers, etc. There is nothing in the complaint, however, showing that the plaintiff was misled by any statements of the defendant, or that anything was said or done preventing a full or complete understanding, on the part of the plaintiff, of the agreement which was signed, or of the terms and conditions of the agreement between the plaintiff's assignor and the defendant.

The argument of the plaintiff on this appeal appears to be all made upon the theory that the agreement entered into between the parties constituted an employment from year to year, and that the defendant had no right to cancel the agreement or terminate the relationship existing between the plaintiff and defendant during the course of the year, but only at the end thereof. This argument is based upon the provisions of section 2012 of the Civil Code, which reads: "Where, after the expiration of an agreement respecting the wages and the term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service." A sufficient answer to this contention is the fact that the contract referred to, or contracts involved herein, do not create the relationship of master and servant, but the relationship of principal and agent. While the plaintiff in this case was to perform certain services, he was in no sense the servant of the defendant; he was the agent of the company for the purpose of distributing its products. The plaintiff was not paid wages in the usual understanding of that term. His compensation

depended upon his skill and ability to build up the route, where he had the privilege of distributing the products furnished by the defendant. Arguing also that the plaintiff was an agent of the defendant, it is insisted that it was an agency coupled with an interest, and that as the plaintiff had paid a valuable consideration, the defendant had no right to terminate the relationship. Section 2356 of the Civil Code reads: "Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated, as to every person having notice thereof, by: 1. Its revocation by the principal; 2. His death; or, 3. His incapacity to contract." While many authorities might be cited, it is only necessary to refer to 2 C. J. 532, § 155, second paragraph, showing that the relationship of principal and agent between the defendant and the plaintiff did not constitute an agency wherein the plaintiff had such an interest in the property or subject of the agency as to bring it within the exception specified in the section of the Code above quoted. The language of the text in 2 Corpus Juris is as follows: "To bring a case within this exception it is necessary: (1) That the power and the interest should be coupled or united in point of time; that they should coexist. Hence the interest must exist in the subject matter of the power, and not merely in that which is produced by an exercise of the power, for if the agent's interest exists only in the proceeds arising from an execution of the power, the power and the interest are not coupled in point of time, since the power, in order to produce the interest, must be exercised, and by its exercise it is extinguished; the interest does not come into being until the power is gone. (2) That the power and the interest should be coupled with reference to their subject matter. They must exist with reference to the same thing. For this reason also it is necessary that the agent's interest should exist in the subject matter of the power, and not merely in that which is produced by an exercise of the power. (3) That the power and the interest should be coupled with reference to the persons in whom they are vested. They must be united in the same person. (4) That the power and the interest should be coupled with reference to their source. They must be derived by the agent from the same person, although it is not necessary that they should be conferred by the same writing if they are conferred contemporaneously as one entire transaction."

A reference to the terms of the contract constituting the agency which we have set forth herein shows that the interest of the agent was in the proceeds arising from the exercise of the power for the privilege conferred. The power or privilege conferred being to act as distributor, and the remuneration or interest which the agent owned or was to receive came from and was a part of the proceeds derived from the distribution of the water products furnished by the company, and constituted, in the language of the section, "the proceeds arising from the exercise of the power." A further reference to the contract shows that the time of continuance specified therein was one year, after which it would be a relationship existing at the will of the parties. The transcript shows that by stipulation, the agreement entered into between the defendant and the plaintiff was to be considered as a part of the plaintiff's second amended complaint; the time of the contract to continue, or the time during which the relationship of principal and agent should continue reads as follows: "The exclusive right to sell and distribute Elysian Springs Water and carbonated beverages in that certain territory hereinafter described, for the period of one year, or such time as the distributor shall faithfully comply with the requirements herein enumerated." This provision can only be read as particularly providing that the relationship shall exist for the period of one year, and thereafter, during the will of the parties. Unless so read, it would be a contract providing for a relationship to exist in perpetuity, something which the law abhors. Echols v. New Orleans, etc., R. R. Co., 52 Miss. 610.

The contract entered into between the parties contains no provision limiting revocation and dissolution of the relationship, save and except the one-year period. Thus the rule set forth in 1 California Jurisprudence, p. 702, § 11, applies. We quote from the text: "It is the general rule that any agency, unless coupled with an interest, is revocable at any time as between the principal and the agent, at the mere pleasure of the principal, in so far as it relates to things concerning which the agency has not been executed. This principle is recognized in section 2356 of the Civil Code." We do not need to quote the whole of the section, but the rule therein stated and the authorities cited show clearly the right of the principal to revoke an agency, unless limited by the terms of the contract creating the agency, which does not exist in this case, as more than the time limit had expired; in fact, three times the period limited had expired before the agency was revoked.

[3] The facts set forth in the plaintiff's complaint show that, if the authorities relative to the revocation of an agency such as existed in this case, which hold that the agent must be given a reasonable time within which to recoup his expenditures, etc., apply, yet a cause of action has not been stated based upon the holding in such cases, because by the terms of the pleading, plaintiff has had such time, and has pleaded facts showing that he has more than recouped his expenses and made a substantial profit. This rule, however, was expressly denied application in the case of Boehm v. Spreckels, 183 Cal. 239, 191 P. 5. Having fixed one year for the duration of the contract, it must be held that the contracting parties considered the same a reasonable time, and, in view of the facts which we have just stated relative to the time when

the relationship did exist, and the fact that the plaintiff had more than recouped his expenses and realized a profit, the fact that the agency yielded a greater return at the expiration of its existence than at its inception is not a material matter for our consideration.

While other cases might be cited, two cases decided by the Supreme Court are determinative of the questions involved in this action. In the case of Boehm v. Spreckels, supra, and Otten v. Spreckels, 183 Cal. 252, 191 P. 11, contracts relative to the distribution of paper and the control and ownership of paper routes, almost identical with the contracts in this case, were involved. In the Spreckels Cases, consideration had been paid for the privilege of distributing papers over the routes involved. The papers were delivered to the distributors at so much per paper, to be sold by the distributor to patrons at the price fixed by Spreckles, or rather, by the Call Publishing Company. The distributors received their compensation out of the proceeds of the distribution and sale of the papers to the customers. The routes belonged to the Call Publishing Company, called "Spreckels" in the opinions in the two cases referred to. Here the circumstances are exactly the same. The bottled products were delivered by the defendant to the plaintiff at a certain price; the plaintiff was to distribute the bottled products over a route belonging to the defendant and to the defendant's customers, delivering the same to them at a certain fixed price named by the company, and out of the proceeds received his compensation. It was held in both of the Spreckels Cases that the contract or relationship of principal and agent was terminable at will, and that no cause of action existed on the part of either plaintiff in the way of damages. We do not need to quote from the language of the cases, a reference to them being all that is necessary.

Appellant seeks to distinguish the Spreckels Cases from the case at bar by making the contention that the agency here was coupled with an interest. We think this attempted distinction is not tenable, and that the case at bar does not present any circumstances preventing the holding of those cases being determinative of the issues here involved. The giving of a consideration for the assignment of the agent's contract, or the assignment of Kinne's contract to the plaintiff, is not such a consideration as would make the agency irrevocable. 2 Cor. Jur. 536. At least, the irrevocability of the agency would exist only for the period of its specified duration, to wit, one year. We think that during that period the agency would not be irrevocable, but, if revoked without cause, liability for damages arising therefrom would only be incurred. Meyer v. Pulitzer Publishing Co., 156 Mo. App. 170, 136 S. W. 5; Staroske v. Pulitzer Publishing Co., 235 Mo. 67, 138 S. W. 36.

Other cases might be cited, but we think the two Spreckels Cases heretofore referred to are decisive.

The judgment is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

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105 Cal. App. 484

BYERS v. DOHENY.★

Civ. 4062, 4063.

District Court of Appeal, Third District, California.

May 3, 1930.

Rehearing Denied June 2, 1930. Hearing Denied by Supreme Court June 30, 1930.

1. Principal and agent ⟹177(3).

Purchaser of realty is chargeable with knowledge of agent relative to transaction, whereby third person was paying part of purchase price (Civ. Code, §§ 2332, 3519).

2. Specific performance ⟹64.

Specific performance of verbal agreement to execute lease may be had, where landlord is estopped to invoke statute of frauds.

3. Tenancy in common ⟹12.

Third person paying part of purchase price of realty without agreement as to interest would be entitled to undivided interest proportionate to purchase price paid (Civ. Code, § 853).

4. Trusts ⟹74.

Under agreement between purchaser of realty and third person, purchaser *held* to hold title to leasehold interest in lands purchased in trust for third person.

At time of purchase of land subject to leasehold interest covering oil developments, purchaser of land in effect expressly agreed through his agent that third party would pay stipulated amount for leasehold interest and purchaser balance for land subject to lease, title to be taken in purchaser's name.

5. Trusts ⟹63½.

Fact that oral agreement was made does not preclude reliance on trust arising by implication of law from acts done pursuant to such agreement.

6. Trusts ⟹63½.

Plea of statute of frauds cannot be set up as bar to relief in cases of resulting trusts.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by Foster W. Byers against E. L. Doheny to establish leasehold interest in oil

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★Rehearing denied. Hearing denied by Supreme Court.

lands. From the judgment rendered, both plaintiff and defendant separately appeal.

Reversed.

Wellborn, Wellborn & Wellborn, of Los Angeles, for appellant.

Blackstock & Rogers, of Ventura, for respondent.

FINCH, P. J.

The complaint alleges that at all times between July, 1925, and November, 1926, the Crown Oil Company was the owner, subject to a deed of trust, of all the land described in the complaint; that, subject to the same deed of trust, the plaintiff was the owner of an "oil lease upon 40 acres of said property" and an option "for an oil lease upon all of said real property" other than said 40 acres; that prior to any negotiations with the defendant the plaintiff was given judgment against the Crown Oil Company requiring it to execute a lease in accordance with the terms of said option, the judgment setting forth a copy of the lease to be executed; that the judgment had become final and the plaintiff had been put in possession of the property; that steps were being taken to sell the land under the terms of the deed of trust to satisfy the indebtedness secured thereby and the "plaintiff realized that his leasehold interest in all of said property was jeopardized"; that "in order to protect his leasehold rights, said plaintiff began negotiations with the holders of said obligation secured by said trust deed, and endeavored to interest someone to assist him in the purchase of said trust deed or of the said property, and on or about the first day of July, 1926, began negotiations with defendant toward that end; * * * that said defendant by reason of said negotiations became interested in said real property and desired to secure an interest in the same, and so advised plaintiff; that plaintiff thereupon continued negotiations with the holders of the obligation secured by said trust deed, and expended his time and effort and considerable amount of his personal funds in pursuing said negotiations and finally secured the consent of said owners of said obligation to sell all of said property and all of their rights thereunder, for the sum of $100,000."

The foregoing allegations were proved by uncontradicted evidence and the court found them to be true. The allegations of the complaint continue as follows: "That it was thereupon expressly agreed and understood by and between said plaintiff and said defendant that said property should be acquired by the parties hereto and that said defendant would pay on account of said purchase, the sum of $75,000 in cash, and that said plaintiff should provide the remaining sum of $25,000 of the purchase price thereof; that it was then and there expressly understood and agreed by and between the plaintiff and the defendant that the interests of the parties in said real property should be held in the following proportions: That defendant should take and have in his name the title to the fee in said real property, and that plaintiff should take and have in his name of and from defendant, a lease of the oil and mineral rights on all of said property for the term, and under the provisions of said leases, which he held upon said property as aforesaid;" that "pursuant to said understanding and agreement" the defendant took an assignment of the trust deed and the moneys secured thereby and paid in cash the sum of $75,000 of the purchase price thereof and the plaintiff gave the assignors his promissory note in the sum of $25,000 in payment of the remainder of the purchase price; that thereafter, "on November 13, 1926, and pursuant to said understanding and agreement, * * * a sale of said real property under said trust deed was had, at which sale, pursuant to said agreement and understanding, said defendant bid in said property, in his own name, and the legal title to said property passed to and became vested in said defendant." The prayer is for a decree adjudging that the plaintiff "is the owner of a leasehold interest in said real property for the time and upon the terms and subject to the provisions as in this complaint set forth, * * * that the defendant convey said leasehold interest to the plaintiff, * * * and for * * * such other relief as shall be proper."

The answer denies the material allegations of the complaint, "but alleges that plaintiff, knowing that defendant had some knowledge of the property in question, importuned him to purchase said property, inasmuch as plaintiff represented that he, plaintiff, was about to lose all interest or estate in the same."

The court found "that defendant did agree to and with plaintiff that he, said defendant, would give and grant to said plaintiff a lease of the oil and mineral rights on all of said property for the term on the terms, and with the provisions as alleged in said complaint; that on the trial of said cause said defendant interposed the defense of the statute of frauds of the state of California to and against said agreement; and the court finds that no note or memorandum of said agreement on the part of defendant was or is in writing subscribed by defendant or by his agent, and that said agreement is for that reason void and unenforceable as against defendant; and that it is not true that defendant holds said or any leasehold interest for plaintiff; but that it is true that plaintiff did contribute and pay of the purchase price of all of said property one-fourth thereof and that defendant now holds an undivided one-fourth interest in and to all of said property in trust for plaintiff."

Judgment was entered in accordance with the findings. The defendant has appealed from the whole of the judgment, and the plaintiff has appealed from the part thereof which adjudges that "plaintiff is not entitled to and is not awarded a lease of the oil and

the plaintiff has kept a man employed during the time mentioned "to pump the wells to keep the lease and ship the oil." It appears from the evidence that it has a damaging effect upon a producing oil well to shut it down.

[1, 2] To permit the defendant, under the circumstances stated, to invoke the statute of frauds as a defense would be to make the statute an instrument of fraud. On July 19, 1926, and at all times thereafter, Wellborn knew that the plaintiff was paying one-fourth of the purchase price of the property in reliance upon the defendant's oral agreement to execute the alleged lease. The defendant was chargeable with the knowledge of his agent in relation to the transaction. "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." Civ. Code, § 2332. "He who can and does not forbid that which is done on his behalf, is deemed to have bidden it." Civ. Code, § 3519. Specific performance of a verbal agreement to execute a lease has been decreed in this state in a case where the landlord was estopped to invoke the statute of frauds. Clark v. Clark, 49 Cal. 586. It is unnecessary, however, to decide whether the facts proved in this case constitute an estoppel.

[3-6] Had the plaintiff paid one-fourth of the purchase price without any agreement or understanding as to the interest, he would thereby acquire in the property, he would have been entitled, under the provisions of section 853 of the Civil Code, to the judgment which was entered herein, but the agreement between the parties was to the effect that the plaintiff was to acquire only a leasehold interest in the property. It may be inferred from the vigor with which this case is prosecuted and defended that such leasehold interest is of considerable value. The effect of the lease, therefore, is to make the land less valuable than it would be if freed from the lease. This probably accounts for the fact that the defendant, after having agreed to continue the lease in force, was unwilling to pay in excess of $75,000 for the property and also for the plaintiff's willingness to pay $25,000 to consummate the transaction. If the parties had expressly agreed that the plaintiff would pay $25,000 for the leasehold interest and the defendant $75,000 for the land subject to the lease, the title to be taken in the defendant's name, then, upon the consummation of the transfer, the defendant would undoubtedly hold title to the leasehold interest in trust for the plaintiff. This is in effect what the parties actually did, and the conclusion follows that the defendant holds title to the leasehold interest in trust for the plaintiff. "It is now a generally accepted rule that a resulting trust may arise in favor of one who furnishes a part of the purchase money for land where the title is taken in another, though there is a diversity of opinion as to whether there must be a distinct understanding that the payment is for a definite interest in the land, or whether the fact of furnishing the money without more will raise a resulting trust. Many courts take the view that the money must have been paid for a specific undivided share, as a half, quarter, etc., or for a particular interest, as a life estate, remainder, etc." 26 R. C. L. 1224; Breitenbucher v. Oppenheim, 160 Cal. 98, 116 P. 55. In this case the payment made by the plaintiff was for a "particular interest," the leasehold interest in the land. "The fact that an oral agreement was made does not preclude the plaintiff from relying on the trust which arises by implication of law from the acts done pursuant to such agreement." 25 Cal. Jur. 179; Breitenbucher v. Oppenheim, supra; Pavlovich v. Pavlovich, 22 Cal. App. 500, 135 P. 303. The plea of the statute of frauds cannot be set up as a bar to relief in cases of resulting trusts. Pavlovich v. Pavlovich, supra.

From what has been said it appears that there is merit in both appeals, and that the entire judgment must be reversed. While there is ample evidence to support a judgment for the plaintiff, the findings are not sufficient to warrant this court in directing the entry of such a judgment.

The judgment is reversed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

On Petition for Rehearing

PER CURIAM.

The defendant has filed a petition for a rehearing.

In the opinion heretofore filed it is said: "The payment made by the plaintiff was for a particular interest, the leasehold interest in the land." By the term "leasehold interest" it was not intended to refer to the leasehold interest held by the plaintiff prior to the sale of the land under the trust deed, but to a like interest acquired by the purchase of the land at such sale.

In his petition the defendant quotes from the opinion that "the plaintiff further testified that * * * the defendant agreed to give him a lease in accordance with the terms of the decree in his aforesaid action against the Crown Oil Company," and then says: "We have again read very carefully the entire transcript of the evidence in this case * * * and we have been unable to find any such testimony by the plaintiff." It is not deemed necessary to lengthen this opinion by quoting from the testimony of the plaintiff, but, for the convenience of counsel for the defendant, it may be said that folios 193, 198, 390, 392, 393, 394, 395, 396, 398, 399, and 416 of the supplement to his opening brief amply support the statement quoted from the opinion.

The case has been discussed on the theory of the enforcement of a resulting trust rather than the specific performance of an oral agreement.

The petition is denied.

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107 Cal. App. (Supp.) 778

PEOPLE v. FIMBRES.

Cr. 226.

Appellate Department, Superior Court, Los Angeles County, California.

Jan. 16, 1930.

1. Animals ⚷1.

Dog is regarded as property.

2. Automobiles ⚷336.

Automobile accident in which dog is injured comes within provisions of law requiring driver to stop at scene of accident (California Vehicle Act, § 141, as amended by St. 1929, p. 544).

3. Automobiles ⚷351.

Complaint charging defendant with failing to stop after running over dog charged public offense (California Vehicle Act, § 141, as amended by St. 1929, p. 544).

Although the complaint charged defendant with operating an automobile and failing and refusing and neglecting to stop motor vehicle to render aid after running into and damaging a dog, the words "to render aid" should be disregarded as surplusage, and complaint then sufficiently charged failure to stop after accident.

Appeal from Recorder's Court of Lynwood; Arch G. McLay, City Recorder.

Frank Fimbres was convicted under a complaint charging that he was operating an automobile on a public highway, and did then and there run into and damage certain personal property, and failed and refused and neglected to stop to render aid, and he appeals.

Affirmed.

Ivan Kelso, L. D. Stahl, and Albert E. Wheatcroft, all of Los Angeles, for appellant.

Buron Fitts, Dist. Atty., and Tracy C. Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

SHAW, J.

Defendant was prosecuted in the recorder's court of Lynwood on a complaint charging that he was operating an automobile on a public highway, and "did then and there run into and damage on the public highway certain personal property, towit, a dog, and did fail and refuse and neglect to stop said motor vehicle to render aid, contrary to section 141-B of the California Vehicle Act." The evidence showed that defendant ran over two dogs, which died of their injuries, that he did not stop, but drove on a distance of seven blocks, and was then stopped by the owner of one of the dogs, to whom he gave his name and address. At the close of the case for the prosecution defendant moved to dismiss upon the ground that the complaint did not state, nor the evidence show, facts constituting any public offense. This motion was denied, and on appeal he assigns the ruling as error.

There is no section 141-B of the California Vehicle Act, but section 141 thereof contains a subdivision (b) which is doubtless intended by the reference in the complaint. It provides that "the driver of any vehicle involved in an accident resulting in damage to property, shall immediately stop such vehicle at the scene of such accident, and shall fulfill the requirements of subdivision (c) and any person failing to stop or to comply with said requirements under such circumstances shall be guilty of a misdemeanor." Subdivision (c) here mentioned reads as follows:

"The driver of any vehicle involved in any accident resulting in injury or death to any person or damage to property shall also give his name, address and the registration number of his vehicle and exhibit his operator's or chauffeur's license to the person struck or the driver or occupants of any vehicle collided with and shall render to any person injured in such accident reasonable assistance, including the carrying of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or such carrying is requested by the injured person."

[1, 2] A dog is regarded in this state as property (Roos v. Loeser, 41 Cal. App. 782, 183 P. 204), and hence an accident in which a dog is injured comes within the words of subdivision (b). The same is true of any other domestic animal. In construing subdivisions (b) and (c), it should be noted that by subdivision (a) of the same section the driver of a vehicle involved in an accident resulting in injury to or death of a person is also required to stop and to comply with subdivision (c). This indicates, as does the language of subdivision (c), that the latter is to have a distributive construction by which the requirement of the last clause thereof, relating to rendering aid, is limited to those cases mentioned in subdivision (a) where a person is injured. Manifestly a dog, or other animal, is not a person; consequently the provision of subdivision (c) as to rendering aid cannot be applied to cases where a dog or other animal is injured.

The first clause of subdivision (c) begins by referring to accidents resulting in damage to "property," and this word, if it stood alone, would include dogs, and other animals here also; but this clause must be construed as a whole, and, when we inquire what is to be done by the person involved in such an accident, we find that he is to give his name and address and the registration number of his vehicle and exhibit his operator's license "to the person struck or the driver or occupants of any vehicle collided with." A dog or any other animal, not being a person, cannot qualify as "the person struck." Dogs and other animals are not found driving vehicles on the highways, so we hardly think the Legislature meant to include them in the term "driver of any vehicle"; and, in view of the utter futility of submitting a written document to the inspection of a dog or other animal, the term "occupant" must also be limited to persons. It may be that "every dog has his day"; but, if so, it is only a "dog-day" and does not entitle him to claim the rights of persons. Hence there was no duty resting on defendant under subdivision (c) of section 141.

[3] The question still remains whether subdivision (b) required defendant to stop on striking and injuring the dogs. As already stated, they were property, and the case was thus within the terms of the subdivision. The provision is that in such cases the driver "shall immediately stop * * * *and* shall fulfill the requirements of subdivision (c)." Here are two separate commands, neither of which is expressly conditioned upon the other; and they are shown not to be so conditioned by the subsequent provision that "any person failing to stop *or* to comply with said requirements" shall be guilty of a misdemeanor. The stopping must, of course, precede the compliance with subdivision (c), and one reason for it, no doubt, is to facilitate such compliance; but we are unable to say that this is the only reason which the Legislature had in mind in requiring a stop. In cases where nothing is to be done under subdivision (c), e. g., those where, as in the case at bar, an animal is struck, or where inanimate property is damaged without a collision of vehicles, a stop by the driver of the car doing the damage may serve a useful purpose. It may perhaps minimize the damage, or enable the owner of the property or other persons who may act in his interest, to learn the identity of the person driving the car, even though the driver is not required to do any affirmative act by way of disclosing his identity. We think, therefore, that the driver of any vehicle involved in an accident resulting in damage to property is required to stop immediately, even though, under the circumstances, he may not be required to do anything further after he has stopped. The complaint here sufficiently charges that defendant failed to stop, and the following words, "to render aid," should be disregarded as surplusage. They do not detract from the force of the statement that defendant failed to stop. But, if there were any uncertainty in the complaint in this respect, it would not be ground for a reversal, in view of the complete proof that defendant made no stop at the time of the accident, and the provisions of section 4½ of article 6 of the Constitution.

The judgment is affirmed.

We concur: McLUCAS, P. J.; BISHOP, J.

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109 Cal. App. (Supp.) 778

PEOPLE v. CHAMNESS.

Cr. 375.

Appellate Department, Superior Court, Los Angeles County, California.

May, 1930.

1. Appeal and error ⟹158(1).

Satisfaction of judgment in civil actions, unless by way of compromise or pursuant to agreement, does not terminate right to appeal.

2. Criminal law ⟹1026.

Defendant, by payment of fine to escape jail sentence, did not waive right to appeal.

3. Criminal law ⟹1144(13).

Appellate court, in determining merits of appeal, must select evidence most strongly supporting judgment.

4. Criminal law ⚷1159(2).

Appellate court cannot in criminal case weigh evidence.

5. False pretenses ⚷49(1).

Evidence *held* insufficient to sustain conviction for receiving money under false pretenses (Pen. Code, § 1110).

Pen. Code, § 1110, requires that, on trial for obtaining money by pretense consisting of oral statement, defendant cannot be convicted, unless pretense is proven by testimony of two witnesses, or that of one witness and corroborating circumstances.

Appeal from Justice's Court, El Monte Township; F. G. Wilson, Justice.

F. E. Chamness was convicted of receiving money under false pretenses, and he appeals.

Motion to dismiss denied, and judgment reversed, with directions.

Doyle, Clark, Thomas & Johnson, of Long Beach, for appellant.

Buron Fitts, Dist. Atty., and Tracy C. Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

BISHOP, J.

The defendant, charged with receiving money under false pretenses, was found guilty and judgment entered imposing a fine of $100, or, in default of its payment, ninety days in jail. Defendant promptly paid the fine, then perfected his appeal. Contending that by this satisfaction of the judgment the questions presented by the appeal became moot, the people move its dismissal.

[1] So far as we are aware, the precise question thus submitted to us has not been considered by any of the appellate courts of this state. The rule is well established in civil actions, however, that the satisfaction of a judgment, unless by way of compromise or with an agreement not to take or pursue an appeal, does not operate to terminate the right to an appeal. Warner Brothers Co. v. Freud (1901) 131 Cal. 639, 63 P. 1017, 82 Am. St. Rep. 400; Levin v. Saroff (1921) 54 Cal. App. 285, 201 P. 961. See note, 29 L. R. A. (N. S.) 22. Also in the recent case of In Matter of Lincoln (1929 Cal. App.) 283 P. 965, it was held that the questions arising on an appeal from a judgment suspending an attorney from practice for the period of a year did not become so moot with the expiration of the year and the consequent termination of the suspension that the appeal should be dismissed. The Lincoln Case is persuasive beyond its force as a decision in a case bearing close analogy, to ours, for the cases upon which the court relied were all criminal cases. As they are reviewed and quoted from somewhat at length in the opinion filed in that case, it is unnecessary for us to list them or produce excerpts from them here. They may also be found in a note in 18 A. L. R. 867, from which it appears that they represent the minority view. It appears that in a majority of the cases on the question it is held that the voluntary satisfying of a judgment by the payment of a fine destroys the right to appeal because it leaves the defendant with no legal wrong to be corrected nor legal right to be protected. The same conclusion is reached where the payment is voluntary only in the sense it is in our case; that is, chosen in preference to going to jail. In the minority view, on the other hand, the fact is recognized that a judgment in a criminal case is effective far beyond the dollars or days it may exact in its technical satisfaction. It was this view which the court preferred to take in the Lincoln Case.

[2] We are satisfied that a defendant convicted of a criminal offense and faced with a term in jail, unless he pays a fine, does not by paying the fine waive his rights to appeal. There is no basis in fact for the contention that he waives his appeal, for the thing done bears no inconsistent relation to the thing to be done, so there is not factually an election. Nor is the one step a relinquishment of the right to pursue the other by virtue of any statute or written rule of court. Rather it is a practice adopted by the courts out of necessity, because: "The demands of actual, practical litigation are too pressing to permit the examination or discussion of academic questions," as was quoted in Foster v. Smith (1897) 115 Cal. 611, 47 P. 591, 592. It is a practice which may be departed from, if public interest requires. Piper v. Hawley (1918) 179 Cal. 10, 175 P. 417. If the defendant has a real, though perhaps not a legal, interest in the determination of the questions involved, even though the judgment itself has been satisfied, it seems to us that the press of other business is no justification for dismissing the appeal on hand. It is to substitute fantasy for fact to say the defendant's real interest in the case ceases with the payment of the fine. Is a good name no longer to be chosen rather than riches? Is a question alive so long as the payment of $100 is involved, but moot when only the matter of a besmirched name remains? We prefer to follow those courts, in the minority though they are, where an appeal is considered useful, though it may serve no purpose but to give a man a chance to clear his name. The motion to dismiss is denied.

[3-5] Turning to the merits of the appeal, and selecting, as we must, the evidence most strongly supporting the judgment, we find that the defendant and Earls, the complain-

ing witness, had entered into a contract whereby the defendant was to furnish labor and material to accomplish certain building repairs. While these repairs were going on, the defendant arrived at work late one morning. An explanation was asked by Earls, and in reply the defendant stated he had gone around to the lumber company to obtain a discount by a prompt payment of a lumber bill. The lumber bill which defendant stated he paid, according to the complaining witness, was one on the Earls job. The fact was, and the defendant claims he made no statement to the contrary, the bill paid was on another job entirely, and the lumber on Earls' building had not been paid for when, some ten days later, Earls paid the defendant $100 on account. Were we permitted to weigh the evidence, we would have no hesitancy in saying that at best the complaining witness was mistaken in what he understood the defendant to have said. Of course, we cannot weigh the evidence, and we speak of its impression upon us solely because the situation illustrates the wisdom of the requirement of section 1110 of the Penal Code that, on a trial for obtaining money by a pretense consisting of an oral statement, "the defendant cannot be convicted * * * unless the pretense is proven by the testimony of two witnesses, or that of one witness and corroborating circumstances." Earls was the only witness who testified that the defendant made the statement that the material bill he had paid was on the Earls job. It was not enough to produce a second witness who testified that there was a conversation respecting the payment of *a* bill, but who heard nothing about the Earls bill. See People v. Neetens (1919) 42 Cal. App. 596, 600, 184 P. 27. Now are the circumstances of the case, which we do not here detail, corroborative of the testimony that the defendant made the pretense claimed. Rather they negative the conclusion that he made the statement charged to him.

The judgment is reversed, with directions that a new trial be had in the Superior Court of Los Angeles county.

We concur: McLUCAS, P. J.; SHAW, J.

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107 Cal. App. (Supp.) 782

PEOPLE v. PORTER.

Cr. 250.

Appellate Department, Superior Court, Los Angeles County, California.

Jan. 29, 1930.

1. Master and servant ⚷84.

Refusal, in prosecution for failure to pay wages of employee, to permit employer to show settlement was made in ignorance of amount owed him by employee, *held* erroneous (St. 1919, p. 294, §§ 5, 6).

Although the case was prosecuted under St. 1919, p. 294, § 6, even assuming that section 5, providing for penalty collectible by employee for failure to pay wages without abatement or reduction, was applicable, nevertheless such provision did not prevent deduction of damages caused by employee's breach of contract where he quits prematurely, or of credits to employer on account of money or property given to employee in part payment of wages.

2. Master and servant ⚷84.

Employer, prosecuted for refusal to pay wages, may show in defense that he has valid offset (St. 1919, p. 294, § 6).

Appeal from Municipal Court of Los Angeles; Charles B. MacCoy, Judge.

Charles L. Porter was convicted under law making it a misdemeanor for an employer under certain conditions to refuse to pay wages of employee when due and demanded, and he appeals.

Reversed and remanded for a new trial.

Archie G. Cope, of Los Angeles, for appellant.

Lloyd S. Nix, City Prosecutor, Joe W. Matherly and F. W. Fellows, Deputy City Prosecutors, all of Los Angeles, for the People.

SHAW, J.

[1, 2] Defendant is charged with a violation of section 6 of the act of 1919 (St. 1919, p. 294) regarding payment of wages, which makes it a misdemeanor for an employer. under the conditions and with the intent therein mentioned, to refuse to pay the wages of an employee when due and demanded. The complaining witness, Mrs. Gerrity, was hired by defendant as manager of an apartment house under an agreement by which she was to receive $25 per month and the use of an apartment, and was to pay the bills for her laundry, ice, and milk, and, according to defendant, some other matters, all of which he testified were to be deducted from her wages. When she quit, defendant had a settlement with her, as a result of which he gave her a check for $15.57, on which he later stopped payment. At a hearing before the labor commissioner, some further deductions were made, and the commissioner found that the amount due was $12.57, nonpayment of which is the basis of this prosecution. At the trial, defendant sought to show that this settlement was made under

mistake and in ignorance of certain amounts owed him by Mrs. Gerrity on account of rents which she negligently failed to collect and for bills incurred and payable by her, all of which amounted to more than the wages which were alleged to be due her. He made an extensive offer of proof in this respect, which the trial court rejected on the theory that no offset against wages due can be shown under this act and in especial reliance on section 5, which provides a penalty collectible by the employee for failure to pay wages "without abatement or reduction."

In this ruling we think the court erred. The case was not prosecuted under section 5, but under section 6, which does not contain the words "without abatement or reduction." But, even if we assume that section 5 throws some light on the purpose and meaning of section 6, it has been held that the words "without abatement or deduction," in a statute similar to section 5, mean merely "without discount on account of the payment thereof before the time they were payable according to the terms of the contract of employment," that they do not prevent the deduction of damages caused by the employee's breach of contract where he quits prematurely, or of credits to the employer on account of money or property given to the employee in part payment of his wages, and that, if the statute were construed to forbid such deductions, it would be unconstitutional. Leep v. St. Louis, etc., R. Co., 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. Rep. 109, 131. There is no material difference between the word "deduction" here considered and the word "reduction" used in our statute.

In Idaho it is held that a statute similar to section 5, but not including the phrase "without abatement or reduction" or equivalent words, does not preclude the right of the employer to interpose any valid counterclaim or defense to the claim of the employee. Olson v. Idora, etc., Co., 28 Idaho, 504, 155 P. 291; Goodell v. Pope-Shenon M. Co., 36 Idaho, 427, 212 P. 342. In Manford v. Menil Singh, 40 Cal. App. 700, 181 P. 844, a former statute similar to section 5 of the act of 1919, but using the word "deduction" instead of "reduction," was under consideration, and the court held that it was to have a reasonable construction, and did not deny the employer any legal defense to the legality of the claim. We think a like rule must be applied to cases arising under section 6, whereby the employer may show in his defense that he has valid offsets or counterclaims to the wages the nonpayment of which is the basis of the charge against him.

Since the ruling of the court below denied the defendant that right, the judgment must be reversed, and the cause remanded to the municipal court for a new trial, and it is so ordered.

We concur: McLUCAS, P. J.; BISHOP, J.

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109 Cal. App. (Supp.) 770

CONNOR v. MINIER et al.

GASTE v. WILLIAMS PLAN CO.

Civ. 105.

Appellate Department, Superior Court, Los Angeles County, California.

May 2, 1930.

1. Usury ⚷16.

Courts, where claim of usury is made, will look through form in which transaction is cast to discover its real substance.

2. Usury ⚷53.

Services or expenses in connection with loan for which lender may reimburse himself must be confined to specific service or expense incidental to loan.

3. Usury ⚷45.

As respects usury, principal sum loaned will be held to be face amount of loan less interest or commission deducted in advance.

4. Usury ⚷117.

Evidence *held* to establish that loan usurious.

The facts established that borrower, although signing two notes for $300 each, actually received only $270, in addition to which lender paid $1.50 for financial report and issued in borrower's name a certificate of investment which was to be paid for by one note and held as security for payment of other, while, according to terms of note, $300 would be repaid in equal weekly installments extending over a period of 40 weeks, so that, even though the total amount of loan remained unpaid for 40 weeks, interest for such period at 12 per cent. maximum rate was less than $28.50 deducted.

5. Usury ⚷111(2).

Allegation that lender was doing business as Industrial Loan Company and not subject to usury law, was affirmative allegation, requiring proof (Industrial Loan Company Act 1917, as amended by St. 1921, p. 729).

6. Usury ⚷137.

Recovery of penalty by reason of usury cannot be had unless usurious interest is actually paid (Usury Act, § 3).

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7. Usury ⟹137.

Mere signing and delivery of usurious instruments does not constitute "payment of interest" as respects recovery of penalty (Usury Act, § 3).

8. Usury ⟹100(1).

As respects usury, payments on interest-bearing note, in absence of express application by parties, will be applied to principal until repayment of amount actually loaned.

9. Usury ⟹137.

Recovery of penalty by reason of usury can be had only by person actually paying interest (Usury Act, § 3).

Appeal from Municipal Court of Los Angeles; Charles E. Haas, Judge.

Action by C. C. Connor, doing business under the fictitious firm name of the Surety Finance & Adjustment Company, against H. W. Minier, Jose Gaste, and others, wherein defendant last named filed a cross-complaint against the Williams Plan Company. Judgment for plaintiff, and defendant last named appeals.

Reversed and remanded.

Wm. E. Prather, of Pasadena, for appellant.

L. J. Styskal, of Los Angeles, for respondent Connor.

Henry K. Elder, of Los Angeles, for respondent Williams Plan Co.

O'Melveny, Tuller & Myers, and Laurence W. Beilenson, all of Los Angeles, amici curiæ.

SHAW, J.

This is an action on a promissory note for $300, in which the Williams Plan Company, hereinafter called simply the company, is named as payee. The plaintiff is the assignee of the payee for collection merely, and hence stands in its shoes as to all defenses. The defendant Gaste filed an answer alleging as a defense that the loan was usurious, and appeals from a judgment against him for the full amount of the note with interest.

From the record, the following facts appear without dispute: The defendant H. W. Minier, desiring to borrow $300, went to the office of the company a few days before May 15, 1928, and applied for a loan. He was told that he must procure accommodation comakers as sureties on a note, and was given an application form and a blank note, on which the note in suit was executed. He brought this note back about May 15, 1928, bearing the signatures of himself and wife, of appellant, and of another person, as comakers. The loan was then made. In connection with the transaction, Minier signed several papers. One of them was an application for the loan, in which he stated that he desired a loan of $300, and agreed if it was made to purchase from the company an investment certificate for that amount, and to hypothecate it as additional security for the loan, and instructed the company to apply the proceeds of the certificate to liquidate the note covering the loan when due. On the same paper with this application were statements of their financial condition signed by appellant and another maker. The note in suit was dated May 4, 1928, and by it the makers above mentioned agreed to pay to the company $300, in forty equal installments, on Tuesday of each week after date, with interest from maturity at 8 per cent. per annum. This note recited that it was given "for the purchase by the maker of an investment certificate of the said company." On May 15, 1928, the company made and signed a paper labeled "investment certificate," which showed that its amount was $300, recited that H. W. Minier was the purchaser thereof and had given a note for the purchase price, describing a note which corresponds to that sued on, except that the date was given as May 15, 1928, and H. W. Minier alone was named as the maker, and then provided that, "when the contract of purchase has been fulfilled and the payments of the aforesaid note made as agreed on or before the dates specified, the Williams Plan Company of Los Angeles will pay to the purchaser or assigns the face value hereof, less any indebtedness owing to said company by said purchaser, and, or, by the co-makers of said note given as the purchase price hereof." This document was retained by the company. Minier alone executed another note labeled "loan note," dated May 15, 1928, by which he agreed to pay to the company, one year after date, $300, with interest at 6 per cent. per annum. This note was physically attached to the investment certificate above mentioned, and stated that said investment certificate was assigned to the company as collateral security therefor. Before making the loan, the company paid $1.50 for a financial report upon the appellant, and, upon receipt of the various papers above mentioned, completed the transaction by giving Minier its check for $270, on May 15, 1928.

[1] When a claim of usury is made, the courts will look through the form in which the transaction is cast to discover its real substance, and if, when that is found, it appears that a borrower has paid, or agreed to pay, more than the lawful rate of interest for a loan, the loan will be held usurious. Haines v. Commercial Mortgage Company, 200 Cal. 609–616, 254 P. 956, 255 P. 805, 53 A. L. R. 725; Wallace v. Zinman, 200 Cal. 585–597, 254 P. 946, 62 A. L. R. 1341.

[2] Our usury law fixes 12 per cent. per annum as the maximum rate of interest that may be charged on a loan, and its manifest intent is to forbid absolutely to the lender any profit whatever by way of commission, bonus, or other kind of charge, if in so doing that rate is exceeded. The lender may perform services or incur expenses in connection with the loan for which he may reimburse himself from the loan, but these items must be confined to specific service or expense incidental to the loan, incurred in such a way as to absolutely preclude its being a device through which additional interest or profit on the loan may be exacted. Haines v. Commercial Mortgage Co., supra.

[3, 4] In the present case all the various papers which we have described are manifestly parts of one transaction by which Minier borrowed money from the company, and all must be taken into consideration to determine whether that loan was usurious. On consideration of them all, and of the other facts stated, we have no doubt that it was. Although Minier signed two notes for $300 each, he actually received only $270, in addition to which the company paid $1.50 for a financial report. At the argument before us, it was stated that the deduction of $30 was made up of one year's interest on $300 at 6 per cent., amounting to $18, and $12 for expenses of the loan; but the record does not show what was the reason for this deduction. The lender showed no services or expenses in connection with the loan except the item of $1.50 above mentioned. If $12 was deducted for expenses, the remainder of it must therefore be regarded as a bonus or commission and treated as a part of the interest deducted in advance. When interest or commission is deducted in advance from the amount of a loan, in testing the transaction for usury, the principal sum loaned will be held to be the face amount of the loan less the interest or commission so deducted. Haines v. Commercial Mortgage Co., supra. The total amount loaned in this case, therefore, is $271.50. According to the terms of the note sued on, $300 would be repaid to the company in equal weekly installments extending over a period of 40 weeks. This amount exceeds the actual loan by $28.50. If we assume that the whole of the loan remains unpaid for 40 weeks, the interest on it for that time at 12 per cent., the maximum rate permitted by the usury law, is only $25.06. The interest charged is therefore usurious even on that assumption, but, in fact, by reason of the installment payments, the whole principal would not remain unpaid for 40 weeks, and the interest which could be lawfully charged is therefore less than the amount just stated. If we consider the other note, which calls for the payment of $300 in one year, with interest at 6 per cent., we find that it contains no provision for its payment before maturity, and no interest has been credited upon it, whatever the purpose of the deductions from the loan may have been. It therefore apparently requires the payment of $18 more as interest, which would increase the amount of usury on the loan.

We do not think the charge of usury is evaded by the device of taking two notes from the borrower, each equal to the amount of the loan applied for, and issuing in his name a certificate of investment which is to be paid for by one note and held as security for the payment of the other. At the trial, plaintiff's counsel admitted that these investment certificates were of doubtful value, and we quite agree with him. The only agreement which the company made by the certificate is that, when the so-called purchase note had been paid, it would repay Minier the amount so paid, less any indebtedness owing by him or the other makers to the company. If Minier had paid that note in 40 weeks, as agreed, he would then have been still indebted to the company on his other note, which ran for one year and for payment of which the certificate of indebtedness was held by the company as collateral. He had instructed the company in his application to apply the proceeds of that certificate to liquidate the other note *when due*, to accomplish which would take the whole of those proceeds. The company would therefore hold the amount it had received for the so-called purchase of the certificate of investment until the loan note was due, some twelve weeks thereafter, and would then apply it all to payment of the loan note. Under such circumstances, the certificate of investment had no real substance, but was a mere device to conceal the usurious character of the transaction by making it appear that the loan was still unpaid long after the time when, if the several instruments were complied with, it would have been paid.

It appears from the evidence that Minier was required to procure a life insurance policy for $1,000 and to deposit it as security for the loan. This was obtained through a broker who was also a director and officer of the company. The company appears to have loaned Minier the amount of the premium on this policy by an arrangement of the same kind as that made with reference to the $300 loan, and it may be that this loan was also usurious, but it is not directly involved in this case. Appellant claims that from this insurance transaction some additional gain accrued to the company on the $300 loan, but, in view of our conclusion that that loan was usurious without any such gain, we have not gone into the matter further than to learn that at least the return to the company on the $300 loan would not be diminished by consideration thereof.

[5] Plaintiff contends that the company was doing business under the Industrial

Loan Company Act of 1917, as amended in 1921 (St. 1917, p. 658; St. 1921, p. 729), and that it is therefore not subject to the usury law (St. 1919, p. Lxxxiii). A rehearing of this case was granted that we might give further consideration to this contention. The matter was argued on the first hearing, and we therefore expressed an opinion regarding it. But on the rehearing it appears that a decision on the point will affect other corporations doing business under this act, some of which conduct their operations in quite a different manner from that above described. On further scrutiny of the record before us, we find that it does not require a decision of this point. The company, in its answer to the cross-complaint, alleged that it was authorized and operating under the provisions of the Industrial Loan Company Act, but this was an affirmative allegation, which it was required to prove. If this fact is a defense to the charge of usury, the plaintiff might also have proved it under the statutory replication given him by section 462 of the Code of Civil Procedure. But the record discloses neither proof of this fact nor attempt to prove it.

[6-9] Appellant, in addition to setting up the defense of usury in his answer, filed also a cross-complaint against the company, alleging the payment of usury and seeking to recover the statutory penalty of treble the amount so paid. The fact that the loan is usurious does not, of itself, entitle him to recover on this cross-complaint. Unless usurious interest is actually paid, no recovery of the penalty provided by section 3 of the Usury Act (St. 1919, p. Lxxxiii) can be had. The mere signing and delivery of instruments providing for such interest, while they stamp the loan as usurious, do not constitute a payment of the interest Haines v. Commercial Mortgage Co., supra; Duke v. Levy (Cal. Sup.) 281 P. 496. The testimony shows that the amount paid on the loan is $125.70, which is less than the principal sum loaned. Minier testified that a part of the amount paid had been applied by the company to interest "as set forth in cross-defendant's exhibit ———." We can find no exhibit so designated, and the only exhibit which we find referring to payments does not apply any part thereof to interest. If any part of the payments was expressly applied by the company on account of interest without directions to the contrary from the payer, a recovery could be had on account thereof; but, unless this appears, the trial court should not on a retrial apply any of the payments to interest. The installment note did not provide for interest before maturity, and, while the loan note bore interest, the interest was not due at the time the payments were made. Under such circumstances, in the absence of an express application by the parties, all payments will be applied to principal until the amount actually loaned has been repaid. Haines v. Commercial Mortgage Co., supra. The evidence does not show who made the payments above mentioned, but it should be noted that section 3 of the Usury Act authorizes a recovery only by the person who has paid the interest. A payment by Minier will not support appellant's cross-complaint. Plaintiff will, on the other hand, if the same facts appear at the new trial, be entitled to recover the unpaid portion of the sum actually loaned to Minier.

The judgment is reversed, and the cause is remanded to the municipal court for a new trial, appellant to recover his costs on appeal.

We concur: McLUCAS, P. J.; BISHOP, J.

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109 Cal. App. (Supp.) 767

HOOPER et al. v. MILEY OIL CO.

Civ. 128.

Appellate Department, Superior Court, Los Angeles County, California.

March 25, 1930.

Courts ⟹169(1).

Municipal court has jurisdiction of actions at law involving title to realty within statutory limit of $2,000 (Const. art. 6, §§ 5, 13, as amended in 1928; St. 1929, p. 837, § 2, amending St. 1925, p. 648, § 29; Code Civ. Proc. § 76).

Const. art. 6, § 5, as amended in 1928, and Code Civ. Proc. § 76, give Superior Court original jurisdiction in all civil cases except those in which jurisdiction is given to municipal or other inferior courts, Const. art. 6, § 13, as amended in 1928, authorizes Legislature to fix jurisdiction of municipal courts and confirms previous acts fixing exclusive jurisdiction of such courts in cases at law. St. 1925, p. 648, § 29, giving municipal court exclusive original jurisdiction of cases at law in which demand or value of property in controversy amounts to $1,000 or less, was amended by St. 1929, p. 837, § 2, increasing amount to $2,000.

Appeal from Municipal Court of Los Angeles; Charles E. Haas, Judge.

Action by Hugh F. S. Hooper and others against the Miley Oil Company for damages to real and personal property. From a judgment of dismissal, plaintiffs appeal.

Reversed and remanded.

F. A. Waters, of Los Angeles, for appellants.

Henry W. Nisbet, of Los Angeles, for respondent.

McLUCAS, P. J.

Plaintiffs brought action for damages in the sum of $825 to real and personal property by reason of alleged negligence on the part of the defendant in drilling an oil well. Complaint was filed on March 11, 1929, alleging damages in the sum of $750, and amended complaint was filed June 21, 1929, alleging damages in the sum of $825. The case was tried September 17, 1929, and leave to file a second amended complaint was granted, which alleged damages in the sum of $825. Defendant objected to the introduction of any evidence on the ground that it appeared from the pleadings that the title to real property was involved in the action and that for such reason the court had no jurisdiction. The objection was sustained, and judgment of dismissal granted on January 20, 1930. Plaintiffs appeal from the judgment.

The sole question for determination is whether the municipal court has jurisdiction of actions involving the title to real property.

On November 6, 1928, section 5 of article 6 of the Constitution was amended so as to read in part as follows:

"The superior courts shall have original jurisdiction in all civil cases and proceedings (except as in this article otherwise provided, and except, also cases and proceedings in which jurisdiction is or shall be given by law to municipal or to justices in other inferior courts). * * *"

On the same date, section 13 of article 6 of the Constitution was amended providing that:

"Notwithstanding any provision contained in this article, the legislature may fix by law the jurisdiction of municipal courts and inferior courts in cities having municipal courts which may be established in pursuance of this article, and may fix by law the powers, duties, qualifications and responsibilities of judges thereof.

"Any action heretofore taken by the legislature in fixing exclusive jurisdiction of municipal courts in cases at law is hereby ratified and confirmed."

Prior to the foregoing amendment of section 13 of article 6 of the Constitution, the Legislature had, on May 23, 1925, adopted an act which provided that:

"Each municipal court shall have exclusive original jurisdiction of all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to $1000 or less. * * *" St. 1925, p. 648, § 29.

This act was ratified and affirmed by the provision of the amendment of section 13 of article 6 of the Constitution, adopted November 6, 1928.

Pursuant to the provisions of section 13 of article 6 of the Constitution, as amended November 6, 1928, the Legislature on May 25, 1929 adopted an act effective August 14, 1929, amending the act adopted in 1925 and fixing the jurisdiction of municipal courts, in which each municipal court is granted exclusive original jurisdiction of all civil cases as follows:

"Each municipal court shall have exclusive original jurisdiction of all civil cases and actions, arising within the city or city and county in which such municipal court is established, of the following classes: 1. All cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to two thousand dollars or less. * * *" St. 1929, c. 477, p. 838, § 2.

Section 76 of the Code of Civil Procedure was amended in 1929 so as to provide, in part, as follows:

"The superior court shall have original jurisdiction: 1. In all civil cases and proceedings except cases and proceedings in which jurisdiction is or shall be given by law to municipal or to justices' or other inferior courts. * * *"

Formerly the Superior Court had original jurisdiction of all cases at law involving the title or possession of real property under the provisions of the Constitution, article 6, § 5; Code Civ. Proc. § 76. But on the adoption of the amendments to sections 5 and 13 of article 6 of the Constitution, on November 6, 1928, the Superior Court lost such jurisdiction up to $1,000 and since the legislation of 1929, adopted pursuant to the constitutional amendment of 1928, which specifically provided that the Superior Court should have original jurisdiction in all civil cases except cases in which jurisdiction is or shall be given by law to municipal or other inferior courts, we conclude that the Superior Court has lost jurisdiction of all actions at law within the statutory limit of $2,000, including actions at law which involve the title or possession of real property, and that such jurisdiction has been granted to the municipal court.

The judgment is reversed, the cause remanded for a new trial in the municipal court; appellants to have their costs on appeal.

We concur: SHAW, J.; BISHOP, J.

106 Cal. App. (Supp.) 763

PEOPLE v. ARNOLD.

Cr. 37848.

Appellate Department, Superior Court, Los Angeles County, California.

Oct. 19, 1929.

Intoxicating liquors ⟹143.

Café proprietor allowing his guests to consume intoxicating liquor brought by them on his premises is guilty of maintaining common nuisance (Volstead Act, tit. 2, § 21 [27 USCA § 33]).

Volstead Act, tit. 2, § 21 (27 USCA § 33), adopted by Wright Act (St. Cal. 1921, p. 79), declares any place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of such act a common nuisance, and any person maintaining such nuisance guilty of a misdemeanor.

Appeal from Municipal Court of Los Angeles; H. Parker Wood, Judge.

Lacy P. Arnold was convicted of maintaining a common nuisance, and he appeals.

Affirmed.

Nathan O. Freedman, of Los Angeles, for appellant.

Buron Fitts, Dist. Atty., and Tracy C. Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

BISHOP, J.

Section 21, title 2 of the Volstead Law (27 USCA § 33), adopted by our Wright Act (St. 1921, p. 79), reads in part as follows:

"Any room, house, building * * * or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this chapter * * * is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor. * * *"

The main question presented by this appeal is whether or not a proprietor of a café who himself furnishes no liquor to his guests, but who allows them to consume in his premises liquor which they bring, offends under this section.

The evidence is sufficient to compel us, reviewing the matter on appeal, to consider the following as established facts: The defendant was in charge of a place known as Sharkey's Café, which had a dance floor bordered by banquet rooms and booths, with tables on the edge of the floor. On the night charged in the complaint some one hundred and twenty-five guests were in the café, many of them drinking intoxicating liquor, some of them drunk, and there was no table but bore liquor or cracked ice and ginger ale. While the drinking was going on, the defendant was actively engaged as proprietor of the place, being in and out of the kitchen, passing the booths, waiting at the front entrance, and knew that intoxicating liquor was being brought in and consumed by his patrons.

There was no evidence that any liquor was manufactured, sold, or bartered on the premises, or that the defendant kept any on hand or supplied any.

Defendant was convicted by a jury, and sentenced to pay a fine of $1,000. On his appeal, he contended that he was not guilty of maintaining a nuisance because he was not engaged in making any commercial use of intoxicating liquor.

So far as has been called to our attention, there is no decision in this state measuring the language of section 21 of title 2 of the Volstead Law by a state of facts such as we have. In the federal courts, however, there are several cases which remove the question from the field of doubt.

In Fritzel v. United States (C. C. A. 7th Circuit, 1927) 17 F.(2d) 965, 966, the question was squarely considered, and the court held that a nuisance was being maintained. The following language in the opinion suffices to illustrate the court's reasoning:

"* * * Any *place* where liquor is kept in violation of the law—*no matter by whom kept*—to be a common nuisance. * * *

"In view of the fact that, with certain exceptions * * * mère possession is forbidden, it is well to remember that consumption is impossible without possession by the consumer."

The emphasis shown is that of the court, not ours. The federal Supreme Court declined to review the case.

Other cases reaching the same conclusion are: United States v. Budar (D. C. 1925) 9 F.(2d) 126; Rossi v. United States (C. C. A. 8th Circuit, 1926) 16 F.(2d) 712; United States v. Club Chez Pierre (D. C. 1929) 31 F.(2d) 220; United States v. Butler Hotel Co. (D. C. 1929) 32 F.(2d) 324.

Other contentions made by appellant have been considered by us, but will not be discussed here. We are of the opinion that no error prejudicial to defendant appears, and the judgment following conviction should be affirmed.

We concur: McLUCAS, P. J.; McCOMB, J.

106 Cal. App. (Supp.) 783

LIVE OAK CEMETERY ASS'N v. ADAMSON et al.

Civ. 284138.

Appellate Department, Superior Court, Los Angeles County, California.

Jan. 8, 1930.

1. Appeal and error ⟹907(3).

Superior court must assume, in absence of objection to sufficiency of evidence in bill of exceptions, that findings were supported by ample evidence.

2. Trusts ⟹352.

Corporation from which officer obtained moneys advanced to another company cannot recover amount on trust theory in action for money received.

The facts disclosed that officer of plaintiff corporation seeking to recover judgment against defendants on their liability as stockholders of another corporation was also officer in such corporation, and was also interested in a third corporation. Plaintiff corporation had a fund from which officer withdrew certain sum which he mingled with moneys of third corporation, and which moneys were used to pay bills for benefit of defendant corporation or deposited in its accounts and withdrawal being used in corporation's interests. No one in defendant corporation except officer knew that plaintiff corporation's money was being used, and it was impossible to trace any specific withdrawal from plaintiff's fund to where it finally benefited defendant corporation.

3. Courts ⟹188(3).

Corporation, from which officer obtained moneys advanced to another company, could not recover amount on trust theory in municipal court action, to which officer was not party (Const. art. 6, § 11).

Const. art. 6, § 11, at time action was tried, gave municipal court no jurisdiction to declare existence of trust.

4. Corporations ⟹428(7).

Corporation, to which officer advanced moneys obtained from another corporation, *held* liable to latter on implied contract; his knowledge being that of corporation.

5. Corporations ⟹430.

Corporation *held* not liable to corporation, from which officer secured funds to pay bills, for amount of his and two others' notes.

6. Trusts ⟹372(1).

Presumption is that moneys, drawn by trustee from fund in which he mingled his personal funds, were his own.

7. Corporations ⟹401.

Corporation, to which officer advanced moneys of another corporation of which he was also officer, *held* liable only for expenditures after exhaustion of officer's own funds.

8. Licenses ⟹39.

Stock, issued by corporation before receiving consideration for other stock, in violation of permit, *held* void (Corporate Securities Act, §§ 12, 13).

Corporate Securities Act, § 12 (Deering's Gen. Laws 1923, Act 3814) declares securities issued by corporation without permit of commissioner void, and section 13 declares corporation issuing security in nonconformity with permit guilty of a public offense.

Appeal from Municipal Court of Los Angeles; Charles B. MacCoy, Judge.

Action by the Live Oak Cemetery Association against Victor Adamson and others. From a judgment against defendant Adamson and certain other defendants, they appeal.

Reversed.

Bert L. Cooper, of Pomona, and Reeve Hobbie, of Monrovia, for appellants.

Robert H. Dunlap, of Los Angeles, for respondent.

BISHOP, J.

[1] Plaintiff obtained judgment against the appealing defendants on their liability as stockholders of the Victor Adamson Productions, Inc. By way of defense appellants lay the ax to two roots of plaintiff's case. How successfully they cut must be determined from an examination of the judgment roll, for there is no objection to the sufficiency of the evidence appearing in the bill of exceptions, and we must assume, therefore, that there is ample evidence to support each finding. Millar v. Millar (1917) 175 Cal. 797, 167 P. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184; Jones v. Wickstrom (1928) 92 Cal. App. 292, 268 P. 449.

First of all, it is insisted that an action for money had and received will not lie in a case where, as here, the money expended was embezzled. To have the problem properly before us we must see the picture portrayed by the findings of fact.

One A. B. Watson was, from October 1, 1927, on through the story, the president of the plaintiff corporation. He was also president of the Victor Adamson Productions, Inc., part of that time, and all of the time an officer in charge of the books and records. Watson had still a third interest, the Foothill Cities Audit Company, under which fic-

titious name he carried on an accounting business. Each of the three concerns named had checking accounts in two banks in Monrovia, and Watson kept all the books.

The plaintiff corporation had a fund set aside for the perpetual care of the graves in its cemetery. From this special fund, between September 23, 1927, and June 25, 1928, Watson drew out by checks the sum of $22,175. This sum he mingled with the moneys of his audit company in his two accounts. The income of his audit company during the years 1927 and 1928, not taking into consideration the embezzled money, was $30,830.61. The expenditures of the audit company, not including those for the Adamson Company about to be mentioned, exceeded $23,000.

Between September and June, Watson drew on his audit company accounts for $29,720.35, and either paid bills for the benefit of the Adamson Company or deposited the moneys in one or the other of its accounts; the withdrawals then being made in the corporation's interests. The figure just given includes the sum of $4,500 which went to pay the individual notes of Watson and two others; the proceeds of the notes having been credited to the Adamson Company account. A little over $5,000 was returned by the Adamson Company to Watson during this time.

Plaintiff's books show that Watson was charged with the sums withdrawn. The books of the Adamson Company show Watson credited with the expenditures he made on its behalf. No one in the Adamson Company except Watson himself knew that plaintiff's money was being used. Indeed, they were told by Watson, and innocently believed, that it was Watson's own funds he was advancing. No money went directly from plaintiff to the Adamson Company nor to its account, and it is not possible to trace any specific withdrawal from plaintiff's fund to where it finally benefited the Adamson Company.

[2, 3] Does this state of facts create a liability on the part of the Adamson Company to the plaintiff? In supporting an affirmative answer, plaintiff advances two theories:

First, it takes the position that from out the transaction the Adamson Company emerges in debt to Watson; Watson holds the debt in trust for the plaintiff; as the beneficiary, the plaintiff may sue directly. The position seems to us untenable in this case. In the first place, the action at bar is one for money had and received, not one predicated on acts establishing a trust for the benefit of the plaintiff. Then, too, the relation suggested between the plaintiff and the Adamson Company is plainly not a legal one, but one to be created by a decree directed by a court with equity jurisdiction. At the time this action was tried, the municipal court had no jurisdiction to decide that Watson should hold his debt in trust for the plaintiff. Article 6, state Constitution, section 11. Furthermore, a judgment so decreeing would not be in any way binding upon Watson, as he is not a party to the action, and would have to be reversed for that reason. See Hutchins v. Security Trust & Savings Bank (Cal. Sup. 1929) 281 P. 1026, 65 A. L. R. 1059, and cases cited, for a discussion of this principle.

[4] Plaintiff's second theory is that the Adamson corporation is liable on an implied contract. This is presented by the pleadings, and is tenable. The principle involved is illustrated by Gray v. Huffaker (1917) 176 Cal. 516, 169 P. 1038, 1039. In this case moneys of Gray intrusted to Mr. Huffaker were by him used to pay off a note executed by Huffaker and his wife, secured by a mortgage on her separate property. This use of Gray's money was made with her knowledge. An action for money had and received resulted in judgment for Gray. The court said:

"Upon these facts the plaintiff was entitled to judgment for the money of Gray so appropriated to the use of the defendants. * * * She received a benefit from his money to the same extent as if she herself had received the money and had applied it to pay the mortgage debt. Standish v. Babcock, 52 N. J. Eq. 628, 29 A. 327."

In the case at bar, at least some of plaintiff's moneys was used to meet bills of the Adamson Company. It received a benefit to the same extent as though it had received the money directly and had applied it to its obligations. The question remains: Was this done with its knowledge?

It is plain, from the findings of fact, that the only knowledge that can be said to be the Adamson Company's is that possessed by Watson. Under the circumstances, his knowledge is that of the Adamson Company.

The question presented in the case of McKenney v. Ellsworth (1913) 165 Cal. 326, 132 P. 75, 76, was whether or not the bank, for which plaintiff was receiver, had taken the note being sued on with knowledge that $5,000 had been paid on it. The payee of the note as executed was one Dennis. The statement of the court pertinent to our inquiry follows:

"Dennis was president of the bank, and the only notice to the bank is that which, as respondent asserts, is to be imputed to it by reason of the fact that its president, Dennis, had knowledge of the payment and offset. The familiar rule that a principal is bound by the knowledge of his agent, acquired in the course of the agency, rests upon the presumption that the agent will communicate to the principal the facts learned by him, as it is his duty to do. But, says the

appellant, where an agent of a corporation is dealing with the corporation in a transaction in his own behalf, it will not be presumed that he will communicate to his principal facts affecting the transaction. Bank v. Burgwyn, 110 N. C. 267, 14 S. E. 623, 17 L. R. A. 326; McDonald v. Randall, 139 Cal. 246, 72 P. 997. This is no doubt the general rule regarding the imputing to a principal of notice of facts known to an agent who is, in the particular transaction in question, acting in an interest adverse to that of his principal. But the rule is not without exceptions. If the agent is in fact acting for his principal in the transaction, even though he may have an opposing personal interest, 'it is his duty, notwithstanding his interest, to communicate to his company (principal) any facts in his possession, material to the transaction, and the law will therefore presume, in favor of third persons, that he made such communication.' Bank of Pittsburgh v. Whitehead, 36 Am. Dec. 186, note; Le Duc v. Moore, 111 N. C. 516, 15 S. E. 888."

"Usually, this is a conclusive presumption." Offeman v. Robertson-Cole Studios (1926) 80 Cal. App. 1, 12, 251 P. 830, 835.

This case seems to us to be controlling in the situation here. Watson was part of the time the president of the Adamson Company, part of the time its secretary, and at all times an officer and in charge of the books and records of the corporation. These facts of themselves are not determinative, however. But it would seem to be the fact, and on the retrial the matter can be definitely determined, that he was left largely in charge of the fiscal affairs of the company. As such, he, it seems, obtained the money to pay its bills and keep it going. He was then not only loaning money he had converted to his own account to the Adamson Company, but he was intrusted with the duty of securing the funds. He was the company's agent, then, and his knowledge that so much of the money as was actually that of the plaintiff was not his own is knowledge of the company. See, also, First National Bank v. Reed (1926) 198 Cal. 252, 244 P. 368; Los Angeles Investment Co. v. Home Savings Bank (1919) 180 Cal. 601, 606, 182 P. 293, 5 A. L. R. 1193; Williams v. Hasshagen (1913) 166 Cal. 386, 137 P. 9; Offeman v. Robertson-Cole Studios (1926), supra; Southern Trust & Commerce Bank v. San Diego Savings Bank (1922) 60 Cal. App. 215, 212 P. 385.

Nor is it material that Watson was acting under no express authorization, if it be found that he was in fact the agent of the company with respect to getting its bills paid. National Bank of San Mateo v. Whitney (1919) 181 Cal. 202, 183 P. 789, 8 A. L. R. 298, presents a closely analogous case.

Our conclusion, then, is that, if on a retrial of this action it appears that Watson was intrusted with securing funds for the Adamson Company, or paying its bills, his knowledge that the funds he secured or used were those of the plaintiff brings that knowledge home to the Adamson Company.

[5] Under the facts now appearing, however, a judgment in the amount given is without warrant. To begin with, under no theory suggested to us or conjured up by our imagination can the payment of the notes, amounting to $4,500, which "were never the liabilities of the Adamson Co.," be said to be for the benefit of the company, or to create any liability on the company. Unless, on a retrial of this cause, the Adamson Company should be shown to have some legal obligation respecting the notes of Watson, Keefe, and Wilson, the payment of those notes should not be taken into consideration.

[6, 7] It would seem, furthermore, that some of the advances made by Watson were from his personal funds (of the audit company), and not from moneys purloined from plaintiff. The following quotation from Elizalde v. Elizalde (1902) 137 Cal. 634, at page 641, 66 P. 369, 70 P. 861, gives the rule to be applied:

"If the trustee, after so mingling the funds, has drawn therefrom from time to time, it will be presumed that the moneys so drawn were from his own portion of the fund, rather than from the moneys held by him in trust. In re Hallett's Estate, 13 Ch. Div. 696; National Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693; Lewin, Trusts, *895. So long as the amount in the fund is greater than the amount of the trust fund, it will, in the absence of any showing to the contrary, be presumed to be that held in trust. Whether the moneys are mingled in one account at a bank or are kept together in the strong box of the trustee is immaterial."

Upon a retrial it will be necessary, if plaintiff is to succeed, to show that moneys withdrawn from one or the other of the audit company accounts was not Watson's, tested by the rule just given. Only such expenditures for the Adamson Company's benefit as were made after all of Watson's own funds were exhausted in the account drawn upon can be charged to the Adamson Company and through it to its stockholders.

[8] Another major attack upon the judgment is made and of itself requires a reversal. This has to do with the premise upon which the case is founded, that defendants are stockholders. They are not, and never were, stockholders, they defend, because the stock purported to be issued them was unauthorized.

The irregularity on which they rely is accurately set forth in an amendment to their answer. Nowhere did the trial court find that the several allegations of the amendment

were or were not true, but by way of what seems to be a recital of the evidence it is made to appear that the Adamson Company was authorized to issue stock upon these terms:

"(1) Thirty shares for cash, at the rate of $1.00 per share.

"(2) 5,000 shares in part payment for certain items of personal property to be transferred by Victor Adamson, one of the promoters of said Adamson Co., free and clear of all liens and encumbrances of all kinds and descriptions, consisting of various kinds of equipment suitable for the production of motion pictures.

"(3) And after the Adamson Co. shall have received the consideration of for and issued said 5,030 shares of stock, to sell and issue to the public, 24,470 shares of stock at and for a price of $1.00 per share."

As set up in the answer, the permit referred with more definiteness to the personal property to be conveyed than would appear from the permit given in the findings, and the answer with definiteness avers that the property was not conveyed. Nowhere in the findings is there any reference whatever to the issue thus raised by the answer. In the conclusions of law, however, this statement appears:

"V. (a) That the terms of the permit of the Corporation Commissioner with reference to the issue of the Adamson Co. stock were not complied with in that. * * * Victor Adamson did not transfer to Adamson Co. all of the items of personal property which, by the terms of said permit, he was required to transfer as conditions precedent to the issuance of stock to him."

While this is a mixed finding of fact and conclusion of law, it is a finding of fact on the proposition presented by defendants; and it does appear that the Adamson corporation did not receive the consideration for the 5,000 shares of stock it was authorized to issue to Adamson, and that it was the court's conclusion that the giving of the consideration was a condition precedent to the issue of the stock.

But, if this be so, the Adamson Company was without authority to issue any shares to the defendants, for additional shares could be issued only (as stated in the permit) "after the Adamson Co. shall have received the consideration of for (sic.) and issued said 5,030 shares of stock." The conclusion to reach in the premises cannot be in doubt, in view of the authorities.

To begin with, the Corporate Securities Act (Deering, General Laws, Act 3814) provides in section 12 thereof:

"Every security issued by any company, without a permit of the commissioner authorizing the same then in effect, shall be void. * * *"

Stock issued where no permit has been granted at all has been declared to be void, and the person to whom the stock was issued was not liable as a stockholder, for, "the corporation having no legal rights against Reno, its creditors could have none." Honn v. Hamer (1927) 81 Cal. App. 276, 253 P. 336, 337. Just as clearly within the characterization of section 12, it seems to us, must be placed stock issued after a permit has been granted, but which finds no authority for its issuance in the permit. Such stock is void, for it is issued without a permit authorizing it.

On yet another principle, it seems to us, the stock issued to defendants before the Adamson Company received the consideration for the 5,000 shares is void. This principle finds expression in Smith v. Bach (1920) 183 Cal. 259, 191 P. 14, 15, as follows:

"The general rule controlling in cases of this character is that, where a statute prohibits or attaches a penalty to the doing of an act, the act is void, and this, notwithstanding that the statute does not expressly pronounce it so. * * *"

Section 13 of the Corporate Securities Act reads in part:

"Every company which shall * * * issue * * * any security * * * in nonconformity with a permit of the commissioner authorizing the same * * * shall be guilty of a public offense * * *."

Accordingly, it is held that a contract to purchase stock, not conforming to the terms of a permit, is void. Gridley v. Tilson (1927) 202 Cal. 748, 262 P. 322; Domenigoni v. Imperial Live Stock, etc., Co. (1922) 189 Cal. 467, 209 P. 36; Otten v. Riesener Chocolate Co. (1927) 82 Cal. App. 83, 254 P. 942.

In the Otten Case the court says it is holding the contract for the purchase void, and is not declaring the stock to be void as that question is not involved. Brewis v. Toffelmier (Cal. App. 1929) 275 P. 819, 821, deals with a case much like the Otten so far as the issue of stock is concerned (in each the violation complained of was the failure to exhibit a copy of the permit), and the court makes a distinction between those cases where there is no stock, because there is no permit authorizing its issue, and the case before it. We find in the opinion:

"His stock is not something that does not exist, as in the other case, but is properly issued, even if not properly delivered. * * *"

Without pausing to examine the latter statement too critically, we find the stock in our case not properly issued, because issued prior to the event upon which its authorization was conditioned.

The conclusion is ineluctable that, as now appears, the defendants are not stockholders,

and judgment should not have gone against them.

The judgment is reversed, appellants to recover their costs on appeal.

I concur: DORAN, Judge pro tem.

McCOMB, Acting P. J. I concur in the result, basing my decision upon the grounds first stated in the opinion.

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108 Cal. App. (Supp.) 767

PEOPLE v. NORTON et al.

Cr. No. 37779.

Appellate Department, Superior Court, Los Angeles County, California.

Feb. 6, 1930.

1. Municipal corporations ⟹625.

City ordinance regulating billboards must be reasonable.

2. Municipal corporations ⟹602.

City ordinance prohibiting billboards of more than twelve feet in area in residential districts was valid exercise of police power.

3. Constitutional law ⟹42.

Owners of property in built-up territory could not complain as to unconstitutionality of ordinance regulating billboards in respect to wholly vacant property.

4. Municipal corporations ⟹63(1).

Courts will not reverse action of official body in administrative capacity except for manifest and flagrant abuse of discretion.

5. Municipal corporations ⟹63(1).

Court will not substitute its judgment for that of municipal legislative body designating residence district after consideration of all facts.

6. Municipal corporations ⟹112(1).

Constitutional provision requiring every act to consist of one subject expressed in title does not apply to city ordinances (Const. art. 4, § 24).

Appeal from Municipal Court of Los Angeles; Arch G. McLay, Judge.

Thomas J. Norton and another were convicted of violating a city ordinance relating to erection of billboards, and they appeal.

Affirmed.

John J. Craig, of Los Angeles, for appellants.

Erwin P. Werner, City Atty., and George A. Dockweiler, Deputy City Atty., both of Los Angeles, for the People.

McLUCAS, P. J.

Complaint was filed in the municipal court of the city of Los Angeles, charging in count 1 thereof that the defendants did willfully and unlawfully erect and construct, and cause and permit to be erected and constructed, within a residence district, a billboard of an area of more than twelve square feet, contrary to Ordinance 38315, section 16, of said city; and in count 2 thereof that the defendants erected and constructed, and caused and permitted to be erected and constructed, a billboard of a surface area of more than twelve square feet, without first having secured a written permit from the board of public works of said city so to do, contrary to section 20 of said ordinance. Defendants were adjudged guilty on both counts, and now appeal from the judgment and from the order of the trial court denying defendants' motion for new trial, and from all orders made subsequent to the judgment.

The grounds of appeal are:

(1) That the ordinance upon which complaint in this cause is based is unconstitutional, in that it seeks to deprive the defendants of the free use of their private property without due process of law, and in that said ordinance places an unreasonable restriction upon the use of private property, and that said ordinance attempts to take private property without due process of law, and that said ordinance is not within the police powers of the city of Los Angeles.

(2) That the court erred in denying defendant's motion for a new trial.

(3) That the court erred in its rulings upon questions of law occurring at times subsequent to trial.

(4) That the evidence does not support the decision of the court herein.

Ordinance 38315 of the city of Los Angeles, being entitled, "An Ordinance regulating billboards, and advertising signboards," recites in section 1 thereof that:

"For the purpose of regulating the erection, construction and maintenance of billboards and advertising signboards within the City of Los Angeles the territory of the said city shall be divided into districts to be designated and known as (1) Business districts; (2) Semi-Business districts; and (3) Residence districts."

It is provided in section 3 that semibusiness districts shall include all lots fronting on both sides of the same street within any block wherein more than 50 per cent. of the occupied frontage on both sides of said street is occupied by buildings, etc., devoted to, or

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

utilized for, business purposes other than billboards or advertising signboards.

In section 5 it is provided that residence districts shall consist of and include all portions of the city of Los Angeles not included in the business or semibusiness districts.

Section 6 forbids the erection or maintenance of any billboard within the city of Los Angeles of a surface sign space of more than ten feet, six inches in height, with certain exceptions.

Section 7 forbids the erection or maintenance of any billboard, unless all portions of the base line thereof shall be at least twelve inches from the surface of the ground and no portion of such base line more than five feet from the surface of the ground, with certain exceptions.

Section 8 forbids the erection or maintenance in the city of Los Angeles of any billboard, unless the same be safely and securely built.

Section 10 forbids the erection or maintenance within fire district No. 1, of the city of Los Angeles, of any billboard, unless the same shall be constructed entirely of metal or other noncombustible materials.

Section 11 requires that billboards erected or maintained outside of fire district No. 1, of said city, built or constructed of wood or other inflammable materials, shall be at least six feet from any building or other structure constructed of wood or other inflammable materials.

Section 14 provides that it shall be unlawful for any person to cause or permit to be displayed upon any billboard any statement of an obscene, indecent, or immoral nature, etc.

Section 16 provides that it shall be unlawful for any person to erect, or cause to be erected, within any residence district, any billboard or advertising signboard of an area of more than twelve square feet, or within a distance of less than fifteen feet from another billboard.

In section 20 it is provided that it shall be unlawful for any person to erect, or cause to be erected, any billboard or advertising signboard of a surface area of more than twelve square feet, within the city of Los Angeles, without first having secured a written permit from the board of public works so to do.

Appellants contend that said ordinance is unconstitutional, for the reasons stated in their grounds of appeal, as contained in the statement on appeal. Numerous authorities have been cited by appellants in support of their contention, which we believe are to be distinguished from the present case. In Varney & Green v. Williams, 155 Cal. 318, 100 P. 867, 21 L. R. A. (N. S.) 741, 132 Am. St. Rep. 88, relied upon by appellants, the plaintiffs brought action to enjoin the defendant municipal authorities from tearing down certain billboards maintained by plaintiffs. The defendants based their contemplated action upon the provisions of an ordinance prohibiting the erection or maintenance of any "advertising billboard within the corporate limits of the town of East San Jose by any person except a person having a fixed place of business, who may erect and maintain on the premises where his said business is carried on, a sign advertising only merchandise for sale by him at said place of business." The court held that, if the billboards constituted a public nuisance, a court of equity would refuse any writ designed to perpetuate their maintenance, regardless of the validity of the ordinance under which defendants assumed to proceed. It was not contended by the respondents that any nuisance in fact existed, unless it resulted from the mere circumstance that structures were maintained contrary to the terms of the ordinance. The court further held that, except for the limited exemption, the effect of the ordinance was to absolutely prohibit the erection or maintenance of billboards for advertising purposes, and that such sweeping prohibition was beyond the power of the town trustees. However, after pointing out that artistic or æsthetic considerations alone will not justify, as an exercise of the police power, a radical restriction of the right of an owner to use his property in an ordinary and beneficial way, the court said at page 321 of 155 Cal., 100 P. 867, 868:

"In most or all of the cases dealing with prohibitions of the right to erect or maintain billboards, it is recognized that the legislature may under the police power prohibit advertisements of indecent or immoral tendencies or signs dangerous to the physical safety of the persons or property of the public. Ordinances limiting the height of billboards have been sustained as having a tendency to protect passers-by from physical injury. City of Rochester v. West, 164 N. Y. 510, 53 L. R. A. 548, 79 Am. St. Rep. 659, 58 N. E. 673; Gunning System v. City of Buffalo, 75 App. Div. 31, 77 N. Y. S. 987; Whitmier, etc., Co. v. City of Buffalo (C. C.) 118 F. 773; In re Wilshire (C. C.) 103 F. 620."

[1] In Pacific Railways Advertising Company, etc., v. City of Oakland (Cal. App.) 276 P. 629, where the defendants sought to enforce an ordinance prohibiting commercial advertising on the exterior side of street cars, the court held that the ordinance was invalid, in that it attempted to restrict, by absolute prohibition, a legitimate use of private property, instead of regulating the same so that the use may not endanger the public health, morality, and safety. In the case at bar we find no such radical restriction as to the use of private property. Instead of prohibiting billboards, the ordinance here, by its provisions, regulates the same so that their use

may not endanger the public health, morality, and safety. Necessarily, such regulations must be reasonable. In the ordinance now before us for consideration, we find that all billboards are regulated as to height, as to distance from the surface of the ground, as to the safe and secure manner in which they shall be built, as to the material of which they shall be constructed, as to the distance of wooden billboards from any building constructed of wood, or other inflammable material, and as to displaying upon any billboard any statement of an obscene, indecent, or immoral nature. Certainly it must be held that all of these regulations are reasonable, and tend to require the use and maintenance of billboards in such manner that they shall not endanger the public health, morality, and safety.

Appellants contend that the billboard in question was erected on their private property, advertised their personal business, and violated none of the foregoing provisions, except that the billboard was erected in a residence district without a permit therefor. The ordinance forbids the erection of any billboard within a residence district, as defined by the ordinance, of an area of more than twelve square feet. Such prohibition of billboards more than twelve square feet in area within a residence district can only be sustained as a proper exercise of the police power, if the provisions of the ordinance reasonably tend to promote the public peace, health, safety, and general welfare. In Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 385, 38 A. L. R. 1479, where the validity of an ordinance creating a strictly private residential district was brought in question, the court said:

"It is scarcely necessary to reiterate here the well-recognized principle that courts are loathe to substitute their judgment as to the necessity for a particular enactment for the legislative judgment as to the need of such enactment with reference to the exercise of the police power. A large discretion is vested in the legislative branch of the government with reference to the exercise of the police power. Mehlos v. Milwaukee, 156 Wis. 591, Ann. Cas. 1915C, 1102, 51 L. R. A. (N. S.) 1009, 146 N. W. 882; Carter v. Harper, supra [182 Wis. 148, 196 N. W. 451, 33 A. L. R. 269]. Every intendment is to be indulged by the courts in favor of the validity of its exercise and, unless the measure is clearly oppressive, it will be deemed to be within the purview of that power. It is only when it is palpable that the measure in controversy has no real or substantial relation to the public health, safety, morals, or general welfare that it will be nullified by the courts."

[2] In our opinion, a city ordinance is a valid exercise of the police power, whereby billboards of more than twelve feet in area are prohibited in residence districts, for the reason that such a measure bears a real and substantial relation to the public health, morals, safety, and general welfare. In Thomas Cusack Co. v. City of Chicago et al., 242 U. S. 526, 530, 37 S. Ct. 190, 191, 61 L. Ed. 472, L. R. A. 1918A, 136, Ann. Cas. 1917C, 594, the court said:

"Neglecting the testimony which was excluded by the trial court, there remains sufficient to convincingly show the propriety of putting billboards, as distinguished from buildings and fences, in a class by themselves (St. Louis Gunning Advertising Co. v. St. Louis, 235 Mo. 99, 137 S. W. 929), and to justify the prohibition against their erection in residence districts of a city in the interest of the safety, morality, health and decency of the community."

The foregoing language was quoted with approval in St. Louis Poster Adv. Co. v. City of St. Louis, 249 U. S. 269, 274, 39 S. Ct. 274, 63 L. Ed. 599. In Appeal of Liggett, 291 Pa. 109, 139 A. 619, it was held that a city, in the exercise of the police power, may prohibit the erection of billboards in residential districts.

[3] Conceding, without deciding, that the ordinance involved in this case would be unconstitutional as to owners of property in wholly vacant territory included within the residential district created by said ordinance, appellants are not in position to complain that this ordinance is unconstitutional as to appellants, because the record shows that appellants' property is not such vacant property. Ex parte Quong Wo, 161 Cal. 220, 233, 118 P. 714.

[4, 5] Appellants also contend that the evidence shows that the immediate district in the vicinity of their property was trending away from residential into business uses, and will continue to do so, and that for such reasons the ordinance is unreasonable and discriminatory as to appellants. We have examined the evidence, and find no merit in this contention. True, there are both business and vacant properties in the vicinity of appellants' property, but where an official body, in its administrative capacity, has acted upon a matter properly before it, the courts will not reverse, except where there is a manifest and flagrant abuse of discretion. Where the city council, after a consideration of all of the facts, concluded that the public welfare would be promoted by constituting the area a residence district, it is the settled rule that a court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question. Zahn v. Board of Public Works, 274 U. S. 325, 328, 47 S. Ct. 594, 71 L. Ed. 1074; Appeal of Liggett, supra; Miller v. Board of Public Works, supra; Ex parte Quong Wo, supra.

[6] Appellants further urge that the ordinance is violative of section 24, article 4, of the Constitution of California, which requires that every act shall embrace but one subject, which subject shall be expressed in its title. No mention of the penalty is made in the title of the ordinance. But it is now settled that the constitutional provision does not apply to city ordinances. Ex parte Haskell, 112 Cal. 412, 421, 44 P. 725, 32 L. R. A. 527; City ordinances are not required to have a title. Ex parte Young, 154 Cal. 317, 321, 97 P. 822, 22 L. R. A. (N. S.) 330; In re Johnson, 47 Cal. App. 465, 467, 190 P. 852; Trebilcox v. City of Sacramento, 91 Cal. App. 257, 266 P. 1015.

Finally, appellants contend that the billboard ordinance was in effect repealed by a later zoning ordinance which omitted appellants' property from the strictly residential zone. We see no merit in this contention, since the later ordinance does not purport to regulate the erection and maintenance of billboards.

The judgment and orders are affirmed.

We concur: BISHOP, J.; SHAW, J.

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107 Cal. App. (Supp.) 765

DOUGLAS v. KLOPPER.

Civ. 48.

Appellate Department, Superior Court, Los Angeles County, California.

Jan. 16, 1930.

1. Limitation of actions ⟹35(1).

Claim for usurious interest paid *held* not barred by one-year statutes governing actions for treble amount paid and for statutory penalties or forfeitures (Usury Law, § 3; Code Civ. Proc. § 340, subd. 1).

2. Limitation of actions ⟹49(8).

Action to recover usurious interest paid less than two years before institution thereof *held* not barred by limitations (Code Civ. Proc. § 339, subd. 1).

3. Usury ⟹102(1).

One voluntarily paying usurious interest may maintain common-law action, independent of statutory remedy, to recover amount paid (Usury Law, §§ 2, 3).

Usury Law (St. 1919, p. lxxxiii) § 2, declares contract for usurious interest void as to any agreement to pay interest, while section 3 authorizes recovery of three times interest paid, and makes receipt, but not payment, of usurious interest a misdemeanor.

4. Usury ⟹102(7).

Only excess of interest paid over legal rate can be recovered in common-law action for usurious interest paid.

5. Usury ⟹102(7).

Lender, to whom borrower pays usurious interest by agreement, can retain only 7 per cent. simple interest on actual loan (Usury Law, § 1).

Usury Law (St. 1919, p. lxxxiii), § 1, fixes legal interest on loans made without agreement as to interest at 7 per cent., and limits rate that may be agreed on to 12 per cent.

6. Appeal and error ⟹854(2).

While appellate court will not ordinarily consider errors against respondent, proper judgment will be upheld, though given for erroneous reason.

7. Appeal and error ⟹854(2).

Plaintiff recovering judgment for usurious interest paid, which Superior Court held excessive by amount exceeding legal rate, may argue on appeal that court below erred in not allowing interest on amount recovered, where addition thereof still leaves amount of judgment less than that appealed from.

8. Usury ⟹122.

Borrower *held* entitled to interest on amount of usurious interest recovered from date of making usurious payment (Civ. Code, § 3287).

Appeal from Municipal Court of Los Angeles; Frank G. Swain, Judge.

Action by Edwin S. Douglas against P. S. Klopper. Judgment for plaintiff, and defendant appeals.

Reversed and remanded, with directions.

Henry E. Carter, of Los Angeles, for appellant.

Albert E. Coger, of Los Angeles, for respondent.

SHAW, J.

This is an appeal by the defendant from a judgment on the pleadings entered against him upon the plaintiff's motion.

It appears from the complaint that the defendant loaned to the plaintiff the sum of $5,000, for which plaintiff agreed to pay usurious interest, that, in pursuance of this agreement, the plaintiff paid defendant the sum of $684.42 as interest, and that plaintiff seeks to recover the amount so paid, begin-

ning his action more than one year, and less than two years, after the interest was paid.

Defendant in his answer admitted that the loan was usurious, alleged that plaintiff's action was barred by section 3 of the Usury Act (St. 1919, p. lxxxiii), by subdivision 1 of section 339, and by subdivision 1 of section 340, of the Code of Civil Procedure, and further alleged that the payment of interest was voluntary, and hence could not be recovered.

[1, 2] We do not think plaintiff's claim is barred by any of the statutes of limitation set up in the answer. Section 3 of the Usury Act provides that any one who has paid usurious interest may recover treble the amount so paid, provided his action is brought within one year after payment. Plaintiff did not sue for treble the amount of the interest paid, and has therefore not brought his suit under this statute. Hence the fact that he did not bring his action within one year does not bar him. For the same reason subdivision 1 of section 340 of the Code of Civil Procedure, which bars in one year actions on a statute for a penalty or forfeiture, does not apply to the case. Doubtless plaintiff's action is within the purview of subdivision 1 of section 339 of the Code of Civil Procedure, and would be barred within two years, but his cause of action did not arise until the interest was paid, which was less than two years before the action was brought.

[3] This brings us to the principal questions argued, which are, whether one who has paid usurious interest may maintain a common-law action independent of the remedy under the statute to recover the amount so paid, and whether the fact that he has paid such interest voluntarily will prevent a recovery in such an action. On these questions the authorities in other states are conflicting. Our present Usury Law, as stated by the Supreme Court in Wallace v. Zinman, 200 Cal. 585, 590, 254 P. 946, 62 A. L. R. 1341, and in Re Washer, 200 Cal. 598, 602, 254 P. 951, was borrowed to a large extent from the Wisconsin law, and, while the copying may not be sufficiently exact to show a legislative intent to import also the construction judicially put upon the Wisconsin law, yet decisions from that state are quite persuasive as to the rule which should be adopted here, and it is there held that a plaintiff may recover under the circumstances shown by the pleadings in this case.

In Wood v. Lake, 13 Wis. 84, 96, a similar question arose. There the defendant had paid interest in excess of the highest rate allowed by law, and pleaded this payment as a counterclaim in an action brought upon his note. The action having been brought after the expiration of time for pursuing the statutory remedy, the court held this counterclaim good, saying: "A remarkable unanimity of opinion upon this question seems to have prevailed among the courts of Great Britain and those of the several states of the Union where laws against usury, properly so called, have existed. It has been universally held, where statutes forbid the taking of excessive interest, and punish a violation of their provisions by the infliction of fines, penalties or forfeitures upon the person who takes it, that the person who pays the same may, independently of the remedies afforded by the statutes, maintain an action for money had and received, as at the common law, to recover back the money so paid. In such cases, both parties are not understood to be in pari delicto, so as to preclude a recovery by either. Upon this subject, Mr. Comyn, in his Law of Usury, page 211, says: 'And with regard to parties becoming participes criminis, the following distinction is laid down, viz.: between the prohibition of statutes made to protect the weak or necessitous from being overreached or oppressed, and the prohibitions of statutes enacted upon general reasons of policy and public expediency; in the latter case, all parties are equally criminal; in the former, the oppressor is alone within the pale of the law.' The penalties of the law are all aimed at the lender and none at the borrower; and it appears to be clearly within the intent and meaning of the legislature, if not their words, that he shall not be permitted to retain or profit by money or property thus unlawfully acquired. The provision of the law of this state (sec. 3, chap. 172, Laws of 1851), by which every person paying a greater sum for the loan or forbearance of money than that allowed by law, might, if his action was brought within one year after such payment, recover back treble the sum so paid, confirms this view. It shows that the legislature did not intend that the receiver should retain the money thus obtained, and that they did not consider both parties equally at fault. Otherwise they would not have permitted the borrower to recover back three times the amount and thus speculate out of the attempted extortions of the lender. But if the borrower chooses, by not bringing his action within one year, to waive his right to a treble recovery, he may do so and still retain the right to maintain an action for money had and received, to recover back the excess actually paid, at any time within the period prescribed by the statute of limitations. For the remedy given by the statute is cumulative and not exclusive, as has frequently been decided in other states where similar statutory remedies have been given."

In Fay v. Lovejoy, 20 Wis. 403, this ruling was repeated and both of these cases were approved in Schriber v. LeClair, 66 Wis. 591, 29 N. W. 570, 889.

In Browning v. Morris, Cowp. 790, 792, 98 Eng. Rep. 1364, an English case decided in

1778, the rule is thus stated: "The distinction has been taken between statutes enacted on general grounds of policy and public expediency in which each party violating the law is in pari delicto and entitled to no assistance from a court of justice, and those laws enacted to protect weak or necessitous men from being overreached, defrauded or oppressed, in which event the injured party may have relief extended to him, and the whole purport and reason, both of the law of usury and of the great mass of decisions under it, indicate that the lender on usury is regarded as the oppressor and the criminal and the borrower as the oppressed and injured."

In Wheaton v. Hibbard, 20 Johns. (N. Y.) 290, 11 Am. Dec. 284, the same rule was adopted as in the Wisconsin cases, supra, and the court said: "The law considers the borrower rather as a victim than an aggressor. The statute prohibits usury, in order to protect needy and necessitous persons from the oppression of usurers, who are eager to take advantage of the distresses of others, and who violate the law only to complete their ruin. In such a case, the maxim of potior est conditio defendentis, has never been applied."

In Lee v. Hillman, 74 Wash. 408, 133 P. 583, 585, L. R. A. 1918B, 581, Ann. Cas. 1915A, 759, the court followed the same rule and quoted wtih approval from Baum v. Thoms, 150 Ind. 378, 50 N. E. 357, 358, 65 Am. St. Rep. 368, the following: "The payment of usurious interest is not a voluntary payment in such sense as to entitle the receiver to retain the amount paid above legal interest, but such payment is regarded as under the constraint of a formal, though illegal, contract, obtained by taking advantage of the necessities of the borrower, and therefore excepted from the ordinary rule that one voluntarily paying money on an illegal claim cannot maintain an action to recover such payment. Wheaton v. Hibbard, supra; Schroeppel v. Corning, 5 Denio (N. Y.) 236; Peterborough Savings Bank v. Hodgdon, 62 N. H. 300; Willie v. Green, 2 N. H. 333; Caughman v. Drafts, 1 Rich. Eq. (S. C.) 414; Fay v. Lovejoy, 20 Wis. 403; Wood v. Lake, 13 Wis. 84; First Nat. Bank v. Plankinton, 27 Wis. 177, 9 Am. Rep. 453; Grow v. Albee, 19 Vt. 540; Williams v. Wilder, 37 Vt. 613; Scott v. Leary, 34 Md. 389; Philanthropic Bldg. Assn. v. McKnight, 35 Pa. 470; Thomas v. Shoemaker, 6 Watts & S. [Pa.] 179–183; note to Zeigler v. Scott, 54 Am. Dec. 400–402; Bexar Bldg. & L. Assn. v. Robinson, 22 Am. St. Rep. 41; note to Davis v. Garr, 55 Am. Dec. 398–400; 2 Ency. Plead. and Prac. pp. 1019, 1020, and note on usury. It follows, therefore, that in the absence of a statute expressly prohibiting it, usurious interest, which has been paid by a debtor may be recovered in a direct action, or in any action brought by the person receiving such usurious interest, on a contract express or implied against such debtor."

In Lee v. Hillman, a satisfactory answer is made to the argument, which is also presented in the case at bar, that at common law there is no limitation on the rate of interest that may be charged on a loan, and that there can be no common-law right to recover a payment which is made illegal by statute. On this point, the court said: "It may be conceded that there is a sense in which there is no such *right* in the absence of statute, since whatever right the debtor has must necessarily rest primarily upon the statute which makes the exaction of such payment from him unlawful. We think, however, that it does not follow that the debtor who has been thus unlawfully deprived of money or property may not recover such money or property by a common-law *remedy*, and that of course under our system means by the ordinary civil action which we have substituted for the common-law remedy. While the *right* here involved rests primarily upon our usury statute, and would not exist in the absence of such statute, we think an ordinary civil action, that being our substitute for the common-law remedy, furnishes a remedy available to the debtor to recover the money or property unlawfully taken from him in payment of usurious interest. We are unable to see that a debtor having money or property thus unlawfully taken from him is in any different situation, so far as his right to have the same restored is concerned, than as if it were taken from him in some other unlawful manner. Nor can we see that his right to restoration is any different because the taking is made unlawful by statute instead of by the common law."

In 39 Cyc. 1030, is the following statement on this subject: "The common-law doctrine which has been adopted by many of the American courts is that the debtor may recover payments made upon a loan in excess of the legal rate of interest. According to this doctrine such payments are not deemed voluntary, nor the debtor to be in pari delicto in making them. Hence, an action lies to recover such usurious excess from the creditor who ought not in equity and good conscience to retain more than his principal and lawful interest thereon. It is held in these states that other remedies given by statute do not suspend the common-law right, but are cumulative merely."

In a note, many cases supporting this statement are cited, some of which we have examined. In a subsequent note, other, but not so many, cases holding to the contrary, are cited.

In 27 R. C. L. 269, the rule is laid down as follows: "By the weight of authority, both

in this country and in England, an action at common law, in the nature of an action for money had and received, will lie for the recovery back of usurious payments in excess of principal and legal interest. And the omission from a later statute of an express provision of an earlier one for the recovery back of excessive payments does not negative the common law right. A payment of usurious interest is regarded as made under the constraint of a formal, though illegal, contract, obtained by taking advantage of the necessities of the borrower, and is, therefore, excepted from the ordinary rule that one voluntarily paying money on an illegal scheme cannot maintain an action to recover such payment. It is to be observed, however, that while the courts which sustain this rule regard the usurer as an oppressor and the debtor as a victim, so that in a sense the payment of usury is regarded as involuntary, no proof of duress or oppression is necessary to sustain the rule, other than that involved in the act itself of taking the money under a usurious contract."

In an extensive note on this subject, appended to the above-cited case of Lee v. Hillman, in L. R. A. 1918B, 585, this statement is made and supported by the citation of numerous authorities: "By the weight of authority, both in this country and in England, an action at common law, in the nature of an action for money had and received, will lie for the recovery back of usurious payments; at least, where the statute in relation to usury declares usurious contracts void in whole or in part."

This same note cites other less numerous cases to the contrary, but many of them can be distinguished from the case at bar by the fact that the statutes against usury under which they were decided did not declare a usurious agreement void or impose any criminal liability on the lender. Some of these statutes, in fact, clearly placed both parties in pari delicto by forfeiting the usurious interest to some public fund.

In the same note, at page 593, we find this statement, which is supported by the authorities cited: "In jurisdictions recognizing the common-law rule which permits recovery back of usurious payments, it is held that such remedy is not abrogated by an express statutory remedy for the recovery back of excessive interest or a penalty within a limited time, the statutory remedy being regarded as cumulative of the remedy at common law."

The questions under consideration here have not been decided in any case arising under our present Usury Law. There are, however, some California decisions which, in appellant's view of the case, are controlling here. Those decisions were made upon the provision formerly contained in the California Constitution which required a mortgage to be assessed for the purpose of taxation to the mortgagee, and provided that every contract by which the debtor is required to pay the tax on the mortgage "shall, as to any interest specified therein, * * * be null and void." Article 13, § 5. The case of Harralson v. Barrett, 99 Cal. 607, 611, 34 P. 342, 343, arose under this provision. In an action to foreclose a mortgage containing such a forbidden clause, the mortgagor claimed that the interest he had paid should be deducted from the amount of principal due, and the court said: "There is a clause in the mortgage for the payment by the mortgagors of the mortgage tax. This clause, being invalid under section 5 of article 13, of the constitution, supra, releases the mortgagors from any obligation to pay the interest stipulated in the note. The provision was inserted in the constitution for the benefit of the borrower, but it is a benefit which he may waive if he sees fit, and, if he voluntarily fulfills his promise to pay interest, it is through a mistake of law on his part, or a waiver of a known right. In either case he is bound by his own act."

This case was followed without further comment in London, etc., Bank v. Bandmann, 120 Cal. 220, 224, 52 P. 583, 65 Am. St. Rep. 179. In Matthews v. Ormerd, 140 Cal. 578, 581, 74 P. 136, 137, the court said, regarding the same constitutional provision: "With respect to the constitutional provision in question, and the rights of parties under it, the principles are clearly applicable which have been judicially applied to the asserted rights of parties under general usury laws. It is in its essential elements a usury law. In Matthews v. Ormerd, 134 Cal. 87, 66 P. 67, 210, it is called by the court 'this provision against usury,' and in Harralson v. Barrett, 99 Cal. 611, 34 P. 342, and London Bank v. Bandmann, 120 Cal. 224, 52 P. 583, 65 Am. St. Rep. 179, the doctrine generally applied to usury laws, namely, that they are for the benefit of the borrower, and that he may waive the privilege, and that if he does so and pays the interest he cannot recover it back, is applied to the constitutional provision in question."

These three cases were cited and followed on the point that voluntary payments cannot be recovered in Leahy v. Warden, 163 Cal. 178, 124 P. 825, another case cited by appellant, which, however, did not relate to this constitutional provision or to any matter of usury or any payment prohibited by law. A general study of the decisions in other states regarding usury indicates that the court was mistaken in its statement above quoted from Matthews v. Ormerd as to the doctrine generally applied to usury laws. The doctrine there stated has been applied in some cases, but the great weight of authority is to the contrary. However, this fact alone would not justify us in refusing to follow that case unless it is distinguishable on other grounds.

The constitutional provision involved in the cases just referred to declared that every contract containing the provision for payment of the tax by the mortgagor should be null and void as to any interest specified therein. To this extent it was substantially like our present Usury Law, which provides that a contract for usurious interest "shall be null and void as to any agreement or stipulation therein contained to pay interest." Section 2. But the present Usury Law goes farther, and provides as a penalty that three times the interest paid may be recovered from the lender, and also makes the receipt, but not the payment, of usurious interest punishable criminally as a misdemeanor. We think these differences point the way to the application of a different rule in cases arising under the statute. The provisions contained in the statute, but not found in the constitutional provision, are the same as those relied upon in the Wisconsin cases in support of the ruling that usurious interest paid may be recovered, and many of the other cases adopting the same rule lay stress on one or the other of these provisions as indicating that the borrower is not in pari delicto with the lender.

In Tatterson v. Kehrlein, 88 Cal. App. 34, 49, 263 P. 285, 291, it was held that money paid for stock under a contract which is illegal by reason of noncompliance with the Corporate Securities Act may be recovered. The court referred to the English case of Browning v. Morris, from which we have already quoted, saying: "The penalties prescribed by the Corporate Securities Act being all laid on the seller and none on the buyer, and the statute being for the benefit and protection of buyers, the parties are not in pari delicto, and the buyer may have judgment for the money paid out by him under the illegal contract, and may have the contract, the stock certificates and promissory note given in payment of such stock cancelled. (Citing authorities.) The foundation of the right of the plaintiff to recover in these cases, although a party to the illegal contract, is the rule of the common law declared by Lord Mansfield in Browning v. Morris, 2 Cowp. 790, 98 Eng. Reprint 1364."

The Corporate Securities Act is in all respects pointed out in Browning v. Morris in the same class as the Usury Act, and we think the rule thus declared in Tatterson v. Kehrlein should be applied to both.

[4] For the foregoing reasons, the answer in this case stated no defense, and the plaintiff was entitled to a judgment upon the pleadings. But the judgment entered by the court was for the whole amount paid by the plaintiff as interest. The authorities do not sanction the recovery of so much. In Wisconsin, on whose decisions the plaintiff especially relies, it was held, in Fay v. Lovejoy, 20 Wis. 403, that only the excess of the interest paid over the legal rate can be recovered in a common-law action, the court saying: "All the authorities agree that when interest money has been paid and applied as such with the consent of the borrower, only the illegal excess can be recovered back. The reason is, that equity never favors a forfeiture, and will not, unless bound down by statute, lend its aid to enforce one, but will, as a condition of relief, hold the party to the performance of that which is just and equitable. The payment of the principal sum loaned and lawful interest is always regarded as just and equitable. It is no more than the borrower ought in conscience to pay, nor than, in the absence of the prohibition of the statute, he would be required to pay. If therefore he has paid the interest, a court of equity will not aid him to get it back, within the lawful rate, though the lender had no action to compel its payment. And the rule is the same in an action at law for money had and received, to recover it back; or if the borrower set off the interest money paid against the principal sum in a legal action of the lender to recover that. Money had and received, though legal in form, is in its nature an equitable remedy, and lies only where the defendant has received money which, ex aequo et bono, he ought to refund. The fact, therefore, that the statute forfeits all interest, or provides that no interest shall be recovered, does not give the borrower a right to recover it back, where it has once been paid. Many of the cases in which it is held there can be no such recovery, arose under statutes which forfeit both principal and interest. It was competent for the defendant in this case to waive the forfeiture and pay the interest, and so far as he has done so, the payments, within the rate allowed by law, will not be disturbed. It is only the excess or unlawful interest which can be deducted."

The same doctrine is stated and supported by citations of cases in 27 R. C. L. 270, 39 Cyc. 1031, and the above-cited note in L. R. A. 1918B; the language of this note at page 588 being: "At common law, the rule was limited to the recovery back of the usurious excess, and did not extend to lawful interest, even though, under the statute, the lender could not have recovered such interest. This is assumed, in all, or practically all, of the cases which sustain the rule."

[5] The judgment is therefore excessive. In applying this rule, a question may arise which is not directly answered by any of the cases examined by us, as to whether the legal interest which cannot be recovered is 7 per cent., the amount of interest drawn by a loan made without any agreement as to interest (Civ. Code, § 1914; section 1, Usury Act), or 12 per cent., which is the highest rate of interest that may legally be agreed upon for a

loan (section 1, Usury Act). Under our statute, the rate can exceed 7 per cent. only where there is an express written agreement to that effect. Here the only written agreement made upon the subject is void under the statute, and consequently there is in the eyes of the law no agreement as to interest. Defendant's right to retain any part of the interest is based on equitable principles, and we do not see how, under such circumstances, he can have any equity to retain more than the amount of interest which he could recover if there had been no agreement; that is, 7 per cent. simple interest on the actual loan. The principal of the loan in this case was paid by installments at various dates, and hence some computation will be necessary to determine the exact amount of the judgment, which we think can properly be done in the lower court.

[6-8] The respondent also contends that the court erred in not allowing him interest upon the amount of his recovery from the date when he made the payment of interest. It is true he has not appealed from the judgment, and, if we found no other error in it, we could not have taken notice of his contention. But, in view of the necessity of reversing the judgment and remanding the case to the municipal court for further proceedings, we think we should consider this point. While an appellate court will not ordinarily consider errors against respondent, it is equally true that a proper judgment will be upheld although it may have been given for an erroneous reason. The judgment appealed from is simply one in favor of plaintiff for $684.42, and in support of it he may properly advance on appeal any argument which will support a judgment for that amount or less, though it may have been rejected by the trial court. Of course, no effect could be given to such an argument by way of increasing the amount of the recovery, but here it is obvious that, by reason of our ruling that legal interest on the principal must be deducted from the judgment, the addition of interest on the amount recovered will still leave the amount of the judgment less than that from which the appeal was taken. The plaintiff's action is substantially one for money had and received. The amount which he is entitled to recover was paid by him on a definite date, and the defendant's obligation to repay it arose immediately upon the payment. The amount recoverable can be exactly fixed by computation, and hence we think the plaintiff is entitled to interest upon his recovery from the date when he made the usurious payment. Civ. Code, § 3287; Richter v. Union, etc., Co., 129 Cal. 367, 62 P. 39.

The judgment is reversed, and the cause is remanded to the municipal court, with directions to enter a judgment in favor of plaintiff upon the pleadings for the excess of the amount of interest paid by plaintiff over simple interest at 7 per cent. upon the various installments of principal paid by the plaintiff, from the time they were loaned to him until the time he repaid them to defendant, respectively, with interest upon the amount so recovered, at 7 per cent. from May 25, 1926, to date of judgment, appellant to recover his costs of appeal.

We concur: McLUCAS, P. J.; BISHOP, J.

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106 Cal. App. (Supp.) 771

FAY SECURITIES CO. v. BOWERING et al.

Civ. 50.

Appellate Department, Superior Court, Los Angeles County, California.

Dec. 19, 1929.

1. Appeal and error ⟹99.

Order denying motion to declare certain funds subject to attachment and execution, being in effect order discharging attachment, is appealable (Code Civ. Proc. § 983).

2. Exemptions ⟹48(2).

Income from operation of four trucks was not exempt as "earnings for personal services" without showing employment to render personal services and allocation of compensation therefor (Code Civ. Proc. § 690, subd. 10).

Code Civ. Proc. § 690, subd. 10, provides that earnings of judgment debtor for his personal services shall be exempt from execution under certain conditions.

3. Exemptions ⟹122.

Affidavit claiming exemption from attachment and execution on ground earnings were for personal services did not raise conflict in evidence.

4. Exemptions ⟹148.

One claiming exemption from execution on ground earnings were for personal services has burden of proof (Code Civ. Proc. § 690, subd. 10).

5. Exemptions ⟹122.

Affidavit claiming exemption in language of statute is mere conclusion of law and will not support order denying motion to declare funds subject to attachment (Code Civ. Proc. § 690, subd. 10).

Appeal from Municipal Court of Los Angeles; Leonard Wilson, Judge.

Action by the Fay Securities Company against W. H. Jack Bowering and others. From an order denying a motion to declare certain funds subject to attachment and execution, plaintiff appeals.

Reversed.

Harold S. Morrison, of Los Angeles, for appellant.

D. G. Moore, of Compton, for respondent.

SHAW, J.

[1] A writ of attachment against the defendant was levied upon certain money due to him. He claimed that this money was exempt from execution and attachment under subdivision 10 of section 690 of the Code of Civil Procedure. Thereupon, the plaintiff moved the trial court for an order declaring these funds subject to attachment and execution. After the hearing of this motion, the court made an order denying it and directing the release of the money, from which order the plaintiff appeals. No question has been made as to the right of appeal from this order, and it seems to be in effect an order discharging an attachment, and therefore appealable under section 983 of the Code of Civil Procedure. Risdon Iron Works v. Citizens', etc., Co., 122 Cal. 94, 54 P. 529, 68 Am. St. Rep. 25.

[2] At the hearing of the motion, the defendant testified that he was in the trucking business, owning and operating four trucks and employing three men as drivers, besides himself, and that the money attached was due him as the result of the operation of his four trucks and was income from his trucking business.

The provision of the Code under which the exemption is claimed is that "the earnings of the judgment debtor for his personal services" shall be exempt from execution under certain conditions not here involved. The question before us is whether the money above mentioned is within this exemption. As far as we are advised, this question has not been decided by any of the appellate courts of this state, but there are numerous decisions on similar questions in other states. On account of the varying language of the exemption statutes, many of these decisions are not in point here. In some of the states, the exemption is of "earnings" without qualifying words. Some decisions, based on such a statute, hold that income arising from a business in which capital or assets are employed may be exempt. There are also a few decisions extending this rule to statutes exempting "earnings from personal services," but only in cases where the services of the debtor are the chief factor in the business. The weight of authority in other states appears to be that the terms "personal earnings" and "earnings for personal services," which are treated in many authorities as synonymous, do not include a debtor's income arising from a business involving other elements of gain than his personal services, such as the employment of capital or assets. 25 Corp. Juris 68.

In New York, where the statute exempts "personal earnings," it has been held that the exemption does not include moneys due from customers to one who retails ice and employs two carts and several men (Mulford v. Gibbs, 9 App. Div. 490, 41 N. Y. S. 273), or the income of a saloon keeper from his business (Prince v. Brett, 21 App. Div. 190, 47 N. Y. S. 402), or money due the judgment debtor for milk produced by him on a rented farm, although he appears to have worked the farm in person (The Matter of Wyman, 76 App. Div. 292, 78 N. Y. S. 546), or income of the judgment debtor from an iron working shop in which he hires three men and uses a truck and various machinery (Schafer v. Tyroler, 94 Misc. Rep. 127, 158 N. Y. S. 1090), on the ground that all these items are the proceeds of a business rather than personal earnings.

In Shelly v. Smith, 59 Iowa, 455, 13 N. W. 419, it was held that money due from boarders to the keeper of a boarding house who has several boarders and four employees, besides herself and her daughter, is not exempt, and in Youst v. Willis, 5 Okl. 170, 49 P. 56, the same ruling was made as to money due a hotel keeper from his guests. The statute in each case was the same as ours, and in the Iowa case the court pointed out that many elements of profit are involved in the keeping of a boarding house besides the mere personal earnings of the proprietor and his family.

In Clapp v. Smith, 91 Okl. 84, 216 P. 120, it was held that the proceeds of crops grown by a farmer are not exempt as "current wages or earnings from professional or personal services."

In Wineblood v. Payne, 129 Okl. 103, 263 P. 669, it was held that one who was driving a truck and hauling gravel at $3 per load might claim as exempt the reasonable wages of a truck driver, although it was conceded that the earnings of the truck were not exempt and there was nothing in the terms of his employment on which such a segregation could be based. The court cited in support of its decision 25 Corp. Juris 69, and the rule there stated is: "Where a debtor's income is derived from a business involving other elements of gain than his personal services, he is entitled to an exemption in as much thereof as is necessary to compensate him for his own personal labor, provided it can be ascertained. But if the amount due the debtor on account of personal labor cannot be distinguished from the rest, no part of such income will be exempt as 'personal earnings' under the statute."

Manifestly this decision is not supported by the authority cited and it does not seem to us well grounded in reason. How can it be said with truth that one who hauls goods in a truck by contract for a lump sum per load is receiving any particular portion of the freight charge for his personal services and the remainder for the use of his truck? If this can be done, it would be equally proper to find the rental value of the truck, subtract that from the gross receipts, and call the balance the earnings of the driver. Neither process takes account of the expenses of operating the truck, nor does the Oklahoma court point out how those expenses are to be paid, though perhaps it assumes that they will be met out of the balance remaining after taking out the wages of the driver. But suppose a truck operator, in order to meet competition, or by reason of bad judgment, or bad luck, fixes a price for hauling that does not cover the three items of operating expenses, driver's wages, and rental value of the truck. Which is then to be eliminated in apportioning the returns? The mere fact that one of these items is exempt from execution, if ascertained, hardly affords a reason for holding that it must or can be segregated from the others for that purpose where no means of segregation appear. It might easily happen that the hauling price would be no more than sufficient to cover the operating expenses. Since a truck could not be operated at all without some provision for the expenses of doing so, it would be more reasonable in such a case to apply the whole returns for that purpose and hold that no earnings for the driver were included therein (which would manifestly be the fact if the operator were solvent and no question of exemption were involved); but the Oklahoma decision would lead to the absurdity of applying the returns in such a case to the earnings of the driver although, in fact, there were no earnings. We think the true rule in this matter is that stated in the passage already quoted from Corpus Juris. That rule purports to be based on the case of Brainard v. Shannon, 60 Me. 342, and a reading of that case shows the ascertainment of the amount of personal earnings referred to is to be made by some reference to the original contract for the work and not by mere testimony in court as to the reasonable value of the services. In this Maine case, it appeared that the judgment debtor had done work for which it was agreed that he was to have $3 per day for his own wages and an agreed price for other men employed by him on the work. The statute there involved exempted "wages for his personal labor," and the court said: "But this provision does not exempt that which is due to him for the wages or work of other men employed by him, or due to him upon jobs into which other matters besides his personal labor, not capable of being distinguished from it, go to form the price which he is to receive, even though the amount thus due to him at the time of the service of the process does not exceed the amount of his wages for his own personal labor during the time specified. * * * The statement is, that Turner had been doing work for Shannon, for which he was to have a certain sum per diem for his own wages, and pay for the work of the men employed by him at a fixed rate. Under such a contract, honestly made without any fraudulent practice or design, we think that the wages of the principal defendant's personal labor may be exempted, so far as it can be ascertained from the accounts what is actually due for such wages."

There are other cases in which the same principles are followed. Applying them to the present case, we find that it nowhere appears that there was any arrangement by which the defendant was employed to render any personal services, or by which any part of the compensation to be paid for trucking was allocated to payment for such services. In the absence of something of this kind, the defendant is not entitled to claim an exemption for any part of that compensation as being his earnings for personal services.

[3-5] At the hearing of this matter, the court had before it, in addition to defendant's testimony, his affidavit claiming exemption, originally delivered to the marshal, in which he stated merely, in the words of the statute, that the money attached was "earnings due him for his personal services," and that the conditions making such earnings exempt existed. This affidavit, however, cannot be regarded as raising a conflict in the evidence, for it states a mere legal conclusion which can have no weight against facts stated by him on which he bases the conclusion. Burns v. Jackson, 53 Cal. App. 345–347, 200 P. 80. The burden is upon one claiming an exemption to show by evidence that he is entitled to it. An affidavit, in the language of the statute, is a mere conclusion of law and is not such evidence as will support an order like that made in this case. Petrich v. Francis, 83 Cal. App. 72, 256 P. 444.

The order appealed from is reversed.

McLUCAS, P. J., and BISHOP, J., concur.

108 Cal. App. (Supp.) 775

PEOPLE v. PEET.

Cr. 253.

Appellate Department, Superior Court, Los Angeles County, California.

Feb. 26, 1930.

1. Automobiles ⟹355(4).

Evidence *held* sufficient to sustain conviction for reckless driving.

2. Witnesses ⟹70.

Charge of reckless driving, dependent on speed of automobile, falls within law relating to competency of arresting officers (California Vehicle Act, § 155, as amended by St. 1929, p. 548, § 70).

California Vehicle Act, § 155, as amended by St. 1929, p. 548, § 70, requires every officer when on duty to be dressed in a full distinctive uniform, and to paint any automobile used for patrolling public highways a distinctive color, and that, on failure to so dress or comply with requirements as to automobile, arresting officer shall be incompetent as a witness or witnesses in any prosecution on charge involving speed of vehicle.

3. Witnesses ⟹77.

Refusal to permit cross-examination to determine competency of arresting officer, in prosecution for reckless driving dependent on speed of automobile, *held* error (California Vehicle Act, § 155, as amended by St. 1929, p. 548, § 70).

The defendant, by way of cross-examination, to which objection was sustained, asked the arresting officer the purposes for which he was patrolling the highway, whether he was attired in the uniform usually worn by traffic officers, and what the color of the officer's car was.

Appeal from Justice Court, Inglewood Township; A. F. Monroe, Justice of Peace.

Marlin D. Peet was convicted of reckless driving, and he appeals.

Reversed, and new trial directed.

Marlin D. Peet, in pro. per.

Buron Fitts, Dist. Atty., and Tracy C. Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

BISHOP, J.

[1] The appellant was charged with reckless driving. The only witness for the people was an officer who testified that while patrolling a boulevard in the county he noticed the defendant driving between forty-five and fifty miles per hour down the boulevard, by other automobiles, and across street intersections, We are not impressed by the strength of the evidence in the case, but find it sufficient to uphold the judgment. The only question in the case arises out of rulings on the evidence.

The defendant by way of cross-examination asked the officer the following questions: "For what purpose were you patrolling the highway?" "Were you attired in the uniform usually worn by traffic officers?" "What was the color of the car you were driving?" Objections were made and sustained to these questions, and they remained unanswered.

It must be conceded that the ruling on these objections does not constitute reversible error, unless it is made so by section 155 of the California Vehicle Act. The pertinent provisions of that section, as amended in 1929 (St. 1929, p. 548, § 70), are as follows:

"Every officer when on duty for the purpose of enforcing the provisions of this act shall be dressed in a full distinctive uniform, and no officer shall use an automobile for patrolling public highways in the performance of such duty, unless such automobile is painted a distinctive color such as may be determined upon by the division of motor vehicles.

"In any prosecution under this act upon a charge involving the speed of a vehicle, any officer or officers arresting or participating or assisting in the arrest of the person so charged shall be incompetent as a witness or witnesses * * * when an automobile was used by such officer or officers in violation of the provisions of this act, or the officer or officers were not in full uniform, and the court shall be without jurisdiction to render a judgment of conviction upon the testimony * * * by any such officer or officers so using an automobile not in conformity with the act or not in full uniform. [Effective August 14, 1929.]"

It is apparent that our question, then, is this: Was the charge of reckless driving one "involving the speed of a vehicle," as these words are used in section 155? If it was, the defendant had a right to test the competency of the officer to be a witness, and to discover whether or not his testimony was to be given any weight at all; and in depriving him of this right the court erred to his prejudice.

It may be urged that a charge of reckless driving does not necessarily involve the speed of a vehicle. This is true in the sense that the recklessness need not consist in driving at an unlawful speed, but may be attributable to other deviations from the path of safe driving. But in the cause at bar the case of recklessness is founded on the speed at which the defendant was driving his car, under the conditions shown, and, as the rate of speed

thus became a material issue in the prosecution, we conclude that the charge was one involving the speed of a vehicle.

We find support for this determination in the interpretation placed by our Supreme Court on the provision of the Constitution respecting the jurisdiction of "cases at law which involve the title or possession of real property." In the case of Hart v. Carnall-Hopkins Co. (1894) 103 Cal. 132, 37 P. 196, 199, the Supreme Court was considering on appeal a case begun in the justice's court to recover damages for the nonperformance of an agreement. The case was tried by the justice and judgment rendered; an appeal being taken on questions of law and fact. The superior court, quite properly, entered upon a trial de novo; the Supreme Court held, because it could not be told from the face of the transcript, that the case was one involving possession of real property. But, as during the taking of evidence on the trial de novo it appeared that an issue to be decided was as to the possession of certain land, the superior court continued under its original jurisdiction, and the case was properly appealed to the Supreme Court. Nor did it matter, the court said, that the question of possession was only incidentally involved. "If the issue * * * is so involved that it must be decided in order to determine the case, the superior court has original * * * jurisdiction, whether the involution may be said to be merely incidental or not." The language just quoted was repeated with approval in Dungan v. Clark (1910) 159 Cal. 30, 112 P. 718, and again in Morrissey v. Morrissey (1923) 191 Cal. 782, 218 P. 396.

[2] In other cases it is held that title or possession is involved, and therefore the justice's court has no jurisdiction, even though there is no issue joined on the subject. Illustrative of these cases is Boyd v. Southern California Ry. Co. (1899) 126 Cal. 571, 58 P. 1046. It is likewise true, we hold, that a case of reckless driving which is dependent upon the speed at which the car is driven for its proof of recklessness falls within section 155 of the California Vehicle Act, even though the defendant's evidence may not conflict with the prosecution's evidence as to his speed.

The parties have raised no question as to the constitutionality of the portion of section 155 with which we are concerned. Nor are we disposed to discuss the question other than to note that our Supreme Court in Fleming v. Superior Court (1925) 196 Cal. 344, 238 P. 188, devoted considerable space to a consideration of the constitutionality of the analogous provisions of section 155 concerning speed traps and declared them to be valid. The pronouncement was unnecessary to the determination of the case, but it was deliberately made, and, if it does not express the proper rule in our case, the distinction should be made by the Supreme Court, not by us.

[3] Because the defendant was not permitted to apply the touchstone of section 155 to the officer who appeared as a witness, the judgment is reversed, and a new trial directed to be had in the Superior Court of Los Angeles county.

We concur: McLUCAS, P. J.; SHAW, J.

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107 Cal. App. (Supp.) 785

PEOPLE v. RUDDICK and three other cases.

Cr. 36908, 37187, 66, 138.

Appellate Department, Superior Court, Los Angeles County, California.

Jan. 31, 1930.

1. Intoxicating liquors ⚷139.

Possession alone of intoxicating liquor, without intent to sell, transport, or further violate law, except as permitted by statute, is an offense (Wright Act; National Prohibition Act tit. 2, § 3 [27 USCA § 12]).

2. Intoxicating liquors ⚷202, 222.

Complaint charging possession of intoxicating liquor need not set forth unlawful purpose or negative exceptions (Wright Act; National Prohibition Act tit. 2, § 3 [27 USCA § 12]).

3. Intoxicating liquors ⚷223(1).

State in liquor prosecution is not required to prove possession of liquor was not within excepted class (Wright Act; National Prohibition Act tit. 2, § 3 [27 USCA § 12]).

4. Criminal law ⚷260(11).

Trial court's determination in respect to defense in liquor prosecution, that liquor was not possessed at all, cannot be disturbed on appeal.

Appeal from Municipal Court of Los Angeles; Charles L. Bogue, R. Morgan Galbrith, Charles B. MacCoy, Judges.

Clara Ruddick, Roy E. Jones, Mrs. Kate Coyne, and William Paar were convicted for unlawful possession of intoxicating liquor, and they separately appeal.

Affirmed.

MacDonald & Thompson, of Los Angeles, for appellants Ruddick, Jones, and Paar.

L. D. Carter, of Los Angeles, for appellant Coyne.

Lloyd S. Nix, City Prosecutor, and F. W. Fellows and Joe W. Matherly, Deputy City Prosecutors, all of Los Angeles, for the People.

BISHOP, J.

As the above cases all present problems embracing the question, "Is proof merely of the possession of intoxicating liquor sufficient to sustain a conviction under the Wright Act?" we have grouped them together for consideration. In each the defendant was charged with unlawful possession, found guilty, sentenced, and has appealed.

The liquor in the Ruddick Case, a quarter of a bottle less than a quart in size, was found in the kitchen cabinet of a flat occupied as a dwelling by defendant and her husband.

At Jones' residence, a gallon of whisky was found underneath a drawer in the china cabinet of the dining room.

Kate Coyne was found to have a partly filled pint bottle of whisky under her shoulder as she lay on a bed in a hotel room.

In a cabinet situated in the dining room of defendant Paar's residence, there were found sixteen bottles of assorted liquors.

It will appear, as we review the cases, that three questions are involved in the situation before us: Is the mere possession, that is, possession without intent to sell or transport, a public offense? Is it necessary to set forth an unlawful purpose or to negative the exceptions in the complaint or indictment? Is it incumbent on the people to prove that the case does not fall within the exceptions, or is the defendant to take the burden of proceeding with the proof that his possession is within the exceptions?

Without attempting at this point to separate the penal provisions of the National Prohibition Act (41 Stat. 305 [27 USCA]) which our state has adopted from those which are procedural or rules of evidence and are not adopted, the following sections, all in title 2, are pertinent to our investigation.

The first half of section 3, tit. 2 (27 USCA § 12), reads: "No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, * * * furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

Section 25 of the same title (27 USCA § 39) opens with this sentence: "It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property."

A purely procedural provision is placed in section 32, tit. 2 (27 USCA § 49): "* * * It shall not be necessary in any * * * indictment to give the name of the purchaser or to include any defensive negative averments."

In the following section (33), 27 USCA § 50, we find: "After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. Every person legally permitted under this title to have liquor shall report to the commissioner within ten days after the date when the eighteenth amendment of the Constitution of the United States goes into effect, the kind and amount of intoxicating liquors in his possession. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used."

It is unnecessary to list at this time, but only to note that there are other conditions, described in title 2 of the Volstead Act, under which possession is declared to be lawful.

Addressing ourselves to the question, "Does the Volstead Act prohibit possession not shown to be for an unlawful purpose?" we find the negative answer given by appellants not without its support in the federal courts. There are three reported cases from the Western district of Pennsylvania upholding the position they take. United States v. Illig (D. C. 1920) 288 F. 939; United States v. Berger (D. C. 1925) 9 F.(2d) 167; Petition of Shoemaker (D. C. 1925) 9 F.(2d) 170. In the Southern district of Florida too a strong affirmance of appellant's contention is given in United States v. Dowling (D. C. 1922) 278 F. 630. The voice of the Circuit Court of Appeals in the Fifth Circuit probably must be added to these. See Hilt v. United States (1922) 279 F. 421.

The great weight of federal authority, however, supports the conclusion that the Congress could and did make mere possession of intoxicating liquor unlawful. The earliest case on the question coming to our attention is United States v. Murphy (D. C. 1920) 264 F. 842, 843, from the Eastern district of New York. The government had applied for permission to file an information charging the defendant with possession of liquor in viola-

tion of section 3, title 2, of the Volstead Act. The question at issue and the answer given by the court appear in the following quotation:

"Defendant insists that nothing therein contained can be taken to indicate that the mere possession of intoxicating liquor is prohibited, and that Congress * * * could not declare any act to be a crime which was not forbidden by the amendment [18th] itself. * * *

"The amendment in question was adopted in order that the use of intoxicating liquor as a beverage might come to an end. It was within the power of Congress to adopt any reasonable means calculated to bring about the desired result. Limiting possession as the act has done will tend to such an effect. * * *

"The difficulty, if not the actual impossibility, of preventing general traffic in intoxicating liquors, unless the possession thereof is confined to the home of the individual, as title 2, section 33, of the act permits, is so apparent as to need no comment, and Congress cannot be held to have exceeded its power as is contended."

From the Circuit Court of Appeals of the Ninth Circuit we have Page v. United States (1922) 278 F. 41, 44, reviewing a case where the plaintiff in error had been charged with possession. He contended that section 3, title 2, was without vitality because Congress had no authority to prohibit possession. The court made answer: "If, in order to enforce the constitutional amendment, it is necessary to restrict the possession of intoxicating liquor to those having permits to possess the same and to private houses when intended for the sole use of the owner and his family and for bona fide guests, it is within the discretion of Congress to prohibit the possession as a means for the enforcement of the amendment."

The Circuit Court of Appeals of the Eighth Circuit reached the same conclusion in Massey v. United States (1922) 281 F. 293, where legislation respecting possession of game, narcotics, burglar tools, and lottery tickets, furnished a precedent for interpreting the prohibition of possession of liquor.

In harmony with these decisions we find also Ex parte Ramsey (D. C. 1920) 265 F. 950 (a case also from the Southern district of Florida, it may be noted); Rose v. United States (C. C. A. 6th) 274 F. 245; Fitzhugh v. Mitchell (D. C. N. D. Cal. 1922) 277 F. 966; Jordan v. United States (C. C. A. 9th 1924) 299 F. 298; Riggs v. United States (C. C. A. 4th 1926) 14 F.(2d) 5; Fritzel v. United States (C. C. A. 7th 1927) 17 F.(2d) 965, and semble: Broens v. United States (C. C. A. 6th 1923) 290 F. 809; United States v. Club Chez Pierre (D. C. N. D. Ill. 1929) 31 F.(2d) 220; Herter v. United States (C. C. A. 9th 1929) 33 F.(2d) 402.

So far as we are aware, the federal Supreme Court has not spoken on the exact question under consideration. It has voiced its opinion with respect to an Idaho statute, however, in a manner strongly indicative of what its opinion would be. We quote from Crane v. Campbell (1917) 245 U. S. 304, 38 S. Ct. 98, 99, 62 L. Ed. 304:

"It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a state has power absolutely to prohibit manufacture, gift [etc.] of intoxicating liquors within its borders without violating the guaranties of the Fourteenth Amendment. (Citing cases.)

"As the state has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective. (Citing cases.) And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose."

We do not find in our state reports any such debate of the subject as has taken place in the federal courts. In several cases there appears comment explicable on the theory that the court had in mind that mere possession was not enjoined by the Wright act, but only possession for the purpose of sale or, etc. For example, in People v. Buttulia (1924) 70 Cal. App. 444, 233 P. 401, 402, it is said that proof of sales "would also tend to prove that his constructive possession of such liquor was for an illegal purpose." We find a statement to the same effect in People v. Mullaly (1926) 77 Cal. App. 60, 245 P. 811. That "the jury was carefully instructed that the mere possession of intoxicating liquor is not a crime" was set forth as a fact with seeming commendation in People v. Gatlin (1928) 92 Cal. App. 42, 267 P. 564.

All these expressions of opinion, if they are such, that mere possession is no offense, are referable to the same source as the one clear statement contained in People v. Medalgi (1928) 94 Cal. App. 543, 271 P. 552, 554, where the jury had been told: "You are instructed that in this class of offenses the intent is presumed from the doing of the act, that is, the mere doing of the act is sufficient to constitute the offense."

In denying a rehearing, the court criticized this instruction, saying: "If by said instruction the court meant the mere proof of possession of intoxicating liquor was sufficient to constitute the offense, without further proof that it was possessed for unlawful purposes, the instruction was erroneous."

In support of its statement, the court cited People v. Silva (1924) 67 Cal. App. 351, 227 P. 976; People v. Mattos (1924) 67 Cal. App. 346, 227 P. 974; People v. Arnarez (1924) 68 Cal. App. 645, 230 P. 193; and People v. Mullaly, supra. In none of these cases was the interpretation of section 3, title 2, in controversy, and they are not authority for the conclusion that, in declaring "possession" to be an offense, Congress and the state Legislature are to be understood as having added the words, "for the purpose of violating the law by some further act." Because we are to note these cases in another connection, we shall not analyze them at this time.

Opposed to these hints and this declaration we have hints equally strong in People v. Mehra (1925) 73 Cal. App. 162, 238 P. 802, and In re Baldwin (1927) 85 Cal. App. 165, 259 P. 119. Moreover, we have two cases from which quotations are worthy of space. The petitioner in the case of In re Moore (1924) 70 Cal. App. 483, 233 P. 805, 806, had been held to answer on a charge of selling intoxicating liquor. The court expressed grave doubt as to the sufficiency of the evidence as to the sale, but found plenty to prove possession, so denied his release, saying: "'Possession,' says the court in Beyer v. United States (C. C. A.) 282 F. 226, 'is a crime separate and distinct from the crime of the sale of liquor.' In title 2, § 3 * * * of the National Prohibition Law, it is expressly declared that 'no person shall * * * possess any intoxicating liquor except as authorized in this act.' Possession, therefore, except as authorized by the Volstead Act, is one of the acts which the Wright Act, by its adoption of the 'penal provisions' of the federal statute, denounces as a criminal offense."

A similar exposition of the law appears in Re Adams (1927) 85 Cal. App. 161, 259 P. 58, 59: "The law of California prohibits the possession of alcoholic intoxicating liquors fit for use for beverage purposes containing more than one-half of 1 per cent. by volume of alcohol, excepting only when the liquor was obtained before the act went into effect and is kept in the owner's dwelling for use therein by him, his family, and bona fide guests, or in certain cases where certain permits are granted either for medicinal use, or, in accordance with certain of the provisions of the act, allowing special permission under special circumstances. In other words, it is unlawful to possess intoxicating liquor not permitted by any statutory authorization."

Among other authorities relied upon in the foregoing case are Page v. United States, supra, and Rose v. United States, supra, in both of which, as the court points out, the federal Supreme Court was petitioned but declined, to take action.

It should be kept clearly in mind that we are dealing with possession prohibited by section 3 and not the possession that constitutes a nuisance under section 21 of the Volstead Act, considered in People v. Mehra, supra, and People v. Mazzola (1927) 80 Cal. App. 583, 251 P. 222.

[1] On this first of the three questions before us we take the position, therefore, that by the Wright Act (St. 1921, p. 79), as by the Volstead Act, the possession of intoxicating liquor, except as expressly permitted by the act, is an offense; and the courts should not write into section 3, title 2, a further provision not placed there by the Legislature, that possession is an offense only when coupled with an intent further to violate the law.

[2] To the second question we find a happy unanimity of opinion. It is undoubtedly the rule that in charging possession it is not necessary to state that the possession is not one of the excepted classes. Because of the bearing the answer to this question has upon our remaining problem, more time will be devoted to a review of the cases than would be warranted in support of an unchallenged principle.

The case of In re Lord (1926) 199 Cal. 773, 250 P. 714, 716, involved one convicted under the Poison Act. Objection was made that the complaint was insufficient, in that it failed to allege that defendant's act was not one of those excepted by the statute. The court said: "The authorities in this state are without conflict 'that such exceptions and provisos were to be negatived in the pleading only where they are descriptive of the offense or define it, and that where they afford matter of excuse merely they are to be relied on in defense.'"

The petitioner in Matter of Lieritz (1913) 166 Cal. 298, 135 P. 1129, 1131, had been found guilty of violating the Wyllie Act. That act prohibited possession of liquor except in the home for guests, by a pharmacist, when stored where manufactured, etc. The information charging petitioner did not set forth that he was not in the favored group. This was met as follows: "The excepted classes are not mentioned in the definition of the offense, and it is therefore not necessary to enumerate them, nor to declare the defendant not a member of any one of them in drafting a complaint or information. The authorities almost without conflict declare that a complaint, indictment, or information need not allege that an accused comes within exceptions mentioned in the statute upon which the prosecution is founded."

To the same conclusion respecting charges under the Wright Act we find People v. Cencevich (1923) 64 Cal. App. 39, 220 P. 448; In re Trauger (1927) 88 Cal. App. 59, 262 P. 780; In re Baldwin (1927) 85 Cal. App. 165, 259 P. 119.

[3] It is not necessary, then, to plead that the possession charged is not of the character declared to be lawful. Must the people prove what they need not allege? Our answer is that they need not, and we believe that a study of the cases proves the unsoundness of the contrary conclusion enunciated in some of the decisions.

In two early cases in the history of the Wright Act in this state, the defendants were charged with the *sale* of liquor. In each, for some reason, the court instructed the jury substantially in the language of section 33 of title 2 of the Volstead Act, that possession of liquor was prima facie evidence that such liquor was kept for the purpose of being sold, etc., and that the burden was on the possessor to show that the liquor was lawfully acquired, possessed, and used. Quite properly in each of the cases the court held this instruction erroneous, because the Wright Act had adopted only the penal provisions of the Volstead Act. In each case it was concluded, however, that the instruction was harmless—in the one case because the question of possession was not involved; in the other because the possession proved could not have been lawful in any event. These two cases are People v. Mattos (1924) 67 Cal. App. 346, 227 P. 974, and People v. Silva (1924) 67 Cal. App. 351, 227 P. 976.

These cases were followed by the case of People v. Arnarez, to which reference has already been made. Here the defendant was charged with manufacturing liquor, and a verdict was returned finding him guilty of possession of liquor. Possession, the court held, was a distinct offense not included within the charge of manufacturing, and the judgment was reversed. The same instruction condemned in the two preceding cases of Mattos and Arnarez had been given in this case, and again it was disapproved; reference being made to those cases.

Next in the procession is the case of People v. Pagni (1924) 69 Cal. App. 94, 230 P. 1001. Here the defendant was charged with possession, and here again an instruction substantially in the language of section 33 of title 2 of the Volstead Act was given, to the effect that the burden of proof was upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used. Citing the Mattos, Silva, and Arnarez Cases, the court holds that this provision of the Volstead Act was not adopted and the instruction should therefore not have been given.

There follows the case of People v. Buttulia (1924) 70 Cal. App. 444, 233 P. 401, 402, in which the Mattos and Silva Cases are cited and this conclusion given as justifying the admission of evidence of sales of liquor: "In California, therefore, the burden rests upon the prosecution to prove the illegality of possession of intoxicating liquor and that is a material element of the offense."

The next in line is People v. Mullaly (1926) 77 Cal. App. 60, 245 P. 811, 813. The trial court had instructed the jury that, where the prosecution had made satisfactory proof of possession, the burden of proving any license or permit was upon the defendant. This the appellate court said was not in harmony with the Mattos, Silva, Arnarez, and Pagni Cases but held the instruction without prejudice, as "there was no pretense at the trial, however, that the defendant had the liquor lawfully or for a lawful purpose."

In People v. Miller (Cal. App. 1929) 275 P. 482, we find the latest approval of this doctrine; the Buttulia Case being given credit for it.

The conclusion reached in the Pagni Case and since approved, that the burden is on the state to establish the unlawfulness of the possession charged, is premised on the fact that the provisions of section 33 of the title 2 of the Volstead Act were not adopted by the Wright Act. This is a non sequitur. The provisions of section 32 of title 2 were not adopted either; yet the rule otherwise recognized that exceptions need not be denied in a complaint continues to be the law. The Wright Act did not repeal any rules of procedure in California, and the determining question is not, "What part of the Volstead Act was not adopted?" but "What principles govern in the absence of that act?" There is no mistaking the answer.

In the same volume containing the Buttulia Case we find People v. Moronati (1924) 70 Cal. App. 17, 232 P. 991, 992, where the defendant was convicted of having narcotic drugs in his possession. "The trial court instructed the jury that it was not incumbent upon the people to prove that appellant did not come within any of these exceptions, and it is contended that the instruction was error. It is well settled, however, that, 'when the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party. * * *' The present case lies exactly within this rule. The instruction was therefore proper."

The case of People v. Boo Doo Hong (1898) 122 Cal. 606, 55 P. 402, 403, is a leading case on the question. There the Supreme Court upheld an instruction that the burden was upon the defendant charged with unlawful practice of medicine to establish that he had a certificate. The court quotes with approval from Greenleaf on Evidence, as follows: "But, when the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the

statutes do not permit to be done by any persons, except those who are duly licensed therefor; as, for selling liquors, exercising a trade or profession, and the like. Here the party, if licensed, can immediately show it without the least inconvenience; whereas, if proof of the negative were required, the inconvenience would be very great."

In Ex parte Hornef (1908) 154 Cal. 355, 97 P. 891, 893, the same conclusion is reached. The court said: "If he had any such defense on the facts of the charge against him, the time to make it was on his trial in the police court."

In People v. H. Jevne Co. (1919) 179 Cal. 621, 178 P. 517, 520, the same principle was recognized, the court saying: "The existence of such purpose affords, therefore, 'matter of excuse merely,' and is to be relied on in defense."

The rule has been applied in a prosecution for a violation of the Wyllie Act (St. 1911, p. 599). It will suffice to quote from the case, People v. Dial (1915) 28 Cal. App. 704, 153 P. 970, 971: "So here, although the information in this case excludes the defendant from the excepted classes, the statement of such exceptions may be regarded as surplusage, and no evidence thereof was required to establish the charge. This was defensive matter of which the defendant might avail himself by evidence, if he so desired."

We believe the principle to be established, therefore, that, in prosecuting an offender under the Wright Act for the possession of liquor, it is unnecessary for the people either to aver or prove that the case does not fall within the exceptions. We are not unmindful of the authority of the cases above reviewed, but believe the reasoning that leads to our conclusion is authority more binding on us.

The only exception applicable to the cases before us is that set forth in section 33, tit. 2, in these words: "But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein."

With respect to this provision, the following quotation from People v. Avila, 78 Cal. App. 415, 248 P. 693, 695 is of interest: "We think that section 33 of title 2 of the Volstead Act, relative to the possession of intoxicating liquors for beverage purposes, which may be lawful, refers to and must be held to refer to intoxicating liquors procured prior to the date mentioned in section 3."

Supporting the same conclusion is the case of People v. Jones (1926) 78 Cal. App. 554, 248 P. 964.

In three of the cases at bar, that is, People v. Ruddick, People v. Jones, and People v. Paar, it does not appear from the people's evidence how the liquor was acquired and no attempt was made by the defendants to show that it was possessed before the Volstead Act went into effect or that it was lawfully acquired since then. It follows that, irrespective of other evidence in the cases from which unlawful possession might be inferred, the convictions must stand.

[4] In the case of People v. Kate Coyne, the defense was not that the liquor was lawfully possessed, but that it was not possessed at all. The court's decision on this question of fact is not one to be disturbed by us.

The judgments appealed from must all be affirmed.

We concur: McLUCAS, P. J.; SHAW, J.

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106 Cal. App. (Supp.) 765

PEOPLE v. BUCHANAN. SAME v. KOZINSKY. SAME v. WALLEN.

Cr. 114, 115, 77.

Appellate Department, Superior Court, Los Angeles County, California.

Nov. 9, 1929.

1. Intoxicating liquors ⟹173.

Conviction and punishment may be had both for sale or transportation of liquor and for possession of same liquor.

2. Indictment and information ⟹191(½).

Crime of sale or transportation of liquor includes that of possession necessary for, and incidental to, sale or transportation.

3. Intoxicating liquors ⟹236(6½, 20).

Facts *held* to justify conviction for possession of liquor as well as transportation.

The facts established that defendant had in his hands in garage in his own place a box similar to that subsequently found to contain liquor in his automobile, warranting inference that he had liquor in his possession prior to the act of transportation.

Appeal from Municipal Court of Los Angeles; Charles L. Bogue and Caryl M. Sheldon, Judges.

Charles R. Buchanan and Morris Kozinsky were convicted of possession and transportation of liquor, and Bennett Wallen was convicted for possession and sale of liquor, and they separately appeal.

Affirmed as to the first named defendant, and reversed in part and remanded for a new trial as to the other defendants.

MacDonald & Thompson, of Los Angeles, for appellants Buchanan and Kozinsky.

Harry A. Finkenstein, of Los Angeles, for appellant Wallen.

Lloyd S. Nix, City Prosecutor, Joe W. Matherly and Fred W. Fellows, Deputy City Prosecutors, all of Los Angeles, for the People.

BISHOP, J.

In the above-entitled cases the defendants respectively received sentences imposing fines or imprisonment for the possession of intoxicating liquors, and also were sentenced for either the sale or transportation of the same liquor under circumstances which they make the basis of their claim that they are being doubly punished for one offense.

In the Buchanan case the evidence shows that the defendant drove into the garage on the place of his residence, and he was seen there, after an interval, with a brown box in his hands. Shortly thereafter he drove away and was arrested, a box similar in size and color to that which he was seen to have had in the garage being in his automobile, containing two one gallon bottles of contraband liquor. As already noted, defendant was found guilty of both possession and transportation.

In the Kozinsky case the defendant was observed to drive his automobile up alongside of a parked car. He opened the door of his car, and a sack was transferred by the driver of the parked car from the defendant's car to his own. The defendant was thereupon arrested, and it was found that the sack contained prohibited liquor. He was fined both for possession and for transportation.

In the Wallen case the defendant was shown to have been behind the counter in a drug store when a woman came in and asked for a pint of alcohol. He disappeared from view for one or two minutes in the rear of the drug store, then returned, and exchanged a bottle wrapped in paper for $3.50. It was discovered that the bottle contained alcohol, the sale of which is prohibited by law. Following defendant's conviction, he was given a term in jail for the sale and a fine for the possession.

[1, 2] By both federal cases and the decisions of our own appellate courts, we believe the following principles applicable to these cases to be thoroughly established: One may be found guilty and receive punishment for sale or transportation of alcoholic liquors, and at the same time be found guilty and be punished for the possession of the same liquor. But, where the only possession shown by the evidence is that necessary for and incidental to the sale or transportation, the crime of sale or transportation includes that of possession, and but one punishment may be meted out. Three cases from the appellate courts of this state are controlling, and make unnecessary an academic discussion of the problem.

The case of In re Louis Chaus (June, 1928) 92 Cal. App. 384, 268 P. 422, 424, involves a dual charge of possession and transportation. The evidence disclosed that the liquor in question, after being transported to its immediate destination, was removed from its conveyance and placed either in or on a trunk in a garage. The court stated:

"We are not unmindful of those decisions upon the principle of which petitioner seeks to rely, holding that the bare apprehension of one driving a vehicle containing alcoholic liquor may not be punished both for possession and transportation, since the former is then a part of, and necessary to, the latter." (Sic.)

The court then calls attention to the location of the liquor after transportation, and concludes that the defendant was properly punished for two offenses, for it was self-evident "that such possession of the alcohol * * * was not necessary nor incidental to the transportation."

In the case of People v. Mazzola (July, 1929) (Cal. App.) 279 P. 211, 212, the defendant was found guilty of the operation and possession of a still. Punishment for both offenses was approved, the appellate court pointing out that there was evidence of possession prior to the beginning of operation. The court, however, further stated:

"Was the only act of possession of the still necessarily involved in that of operating the still? If the possession of which the appellant was found guilty was necessary and incidental only to that of operating the still, then he was guilty of but one offense, and it cannot be carved into pieces whereby to inflict double punishment. Schroeder v. United States (C. C. A.) 7 F.(2d) 60, and cases there cited. If, however, there was possession for a substantial period of time which was not necessarily incident to the operation of the proscribed utensils, the appellant could be found guilty of both offenses. In re Chaus, 92 Cal. App. 384, 268 P. 422, and cases there cited."

It may be argued, in view of the fact that both of the cases just noted reach the conclusion that the evidence disclosed two separate offenses, that they are therefore not authority for the conclusion that, if the possession is incidental to the transportation (or operation, in the case of a still), the facts constitute but one offense. This criticism cannot be made of the most recent case in this state on the subject, that of People v. Clemett (Sup. Ct., Sept. 1929) 280 P. 681, 682.

In this case our Supreme Court had before it a judgment imposing penalties for the operation and also for the possession of a

still. The evidence, the court said, confirmed its interpretation of the allegations of the information that "the possession and control period is included in the period of operation, inasmuch as possession and control were incidental to operation."

The conclusion of the court was that only the judgment based on the charge of operation could stand—that based on possession must be reversed. Of particular interest to us is the following discussion of the court:

"The same principles applied and reasoning adopted by courts generally in distinguishing the two offenses of possession and transportation are applicable to the instant case.

"In Schroeder v. United States (C. C. A.) 7 F.(2d) 60, 65, the rule is well stated: 'Possession for a substantial time, and followed by transportation, might constitute two distinct offenses, just as possession for a substantial time, followed by a sale, might amount to two distinct offenses. But, where the only possession shown is that which is necessarily incidental to the transportation, the offense is single, and not double.' "

The Schroeder Case quoted by our Supreme Court is a decision of the Circuit Court of Appeals of the Second Circuit. Two decisions in harmony with it have been rendered by the court of the first circuit. Brief quotations will suffice:

"* * * There was no such separate possession and transportation as to constitute two offenses." Segurola v. U. S. (C. C. A. 1926) 16 F.(2d) 563, 566.

"The testimony did not disclose any possession which was not incidental to transportation." Brown v. U. S. (C. C. A. 1926) 16 F. (2d) 682, 684.

We may conclude, therefore, that it is now the law of this state that, where it appears as a fact that the liquor which the defendant is found to have transported was in his possession for any period prior to the beginning of the operation of transportation or following its completion, he may be found guilty of two offenses, transportation and possession, and be punished for both. Where the only possession shown, however, is that necessary for and incidental to transportation, a penalty imposed for the transportation precludes the possibility of further punishment for possession.

With respect to sale and possession, we are aware of no case considered by the higher courts of this state. We are unable, however, to distinguish any difference in principle between such a case and that of operation and possession of a still or the transportation and possession of liquor. A similar conclusion has been reached by the federal courts. In Miller v. United States (C. C. A. 6th, 1924) 300 F. 529, 534, the court said:

"* * * In this case the only possession shown was that which temporarily came to Miller for the purpose of completing by delivery the sale which he was making."

And in Woods v. United States (C. C. A. 8th, 1928) 26 F.(2d) 63, 65, the court stated:

"Though there was substantial evidence of possession as charged in count 1, yet there was no evidence of possession under that count except of possession incident to the sale covered by count 2. * * *

"This being the state of the evidence as to possession under count 1, the judgment as to that count should be set aside as involving double punishment, first, for the sale; second, for possession incident to the sale. This is not allowable."

The federal Supreme Court is some times referred to as having rendered an opinion inconsistent with this conclusion in the case of Albrecht v. United States (1927) 273 U. S. 1, 47 S. Ct. 250, 254, 71 L. Ed. 505. A careful reading of the case discloses that it is in entire harmony with the conclusion we have reached, as will be noted from the following quotation, the emphasis being ours:

"One may obviously possess without selling, and one may sell and cause to be delivered a thing of which he has never had possession, or one may have possession and *later sell, as appears to have been done in this case.* The fact that the person sells the liquor which he possessed does not render the possession and the sale necessarily a single offense."

Applying these principles to the cases in hand, we conclude as follows:

The fact that defendant Buchanan had in his hands in the garage on his own place a box similar to that subsequently found to contain liquor in his automobile forms the basis for an inference which the jury could reasonably draw that he had liquor in his possession prior to the beginning of the act of transportation. The fact that the premises were his own distinguishes this case from that of Schroeder v. United States, supra, in a particular evidently deemed of significance by the court in the Schroeder Case, for the court there points out:

"There is no evidence that the accused lived on the premises" (a five-story tenement building).

[3] We conclude, therefore, that the facts in the Buchanan case justify a conviction of possession as well as transportation. Judgment is therefore affirmed.

There appears no evidence of possession in the Kozinsky case showing possession not involved in the process of transportation. The judgment in that case therefore must be reversed as to count II; the cause remanded for a new trial as to count II.

In the Wallen case there is no proof of possession other than that incident to the sale. The judgment must be affirmed as to count I (sale) and reversed as to count II (possession); the cause remanded for a new trial as to count II.

We concur: McLUCAS, P. J.; SHAW, J.

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108 Cal. App. (Supp.) 779

PEOPLE v. ST. JOHN.
Cr. 164.

Appellate Department, Superior Court, Los Angeles County, California.
Feb. 28, 1930.

1. Constitutional law ⟹87.

Advertising is lawful and useful occupation, and, as such, is property right secured by fundamental law.

2. Constitutional law ⟹81.

Statute prohibiting, regulating, or interfering with private business can be upheld only under police power.

3. Constitutional law ⟹81.

Police power can be rightfully exercised only when statute is for protection of public health, public safety, public morals, or general welfare.

4. Constitutional law ⟹67.

Whether particular regulation of right to pursue lawful and useful occupation is valid exercise of legislative power is judicial question.

5. Municipal corporations ⟹622.

Reasonable ordinances regulating or prohibiting distribution of handbills, and advertising matter, constitutes valid exercise of police power.

6. Municipal corporations ⟹622.

City ordinance prohibiting distribution of advertising matter *held* not unconstitutional as to one distributing commercial advertising pursuant to request of householders.

The ordinance was to the effect that it should be unlawful for any person, firm, or corporation to distribute or throw on any street, alley, or public place, or on any private yard, lawn, driveway, sidewalk, porch, or steps of any residence, or upon or in any part of any structure, or on any vacant property, any advertising sample, handbill, dodger, circular, booklet, or other notice of commercial advertising, and excepting therefrom distribution of newspapers capable of being entered as second-class mail matter.

7. Evidence ⟹20(1).

It is common knowledge that many copies of advertising publications are left on private yards and porches and blown about, littering public streets.

8. Constitutional law ⟹239.

City ordinance prohibiting distribution of advertising matter did not deny equal protection because permitting distribution of publications capable of being entered as second-class mail matter.

9. Constitutional law ⟹48.

Power of judiciary to declare ordinance unconstitutional should never be exerted except when conflict between it and Constitution is palpable and irreconcilable.

Appeal from Police Court, City of South Gate; Ezra Neff, Judge.

Roscoe D. St. John was convicted for violation of a city ordinance by distributing or throwing upon private porches within city notice of commercial advertising, and he appeals.

Affirmed.

Lawler & Degnan, of Los Angeles, for appellant.

Brewton A. Hayne, of Los Angeles, for the People.

McLUCAS, P. J.

The defendant was charged with violation of a city ordinance of South Gate by distributing or throwing upon private porches in said city a notice of commercial advertising, to wit, the Down Town Shopping News, and was adjudged guilty. Defendant appeals from the judgment.

It was stipulated at the trial by plaintiff and defendant that their respective witnesses, if called, would by their testimony establish the following facts: That the Los Angeles Down Town Shopping News is a publication issued and published twice each week, and is composed of advertisements inserted by reputable firms and corporations engaged in the business of selling dry goods, jewelry, furniture, household equipment, and similar merchandise, in the city of Los Angeles and vicinity, and style notes in respect thereof; that said publication does not contain any matter which by any possibility could be construed as lewd, obscene, or scandalous, or injurious to the public health, morals, safety, or welfare; that said publication is not capa-

ble of being entered as second-class matter under the provisions of the United States Post Office regulations of March 3, 1879, and other United States statutes; that the city of South Gate at all times mentioned was a municipal corporation of the state of California, of the sixth class; that on or about the 29th day of September, 1928, the city clerk of the city of South Gate issued to Los Angeles Down Town Shopping News Corporation, the publisher of said publication, a license to transact the business of passing bills in the city of South Gate for the term of one year from the 1st day of October, 1928, to the 30th day of September, 1929, inclusive; that the defendant St. John at all times was the agent of said Los Angeles Down Town Shopping News Corporation, authorized and employed by said corporation to distribute its said publication pursuant to said business license; that on August 20, 1929, the city of South Gate duly enacted Ordinance No. 157 amendatory to Ordinance No. 155; that said Ordinance No. 157 provided: "That it shall be unlawful for any person, firm or corporation to distribute or throw upon any street, alley or public place or upon any private yard, lawn, driveway, sidewalk, porch or steps of any residence or upon or in any part of any structure or upon any vacant property in said City of South Gate, any advertising sample, handbill, dodger, circular, booklet, or other notice of commercial advertising, provided that nothing in this Section shall prohibit the distribution and delivery of any newspaper which is capable of being entered as second class matter under the provisions of the United States Post Office regulations of March 3rd, 1879, and other United States Statutes."

That on the 17th day of July, 1929, on or before the effective dates of said Ordinances No. 155 and No. 157, Mrs. H. A. Schomer, residing in the said city of South Gate, made, executed, and delivered to Los Angeles Down Town Shopping News Corporation her request as follows: "Please deliver at my residence regularly the Los Angeles Down Town Shopping News, and occasional special announcements by Shopping News advertisers, it being understood and agreed that this service is entirely free, with no obligation of any kind on my part."

That subsequent to the effective dates of the ordinances hereinabove referred to, defendant has not delivered in the city of South Gate any publication of the Los Angeles Down Town Shopping News, or other advertising matter, except to the residences of persons who have theretofore executed and delivered requests in like form to the request executed and delivered by the said Mrs. Schomer; that on the 21st day of September, 1929, the defendant, acting as the agent of the Los Angeles Down Town Shopping News Corporation, pursuant to the said request of Mrs. H. A. Schomer, which said request has not been revoked or canceled, delivered to the residence of said Mrs. H. A. Schomer, in said city of South Gate, by throwing upon the porch thereof a copy of the publication of the Los Angeles Down Town Shopping News Corporation, to wit, the "Los Angeles Down Town Shopping News," issued under date of September 23, 1929.

It is the contention of the appellant that said ordinance does not prohibit the distribution of a publication of the character of the Los Angeles Down Town Shopping News by delivering copies thereof to private residences of persons who have requested such delivery, and, secondly, that if said ordinance does prohibit such distribution, it is to that extent unconstitutional and void.

[1-4] Deeming the ordinance sufficient in its terms to prohibit the distribution of notices of commercial advertising upon private porches, in the city of South Gate, to all persons, whether such persons have requested such delivery or not, we proceed immediately to a discussion as to whether said ordinance is unconstitutional and void as to appellant. The Constitutions of the United States and of the state of California guarantee certain fundamental rights and, among others, that no person shall be deprived of life, liberty, or property without due process of law. It is to be conceded that advertising, as urged by appellant, is a lawful and useful occupation, and, as such, is a property right secured by the fundamental law. A statute prohibiting, regulating, or interfering with private business can be upheld only under the police power, and the police power can be rightfully exercised only when the statute in question is for the protection of the public health, the public safety, the public morals, or the general welfare. It is always a judicial question whether any particular regulation of the right to pursue a lawful and useful occupation is a valid exercise of the legislative power. Ex parte Drexel, 147 Cal. 764, 82 P. 429, 2 L. R. A. (N. S.) 588, 3 Ann. Cas. 878; Frost v. City of Los Angeles, 181 Cal. 22, 183 P. 342, 6 A. L. R. 468; Ex parte Dickey, 144 Cal. 234, 77 P. 924, 66 L. R. A. 928, 103 Am. St. Rep. 82, 1 Ann. Cas. 428; In the Matter of the Application of Miller, 162 Cal. 687, 124 P. 427.

[5] By the great weight of authority, the enactment of reasonable ordinances regulating or prohibiting the distribution of handbills, circulars, samples, and other advertising matter, in such manner as will ordinarily result in the littering of streets, sidewalks, or other public places, constitutes a valid exercise of the police power. McQuillin, Municipal Corporations (2d Ed.) vol. 3, § 987, note 22 A. L. R. 1484. In Wettengel v. Denver, 20 Colo. 552, 39 P. 343, 344, it was held that an ordinance providing that no person shall hand or offer to any traveler or other

person on any public street or place, any handbill, advertisement, circular, or other thing of such nature or character that the person taking the same will naturally or probably throw or deposit the same so as to litter or obstruct the street or place, or where the same may be or become calculated to frighten horses or other animals, is reasonable as protecting the public in its right to the free and safe use of the highways of the city by tending to keep them clean, and as preventing the possible frightening of horses. The decision was limited to the distribution of handbills or circulars of the character described in the ordinance, and the court said: "If the object of this ordinance is to prohibit the distributing to travelers on the street of any circular or hand bill, irrespective of its character, it might be held unreasonable, and come within the principle announced in the case of People v. Armstrong, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578."

In People v. Armstrong the ordinance provided in substance, that no person shall distribute circulars, handbills, or advertising cards of any description in or upon any of the public streets and alleys. The defendant was distributing cards one and one-half by two inches in size announcing Y. M. C. A. meetings, to persons only who expressed a desire for the same, and was found guilty of violating the ordinance. The ordinance was held unreasonable and too broad in its terms, but the court held that miscellaneous throwing to the winds of handbills, circulars, or advertising cards would not only litter up the streets and become a nuisance, but would tend to frighten teams and horses and great danger might be apprehended to life and limb.

In Philadelphia v. Brabender, 201 Pa. 574, 51 A. 374, 58 L. R. A. 220, it was held that an ordinance forbidding any one "to cast, or place in the streets of the city, or on the footways thereof, or into the vestibules or yards, or upon the porches of any dwellings or other building within the limits of the city, any paper, advertisement, hand bills, circulars or waste paper," excepting newspapers or circulars in envelopes, did not interfere with the right to acquire, possess, and protect property, as interfering with the advertisement of business, and that the provision did not make invidious discrimination by excepting newspapers and circulars in envelopes. 22 A. L. R. 1486. It was claimed that so far as the ordinance related to the casting of advertisements, circulars, handbills, and waste papers into the vestibules of dwellings, it was invalid. The court said: "It is obvious, however, that the reason upon which the ordinance rests is not merely that the casting of these fugitive papers in the places described is an annoyance to the owners of the premises, but that the wind catches them up and casts them into the streets, where they lie or are blown about, to the annoyance and inconvenience of the general public. This is liable to happen not only to papers cast into the yards and upon the porches, but also, although perhaps in a less degree, to those cast into the vestibules of city dwellings."

In Re Anderson, 69 Neb. 686, 96 N. W. 149, 150, 5 Ann. Cas. 421, in holding an ordinance valid and constitutional which declared it unlawful for any person to circulate or distribute or scatter about, or to hand to any person upon a public street, etc., any dodgers, handbills or circulars, the court said: "The ordinance in question is manifestly a police regulation intended to further the public health and safety by preventing the accumulation of large quantities of waste paper upon the streets and alleys, which might occasion danger from fire, choke up and obstruct gutters and catch-basins, and keep the streets in an unclean and filthy condition. A police regulation, obviously intended as such, and not operating unreasonably beyond the occasions of its enactment, is not invalid simply because it may affect incidentally the exercise of some right guarantied by the Constitution. In all matters within the police power some compromise between the exigencies of public health and safety and the free exercise of their rights by individuals must be reached. The test in such cases is whether the regulation in question is a bona fide exercise of the police power or an arbitrary and unreasonable interference with the rights of individuals under the guise of police regulation."

In People v. Horwitz (Mag. Ct.) 140 N. Y. S. 437, 439, an ordinance providing "that no person shall throw, cast or distribute in or upon any of the streets, avenues or public places, or in front yards or stoops, any hand bills, circulars, cards or other advertising matter whatsoever" was held a valid exercise of the police power which applied to the distribution of circulars folded in newspapers which were sold on the streets.

We have reviewed all of the authorities which have been cited in the briefs of able counsel, and find that in at least two of these cases the ordinances prohibited, as in the case at bar, throwing circulars, handbills, or advertisements upon private porches. Philadelphia v. Brabender, and People v. Horwitz, supra. In Philadelphia v. Brabender a provision of the ordinance forbidding the casting of advertisements into the vestibules of dwellings was held valid. In People v. Horwitz, while the ordinance was held valid, the defendant was charged with distributing advertisements upon the public sidewalks, and the provision of the ordinance prohibiting distributing or casting advertisements upon private porches was not discussed.

Appellant urges that the Philadelphia ordinance was regulatory only, in that no distinction was made between commercial advertis-

ing and circulars and pamphlets devoted to political or religious purposes, and it permitted the distribution of any matter inclosed in an envelope, while the South Gate ordinance prohibits the distribution only of commercial advertising. We do not interpret the South Gate ordinance as prohibiting the distribution of commercial advertising. It merely regulates such distribution. Nothing in the ordinance forbids the distribution of such matter personally to any person in any dwelling or other private building in said city. The ordinance merely forbids throwing or distributing in public places, or in yards, or other places where such distribution is likely to result in the littering of public places. The ordinance does not even prevent the deposit of such advertising matter in a secure box or receptacle provided for the receipt of such matter. Again, the ordinance provides that nothing therein shall prohibit the distribution and delivery of any newspaper which is capable of being entered as second-class matter under the provisions of the United States Post Office regulations. Such newspapers would, in all probability, contain commercial advertising.

Appellant contends that the South Gate ordinance is not intended to prohibit isolated distribution here and there in the particular community, but the record shows that this is not a case of isolated distribution. The complaint charges the defendant with throwing upon private porches in said city a notice of commercial advertising, to wit, the Down Town Shopping News. The complaint does not charge an isolated offense. The statement on appeal shows that said publication is issued twice each week, that defendant is employed to distribute said publication in the city of South Gate, that on September 21, 1929, defendant threw a copy of said publication upon the porch of Mrs. H. A. Schomer, in said city, and that subsequent to the effective dates of said ordinance defendant has not delivered in said city any copy of said publication or other advertising matter except to the residences of persons who had theretofore executed and delivered requests in like form to that executed and delivered by the said Mrs. H. A. Schomer. It is clearly apparent from the whole record that this is not a case of isolated distribution.

[6, 7] Appellant argues that only ordinances regulating or prohibiting the distribution of advertising matter in public streets or places can be upheld as a valid exercise of the police power, but in view of the authorities cited, we are not prepared to hold that the enactment of a reasonable ordinance regulating or prohibiting the distribution of circulars, pamphlets, or other advertising matter in such manner as will ordinarily result in the littering of streets or other public places, does not constitute a valid exercise of the police power. The casting of such advertising matter on private porches is quite as likely to result in the littering of public streets or places by such advertising matter being blown by the winds, or kicked onto the sidewalk and the streets, as if such matter had been directly thrown or distributed in such public places. Nor do we feel that the fact that the householder requests the delivery of such advertising renders less likely the littering of such public places by throwing such pamphlets on private porches. The winds do not await the convenience of the householder in removing such pamphlets to a secure place; in fact, it is a matter of common knowledge that in the absence of the householder, or even without such absence, many copies of advertising publications are left on private yards and porches, with the result that such matter is blown about as if it had been cast to the four winds, and public streets and places are littered thereby. It may well be that in so far as said ordinance prevents the distribution of said advertising matter to persons in residences, stores, or other private places, expressing a willingness or desire for the same, it could not be sustained as constitutional. In our opinion, appellant does not bring himself within such kind of distribution by throwing advertising matter on private porches at the request of the householder, where such distribution is likely to result in littering public streets and places.

[8] Finally, appellant claims that said ordinance is unconstitutional and void, in that it denies to the defendant the equal protection of the laws, and arbitrarily discriminates against the defendant and other persons engaged in the delivery and distribution, in the city of South Gate, of publications containing commercial advertisements but incapable of being entered as second-class matter under the provisions of the United States Post Office regulations, in favor of persons engaged in the distribution and delivery in the city of South Gate of circulars, pamphlets, and publications containing political or religious advertisements, or publications containing commercial advertisements but capable of being entered as such second-class matter. Even if an ordinance regulating the distribution of pamphlets devoted to religious or political purposes could be so drawn as not to interfere with the constitutional guaranty of the right of free speech, surely it is not for the defendant to say the act is void because it does not prohibit other acts equally as mischievous as the acts prohibited. Evidently, in the judgment of the municipal authorities, there was not the same necessity for regulating the distribution of pamphlets and circulars other than those containing commercial advertising.

In City of Philadelphia v. Brabender, supra, the court held that there was no discrimination impairing equal rights in an ordinance prohibiting the casting of advertisements in

vestibules of dwellings, though newspapers and addressed envelopes were excepted. The court said: "Nor can we see that an invidious discrimination is made against any one by the ordinance. All persons are treated alike and subject to the same restrictions. True, the ordinance exempts from its operation newspapers and addressed envelopes, but evidently not for the purpose of favoring those who advertise in that way, but because in the judgment of the municipal authorities, there was not the same necessity for prohibiting the delivery of newspapers and addressed envelopes to the persons for whom they are intended in that way. This discriminates against no persons or class of persons, and surely it is not for the defendant to say that the ordinance is void because it does not prohibit other acts equally as mischievous as the acts prohibited. 'The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws.' Soon Hing v. Crowley, 113 U. S. 703, 5 S. Ct. 730, 28 L. Ed. 1145. The limitations of the powers conferred upon municipal corporations are that they must be exercised in a reasonable, lawful and constitutional manner. 'If these limitations are not transgressed courts cannot interfere with the ordinances of the municipality, for to the mayor and council must be left a reasonable discretion, and for the proper and wholesome exercise thereof they are accountable not to the courts, but to the people.' O'Maley v. Borough of Freeport, 96 Pa. 24, 42 Am. Rep. 527. 'Where the municipal legislature has authority to act, it must be governed, not by our, but by its own discretion; and we shall not be hasty in convicting them of being unreasonable in the exercise of it.'"

For like reasons, we see no discrimination or denial of the equal protection of the laws in the ordinance now before us.

The problems presented to us for solution are not altogether free from difficulty. If the ordinance were to be so construed as to prohibit the distribution of advertising matter personally, or in boxes or receptacles, or in any other manner whatsoever, which is not likely to result in the littering of public streets or places, it would affect adversely only persons who make such distribution, and the record does not show that defendant made such kind of distribution. The discrimination between newspapers and all other sorts of commercial advertising is upheld in Philadelphia v. Brabender, supra. If an improper discrimination is made by the classification of newspapers into those which can be entered as second-class mail matter and those which cannot be so entered, it affects adversely only persons who distribute newspapers of the class last mentioned. Defendant is not such a person. The whole ordinance cannot be declared invalid because of its possible defects in these respects, and the defendant, who is not within either provision which would be so condemned, cannot be heard to object to them. In re Cardinal, 170 Cal. 519, 523, 150 P. 348, L. R. A. 1915F, 850.

[9] On the whole, it must be said that the case raises some doubts as to the validity of the ordinance in all respects, yet it is a settled rule that the power of the judiciary to declare an ordinance unconstitutional should never be exerted except when the conflict between it and the Constitution is palpable and incapable of reconciliation. If there is a doubt only as to the constitutionality of the ordinance, it is the duty of the court to resolve the doubt in favor of its constitutionality, and uphold it. 5 Cal. Jur. 612, 613, 633, 634 and cases cited; Bayley v. Garrison, 190 Cal. 690, 696, 214 P. 871.

We conclude that said ordinance is not unconstitutional and void as to appellant. The judgment is ordered affirmed.

BISHOP and SHAW, JJ., concur.

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107 Cal. App. (Supp.) 757

PEOPLE v. STEWART.

Cr. 40.

Appellate Department, Superior Court, Los Angeles County, California.

Jan. 15, 1930.

1. Witnesses ⟹46.

Officer arresting speeder while on highway for purpose disconnected with Vehicle Act is competent witness, though he used automobile without distinctive color (California Vehicle Act, § 155, as amended by St. 1929 p. 548, § 70).

California Vehicle Act, § 155, as amended by St. 1929, p. 548, § 70, after defining and prohibiting speed traps, provides that no officer shall use automobile for patrolling public highways in performance of duty to enforce such act, unless it is painted distinctive color determined by motor vehicles division, and that officer arresting person prosecuted on charge involving speed of vehicle shall be incompetent as witness if he used automobile in violation of act.

2. Statutes ⟹206.

Statute should be construed, if possible, to give meaning and effect to every word,

clause, and distinct or co-ordinate provision or section.

3. Statutes ⚷206.

Words of statute should never be considered surplusage, if reasonable construction, giving force to and preserving all terms thereof, can be adopted.

4. Criminal law ⚷394.

Rule that inferior court's jurisdiction must be established by party relying thereon does not require prosecution to prove that officer arresting alleged speeder used automobile painted distinctive color before introducing his testimony (California Vehicle Act, § 155, as amended by St. 1929, p. 548, § 70).

5. Criminal law ⚷100(3).

Court acquiring jurisdiction retains it until disposition of cause.

6. Criminal law ⚷104.

Jurisdiction of recorder's court at beginning of and throughout trial for speeding should be presumed to have continued until contrary is shown (California Vehicle Act, § 155, as amended by St. 1929, p. 548, § 70; Code Civ. Proc. § 1963, subd. 32).

7. Witnesses ⚷78.

Party asserting witness' incompetency as to particular facts or under particular conditions has burden of proof, unless it already appears in record.

8. Witnesses ⚷79(2).

Witness of sufficient age and mental capacity is presumed competent, and party objecting has burden of showing incompetency by preponderance of evidence.

9. Witnesses ⚷76(1).

Objection to witness' competency, not made when he is offered and before he is sworn, or immediately on grounds of incompetency becoming apparent during examination, is waived.

10. Witnesses ⚷77, 78.

Witness' incompetency may be shown by voir dire examination or outside evidence or during his own testimony.

11. Witnesses ⚷46.

Defendant, claiming that arresting officers were incompetent witnesses in trial for speeding because they used automobile without distinctive color, had burden of proof (California Vehicle Act, § 155, as amended by St. 1929, p. 548, § 70).

12. Witnesses ⚷46.

Testimony of city policeman, chasing speeder in black police car, *held* admissible, in absence of showing that he was patrolling street to enforce Vehicle Act (California Vehicle Act, § 155, as amended by St. 1929, p. 548, § 70).

13. Criminal law ⚷304(17).

Court must take judicial notice of motor vehicle department's designation of distinctive color for automobiles used in enforcing Vehicle Act (California Vehicle Act, § 155, as amended by St. 1929, p. 548, § 70; Code Civ. Proc. § 1875, subd. 3).

Appeal from Recorder's Court, City of Montebello; A. F. Roach, City Recorder.

K. M. Stewart was convicted of driving an automobile forty miles per hour in a twenty-mile zone, and he appeals.

Affirmed.

Paul G. McIver, of Montebello, for appellant.

Louis H. Burke, of Montebello, for the People.

SHAW, J.

The defendant was convicted on a charge of driving an automobile forty miles per hour in a twenty-mile zone, and appeals from the judgment. The complaint, which was in substantially the language just used in stating it, is inartificially drawn, but no point is made on this appeal in regard to it, and we proceed on the assumption that it is sufficient.

All of the points specified as grounds of appeal resolve themselves into the contention that the trial court did not follow the provisions of section 155 of the California Vehicle Act, as amended in 1929 (St. 1929, p. 548, § 70), and for that reason it had no jurisdiction to render a judgment of conviction. The respondent has also raised the question whether this section of the act is constitutional. But in view of the conclusion to which we have come as to its interpretation, we do not deem it necessary for the purposes of this case to express any opinion on the constitutional question.

Section 155, after defining and prohibiting speed traps, provides:

"Every officer when on duty for the purpose of enforcing the provisions of this act shall be dressed in a full distinctive uniform, and no officer shall use an automobile for patrolling public highways in the performance of such duty, unless such automobile is painted a distinctive color such as may be determined upon by the division of motor vehicles.

"In any prosecution under this act upon a charge involving the speed of a vehicle, any officer or officers arresting or participating or assisting in the arrest of the person so

charged shall be incompetent as a witness or witnesses if any speed trap was used in such arrest, or when an automobile was used by such officer or officers in violation of the provisions of this act, or the officer or officers were not in full uniform, and the court shall be without jurisdiction to render a judgment of conviction upon the testimony procured by the use of a speed trap or by any such officer or officers so using an automobile not in conformity with the act or not in full uniform."

This case requires an interpretation of this section only as it relates to the use of an automobile by officers, and the questions arising are whether the provisions in regard thereto apply to all officers who may chance to be on a public highway and there arrest a defendant for speeding, or only to those who are patrolling the public highways for the purpose of enforcing the provisions of the act; and also whether the burden of showing the facts in this matter rests upon the prosecution or the defense.

[1-3] To the first question stated, the provisions of section 155 afford a ready answer. The testimony of arresting officers is to be excluded "when an automobile was used by such officer or officers in violation of the provisions of this act." All other cases are to be governed by the general rules of evidence, which view an officer in the same light as a private citizen, and permit the testimony of either as to any fact of which he has knowledge. To discover what is a violation of the provisions of this act, we look at the preceding sentence of section 155, and there see that "no officer shall use an automobile for patrolling public highways in the performance of such duty" (that is, the "duty for the purpose of enforcing the provisions of this act," mentioned in the previous part of the sentence), "unless such automobile is painted a distinctive color such as may be determined upon by the division of motor vehicles." That is, the limitation on the testimony of an arresting officer applies only to cases where such officer was at the time of the arrest patrolling public highways for the purpose of enforcing the provisions of the act, and in such cases excludes his testimony only if, in the performance of that duty, he used an automobile not painted the distinctive color designated by the division of motor vehicles. The provision under consideration was clearly not intended to apply to a case where an officer may have been on a highway for some purpose disconnected with the vehicle act, e. g., the pursuit of criminals or his own private affairs, and does not forbid him to turn aside from such a purpose in order to arrest a speeder. Such a casual arrest does not, of itself, require the conclusion that the officer was patrolling public highways for the purpose of enforcing the vehicle act. Any broader construction of this limitation than we give it would ignore some of the words of the statute, contrary to the well-known rule of statutory construction that: "It is fundamental that, if possible, a statute or code section should be construed so as to give meaning and effect, not only to the statute or code section as a whole, but to each and every part thereof, i. e., to every word and clause, and certainly to every distinct or coordinate provision or section. * * * Words should never be considered unnecessary and surplusage, if a reasonable construction can be adopted which will give force to and preserve all the terms of the statute." 23 Cal. Jur. 758, 759.

[4-6] Upon whom rests the burden of showing the facts which disclose whether the arresting officer violated the provisions of the act? Appellant contends that the prosecution must make this proof as a foundation for introducing the testimony of the officer, relying on the concluding provision of the section that the court shall be without jurisdiction to render a judgment of conviction on the testimony of an officer who has violated the law, and the rule that the jurisdiction of an inferior court will not be presumed, but must be established by the party relying on it. The rule referred to is well established, but we do not think it applies to the present case in the manner claimed by appellant. The jurisdiction of the trial court over the case was shown, within the meaning of this rule. Section 155 does not declare that an officer who is using an automobile in violation of its terms shall not arrest a speeder, or that one so arrested shall not be prosecuted, or that any court shall not have jurisdiction of a criminal proceeding against him. The jurisdiction of the trial court attached to this case upon the filing of a complaint charging an offense of which jurisdiction is conferred by law upon it and the bringing of the defendant before it (Roberts v. Police Court, 185 Cal. 65, 195 P. 1053; Fleming v. Superior Court, 196 Cal. 344, 238 P. 88), and that jurisdiction continued at least through the trial and until judgment. The general rule is that a court which once acquires jurisdiction of a cause retains it until the cause is disposed of. The utmost effect of the provision relied on by appellant, assuming that it is valid and the word "jurisdiction" is used in its ordinary sense, is to divest the court of its jurisdiction when a lack of competent evidence appears at the time of judgment. In such a situation we think the presumption as to the continuance of an existing condition (Code Civ. Proc. § 1963, subd. 32) may be applied even to the jurisdiction of an inferior court, and since the court had jurisdiction of the case at the beginning and through the trial, it should be presumed that such jurisdiction continued, unless and until the contrary is shown.

[7, 8] The exclusionary rule of section 155 goes to the competency of the arresting officer as a witness under the conditions stated and is similar in nature and effect to the rules declaring that other witnesses occupying certain relations to the parties, or to the facts, are not competent, such as attorneys, physicians, clergymen, husband and wife, etc. Code Civ. Proc. §§ 1880, 1881. In fact, the similar provision excluding an arresting officer's testimony in case of a speed trap, contained in the 1923 amendment of section 155 (St. 1923, p. 567), was likened to these other exclusionary rules in Fleming v. Superior Court, 196 Cal. 344, 351, 238 P. 88. As to all such rules making witnesses incompetent as to particular facts or under particular conditions, the burden is on the party asserting a witness' incompetency to show it, unless such a showing already appears in the record. 5 Jones on Evidence (2d Ed.) § 2085; 28 R. C. L. 448; People v. Craig, 111 Cal. 460, 44 P. 186; People v. Tyree, 21 Cal. App. 701, 706, 132 P. 784; People v. Harden, 24 Cal. App. 522, 523, 141 P. 1075; People v. Holloway, 28 Cal. App. 214, 218, 151 P. 975. "A person offered as a witness is presumed to be competent, if he appears to be of sufficient age and mental capacity, and the burden rests upon the objecting party to show incompetency by a preponderance of evidence." 40 Cyc. 2239.

[9] "Where a witness is incompetent to testify at all, the objection to his competency must be made when he is offered as a witness and before he is sworn, and if not made then is waived, unless the grounds of incompetency become apparent only after the examination of the witness is commenced, in which case an objection must be taken at once, or it will be construed as waived. 40 Cyc. 2237.

[10] "The competency or incompetency of a witness may be made to appear by a voir dire examination, or outside evidence, or during the course of his own testimony. It is the right of the party against whom a witness is called to have him put on his voir dire and to question him in order to test his competency." 40 Cyc. 2240.

[11] The rules just stated are properly applicable to the provisions of section 155 declaring that arresting officers are incompetent as witnesses under certain conditions. These provisions are in the nature of exceptions to the general rule that all persons of sufficient age and intelligence are competent witnesses and the burden is on the defendant who claims that the officers are incompetent under this section to show the facts from which their incompetency arises.

It is obvious that the provision as to the jurisdiction of the court is merely ancillary to that rendering the officer's testimony incompetent, and is in the nature of a penalty to secure its enforcement. Hence, one who has failed to avail himself of the provision as to incompetency by making the proper showing should not be heard to assert a loss of jurisdiction. Even if we suppose that both the provision as to the evidence of officers and that as to the jurisdiction of the court are merely adjuncts to a general purpose of the Legislature to keep traffic officers on the highway as a means of repressing reckless and unlawful driving, as suggested in Fleming v. Superior Court, supra, in regard to the speed trap law, yet both provisions are in the nature of exceptions to the general rules as to competency and jurisdiction, and we think the burden is upon one who relies upon the existence of either exception to show it.

[12] In the case at bar, it appears from the record that at the beginning of the trial and before any witnesses were called or sworn, the defendant objected to the introduction of any evidence upon the ground that the court had no jurisdiction, basing his objection on section 155 of the Vehicle Act, and this objection was overruled. It follows from what we have already said that there was no error in this ruling. The court had jurisdiction to proceed and to convict the defendant on any proper evidence. This general objection cannot be regarded as an objection to the competency of witnesses who had not yet been produced, and who were not named in the objection. After this objection was overruled two police officers of the city of Montebello were called and sworn, and upon their testimony alone the defendant was convicted. From the testimony of one of them, it appeared that they saw the defendant speeding and chased and arrested him, and that they were riding at the time on a public street, in a police car which was painted black; whereupon the defendant objected to any further testimony from the witness on the ground that he was incompetent under section 155, because the automobile was not painted as required by that section. This objection was overruled. The facts testified to by the witness did not show his incompetency, for the reason that it did not appear that he was patrolling the street for the purpose of enforcing the vehicle act. The defendant made no request to examine the witness further in this respect, and did not offer to show any further facts than the witness had stated. There was therefore no error in the ruling.

[13] The court in overruling one of the above-mentioned objections stated, as a reason for its action, that it had not received any official notice of the action of the motor vehicle department in designating white as the color to be used on automobiles subject to section 155. This was not a sufficient reason for the ruling. The act of the motor ve-

hicle department, under section 155, in designating the distinctive color for automobiles, is a public act of the executive department of this state, and the courts must therefore take judicial notice of it under subdivision 3, section 1875, of the Code of Civil Procedure. No notice of such action is necessary to any court or person.

For the foregoing reasons, the judgment is affirmed.

McLUCAS, P. J., and BISHOP, J., concur.

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109 Cal. App. (Supp.) 757

PEOPLE v. SINICROPE.

SAME v. STODDARD.

SAME v. PATALANO.

Cr. 275, 279, 294.

Appellate Department, Superior Court, Los Angeles County, California.

March 21, 1930.

Rehearing Denied April 9, 1930.

1. Intoxicating liquors ⟹134.

Manufacture of cider and fruit juices which are in fact nonintoxicating and for use in home is not offense (Wright Act; National Prohibition Act tit. 2, §§ 3, 29 [27 USCA §§ 12, 46]).

National Prohibition Act tit. 2, § 29 (27 USCA § 46), as adopted by the Wright Act (St. 1921, p. 79), provides that penalties against manufacture of liquor without a permit shall not apply to person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar.

2. Intoxicating liquors ⟹236(13).

Evidence *held* insufficient to sustain conviction for possession of intoxicating liquor (Wright Act; National Prohibition Act tit. 2, §§ 3, 29 [27 USCA §§ 12, 46]).

The evidence disclosed that defendant had purchased a quantity of grapes, crushed them, and poured the juice into barrels where it was found, nothing was added to the juice, and it was not intoxicating, and was used only by defendant and his family.

3. Intoxicating liquors ⟹231.

Refusal, in prosecution for possession of liquor, to permit evidence to determine whether liquid resulting from crushed grapes was in fact intoxicating, *held* erroneous (Wright Act; National Prohibition Act tit. 2, § 29 [27 USCA § 46]).

4. Intoxicating liquors ⟹134.

Liquid made by adding water to jelly-like syrup obtained in market was not within exception in respect to manufacturing nonintoxicating cider and fruit juices (Wright Act; National Prohibition Act tit. 2, §§ 3, 29 [27 USCA §§ 12, 46]).

The exception made to the general rule that no person shall manufacture or possess liquor containing more than one-half of 1 per cent. of alcohol by volume is limited under National Prohibition Act tit. 2, § 29 (27 USCA § 46), as adopted by Wright Act (St. 1921, p. 79), to those who themselves have taken the steps whereby cider or fruit juice is obtained from the fruit, and does not include those who make use of fruit juice preparations manufactured by some one else.

On Rehearing.

5. Intoxicating liquors ⟹134.

"Juice" as used in law excepting manufacturer of nonintoxicating cider and fruit juice from penalties for manufacture of liquor is sap obtained by expression (National Prohibition Act tit. 2, § 29 [27 USCA § 46]).

6. Intoxicating liquors ⟹110.

Federal Prohibition Commissioner has no authority to make regulations in respect to state liquor law (Wright Act).

The Wright Act (St. 1921, p. 79) adopted only the penal provisions of the Volstead Act (27 USCA), and not the regulations which United States officers may adopt by way of interpretation or enforcement of that act.

7. Statutes ⟹219.

Departmental construction of statute cannot alter plain meaning thereof, but is of value only where meaning is doubtful.

Appeal from Municipal Court of Los Angeles; Chas. B. MacCoy, Leonard Wilson, and Charles L. Bogue, Judges.

Frank A. Sinicrope, Albert H. Stoddard, and Rafael Patalano were convicted of unlawful possession of intoxicating liquor, and they separately appeal.

Affirmed as to the second-named defendant, and reversed and remanded for new trial as to the other defendants.

Joseph Musgrove and F. O. McGirr, both of Los Angeles, for appellant Sinicrope.

Joseph Musgrove, Thomas H. Cannan, and F. O. McGirr, all of Los Angeles, for appellant Stoddard.

O'Melveny, Tuller & Myers, of Los Angeles, amici curiæ.

C. W. Pendleton, of Los Angeles, for appellant Patalano.

Lloyd S. Nix, City Prosecutor, Joe W. Matherly and F. W. Fellows, Deputy City Prosecutors, all of Los Angeles, for the People.

BISHOP, J.

Recently we were called upon to hold (People v. Ruddick, 288 P. 45), that by the Wright Act (St. 1921, p. 79), the mere possession of intoxicating liquor fit for beverage purposes was made a public offense, except as possession was authorized by the act under certain circumstances. In the three cases now before us, the defendants contend that their possession was authorized, each relying upon that portion of section 29, title 2, of the National Prohibition Act (27 USCA § 46), as adopted by the Wright Act (St. 1921, p. 79), which reads as follows:

"The penalties provided in this chapter against the manufacture of liquor without a permit shall not apply to a person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar."

So far as we are aware, this provision has not received attention at the hands of any of the appellate courts of this state. It has been construed, however, in five federal cases, the first of which is United States v. Hill (D. C. Md. 1924) 1 F.(2d) 954, 956. The defendant was on trial charged with the manufacture and possession of wine and cider. It was agreed that the manufacture was authorized by title 2, section 29, if the liquor was not intoxicating. It was not disputed that the liquor was intoxicating tested by the definition contained in section 1, title 2, of the Volstead Act (27 USCA § 4); but the defendant proposed to prove that it was not, in fact, intoxicating. Should evidence directed to this question be admitted?

In support of its affirmative answer, the court advanced these cogent reasons:

"But it is obvious that by the concluding sentence of section 29 of the act, Congress intended that persons manufacturing nonintoxicating cider for use in their homes, and not for sale, should be in a class by themselves, at least in some particulars, otherwise the sentence has no meaning or use whatsoever. If it was intended to punish persons for manufacturing cider for use in their own homes, which contains more than one-half of 1 per cent. of alcohol by volume, there was no necessity for the provision, for the act without the sentence already provided such punishment. If, on the other hand, it was intended by Congress that persons who made cider containing less than one-half of 1 per cent. by volume should not be subject to punishment, there was no need for the provision, for the reason that the other provisions of the act did not provide punishment for such person. The only reasonable explanation for singling out home manufacturers of cider and fruit juices for special mention in this section, to my mind, is that Congress did not intend to subject them to the strict provisions as to the alcoholic content of the product specified in section 1, but intended to prohibit the manufacture of cider and fruit juices for home use, which should be, in fact, intoxicating. If the section is so interpreted, then there is a reason for its insertion in the act."

The Circuit Court of Appeals, Fourth Circuit, came to a like conclusion, in Isner v. United States (1925) 8 F.(2d) 487, 488. The defendant, charged with unlawfully possessing intoxicating liquor, had gathered a quantity of wild cherries and elderberries, had strained out the berries, and added some water. The concoction was found in his cellar. At the trial he offered to show that the liquid was, in fact, not intoxicating, but an objection to this evidence was sustained. Upon the hearing on appeal the government stipulated that the wine was not, as a matter of fact, intoxicating, although it did contain more than one-half of 1 per cent. of alcohol by volume. The court stated its conclusion in the following language:

"We therefore hold that in all such cases it is necessary to prove that such vinegar and fruit juices are in fact intoxicating before a conviction can be had.

"This view of this section is unanimously held by the court, and, as the writer of this opinion was a member of the lower house of Congress when this act was passed, he can say without doubt that the foregoing construction of this section was the intent and meaning of Congress. This provision now under consideration was not a part of the bill as it passed the House of Representatives, but was inserted in the Senate after a number of speeches had been made by persons complaining that the 'grandmother and housewife' were going to be 'penalized and made criminals' if they made blackberry cordials or blackberry wines for use in their own home. In order to meet such objection on the part of such critics of the bill, this provision was agreed upon and inserted in the Senate after a conference of members and Senators deeply interested in the passage of the act and the success of prohibition. A different interpretation than this one placed upon the act would be to totally disregard the plain language of the Congress, which inserted this provision in the Volstead Act for the purpose of making a different rule for conviction of persons who make nonintoxicating vinegar

and fruit juices exclusively for their home uses."

Two contrary conclusions have appeared in reports of federal cases, and should be noted. One of these, United States v. Picalas (D. C. N. D. W. Va. 1928) 27 F.(2d) 366, was appealed, and the judgment reversed on the authority of the Isner Case. See Picalas v. United States (C. C. A. 4, 1929) 33 F.(2d) 1022.

The remaining federal case [In re Baldi (E. D. N. Y. 1929) 33 F.(2d) 973] arose from a petition for the return of twenty-six barrels of wine unlawfully seized. Title 2, section 29, was relied upon as authorizing the possession and therefore the return of the liquor which had been taken. The court held that the possession was not authorized under the section because the wine was intoxicating and because the great quantity involved demonstrated that it was possessed for commercial purposes and not for family use. As the wine was shown to contain 13.13 per cent. of alcohol by volume, it was plainly intoxicating in fact, but the court relied rather on the definition, not being satisfied to interpret section 29 as using the word intoxicating in a sense different from section 1. No attempt was made to explain the purpose to be served by the provision in section 29 if so interpreted, and we are constrained to follow the reasoning of the other federal cases.

[1] We conclude, therefore, that the last sentence of section 29 is one of the exceptions referred to in section 3, title 2, of the Volstead Act (27 USCA § 12), and that a person does not offend under the act, who manufactures, and, after manufacturing, possesses exclusively for use in his own home cider and fruit juices which are, in fact, nonintoxicating.

[2] The evidence in the case against Sinicrope is not sufficient to sustain the judgment when tested by the conclusion just expressed. From the state's case it appeared that the liquor in the possession of the defendant was wine or "what might be called grape juice or fruit juice." The evidence given on behalf of the defendant stands uncontradicted that some three weeks prior to his arrest he had purchased a quantity of grapes, crushed the grapes in his back yard, and poured the juice into the barrels, where it was found. Nothing was added to the grape juice, and it was, in fact, not intoxicating. It was used only by himself and his family, consisting of eight persons. In the premises the judgment against the defendant Sinicrope must be reversed, the cause remanded for a new trial.

[3] In People v. Patalano, the prosecution established that the defendant had in his possession some five barrels of wine. Defendant endeavored to prove that his possession was legal because within the provision of title 2, section 29 of the Volstead Act (27 USCA § 46) which we have considered. His testimony was that he had purchased some grapes and crushed them and placed the grape juice in these barrels. All attempts to introduce evidence to determine whether the resulting liquid was, in fact, intoxicating or not, were defeated by the rulings of the court. In view of the exception made by title 2, section 29, this ruling was incorrect, and the judgment is reversed, the cause remanded for a new trial.

In People v. Stoddard we have presented a somewhat different situation. A prima facie case of unlawful possession was established beyond doubt. By way of an endeavor to bring himself within the shelter of title 2, section 29, the defendant proved that the liquor he was charged with possessing was made by the process of adding water to a thick jelly-like syrup obtained in the market, the syrup being concentrated grape juice.

[4] We are of the opinion that the attempted defense fails. The defendant cannot say the liquor he possessed was fruit juice which he manufactured. If he has manufactured any product, he has done so by operating on a product manufactured by some one else. The raw article, fruit, from which fruit juices may be manufactured, was never in his hands. If any fruit juice was manufactured, it was done, not by him, but by those who made the grape juice which in turn was concentrated to make the syrup bought by the defendant in the market. We are convinced that the exception here made to the general rule that no person shall manufacture or possess liquor containing more than one-half of 1 per cent. of alcohol by volume is limited to those who themselves take the steps whereby cider or fruit juice is obtained from the fruit, and does not include those who make use of fruit juice preparations manufactured by some one else.

It follows that the judgment in the case of People v. Stoddard should be affirmed.

We concur: McLUCAS, P. J., SHAW, J.

Opinion on Rehearing in PEOPLE v. STODDARD.

PER CURIAM.

A petition by defendant for a rehearing, and an extensive brief in support thereof by amici curiæ, have been filed, and we have considered them, but we find therein no reason to change the conclusion stated in our opinion previously filed in this case. A great part of the petition and brief are devoted to the citation and discussion of authorities in support of the proposition that the word "manufacture" includes "the process by which a new product is made by combining materials which in themselves are the finished product of some other manufacturer." We have no quarrel

with this proposition or the authorities by which it is supported. We do not hold, as suggested in the brief, that in every case "one who by his own effort produces an article or commodity cannot be deemed to be a manufacturer thereof unless in its production he uses only raw materials," if—as the brief apparently means but does not say—the term "raw materials" is defined to mean materials in the state in which nature produces them; nor does our decision depend upon any construction of the term "manufacture" so as to exclude defendant's operation therefrom. We do hold, however, that in the particular case of grape juice the raw material from which it is produced is necessarily the grapes, for reasons which we will presently state.

[5] It is declared in the brief that "to be a manufacturer of grape juice * * * one * * * may use * * * grape juice which has been prepared by another," but no explanation is given of how this may be accomplished. We think the same grape juice can be manufactured but once, and any further processes to which it may be subjected, although they be of a manufacturing nature, cannot constitute the manufacture of grape juice. A reference to the definition of the word "juice" is helpful to an understanding of the statute. That word is defined as follows: "The extractable fluid contents of plant cells or plant structures consisting of water holding sugar or other substances in solution." Webster's Dictionary. "The fluid part of animal or vegetable matter; especially the expressible watery matter in fruits, containing usually the characteristic flavor." Standard Dictionary. "The juice of vegetables or fruit is nothing but the sap obtained by expression. If the sap is subjected to heat and evaporation, the article thus produced is generally understood to be a different thing from the sap." Per Taft J. in Smith v. Rheinstrom (C. C. A. 6, 1895) 65 F. 984, 985. It follows from these definitions, and is in effect held in the case just cited, that the syrup or "concentrated grape juice" which defendant testified he bought and used in his operations was not grape juice. Undoubtedly it had at one time been grape juice, before it passed through the manufacturing process by which it was reduced to the "thick jellylike syrup" which defendant described, but it does not follow that it again became grape juice by the addition of water, and we cannot hold that it did, for two reasons. In the first place, the defendant, on whom was the burden of proof, made no showing that the fluid resulting from the addition of water to this syrup was the same either chemically or physically as the original grape juice; and we very much doubt if it was, in view of the results obtained in other processes of concentration and dilution, instances of which are canned or dried milk. In the second place, if it were possible by any sort of synthetic process to make a fluid identical with the juice extracted from grapes, it would not be grape juice by any of the foregoing definitions. It is an essential part of all of them that the fluid to be termed "juice" shall have been extracted or pressed from the fruit. This is not true of the fluid produced by the defendant. Some part of it had been so extracted, but not the added water which constituted four-fifths of its bulk.

Title 2, section 29, of the Volstead Act (27 USCA § 46), does not in terms except liquids equivalent to, or identical with, fruit juice, and we can see no reason to suppose anything of the kind was intended. In fact, a general consideration of the purposes of the act and of the exception leads us to a contrary conclusion. The general purpose of the act is to suppress the use of intoxicating liquors for beverage purposes, and as incidental to that it was deemed necessary to define intoxicating liquors as including all those liquors which contain more than one-half of 1 per cent. of alcohol, to prohibit all manner of dealings with such liquors whether for beverage purposes or not, with a few exceptions, and to surround the exceptions which might lead to any commercial exploitation with safeguards in the way of permits and regulations. No such safeguards were thrown around the manufacture of fruit juices under title 2, section 29. The purpose of that exception as stated in Ismer v. United States (C. C. A. 4, 1925) 8 F.(2d) 487, was to prevent the grandmother and housewife from being penalized and made criminals, if they made the excepted liquors for use in their own homes. It is evident to us that it was not intended thereby to open a path to any sort of commercial dealing, which with the profit urge continually back of it would be likely to lead to abuse of the privilege. If defendant's operation is permitted by law, no doubt manufacturing interests will arise to advertise and exploit the use of this grape syrup for the manufacture of so-called "grape juice." This would result in a situation quite different from that which would appear if the grandmothers and housewives, and the householders, who are also within the exception, were under the necessity of procuring the fruit and extracting the juice therefrom. Fruit juice may by fermentation be made intoxicating in fact, and the statute provides no means of checking up on the process or of discovering who are engaged in it, as it does in the case of all other permitted manufacturing operations. Congress may well have deemed such a condition harmless in case of the comparatively few persons who would go to the trouble of obtaining fruit and extracting the juice therefrom; but have thought that, if any one might merely buy fruit syrup and add water to it, the simplicity of the operation and the influence of advertising and sales pressure by the manufacturers of the syrups would increase the practice to such an extent as to aggravate greatly the difficulty of enforcing the

law. We think that title 2, section 29, of the Volstead Act (27 USCA § 46), sanctions nothing of that kind, and that the term "fruit juices" is there used in the sense of the dictionary definitions so as to include only the fluid actually extracted from fruit. On account of this limited meaning of the term, the only raw material from which fruit juice can be manufactured is of necessity the fruit itself, although, as already stated, it is not generally true that manufacturing can be carried on only with materials provided by nature. The fluid which the defendant manufactured and possessed was therefore not fruit juice, and he was not protected in his possession of it by title 2, section 29, of the Volstead Act.

It is claimed that the conclusion thus stated is contrary to the decision in United States v. Hill (D. C. Md. 1924) 1 F.(2d) 954. On a careful reading of that case we find that this question was neither presented to, nor considered by, the court. The fact that the defendant had manufactured the liquor found in his possession was declared by the court to be undisputed and conceded, but the nature of the manufacturing operation does not appear from the report.

[6, 7] Our attention is also called to an instruction of August 6, 1929, addressed by the United States Prohibition Commissioner to his agents, directing them not to interfere with the use of grape concentrates in the home for the manufacture of fruit juices, and it is contended that this is a regulation having the force of law. We are here dealing with a law of the state of California, regarding which the Prohibition Commissioner, who is an officer of the United States, can have no authority to make regulations. Our statute, the Wright Act, has adopted only the penal provisions of the Volstead Act, not the regulations which United States officers may adopt by way of interpretation or enforcement of that act. Moreover, such departmental construction of the statute cannot alter the plain meaning of the statute, but is of value only where its meaning is doubtful. Hodge v. McCall, 185 Cal. 330, 334, 197 P. 86.

The petition for a rehearing is denied.

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209 Cal. 443

TIPTON v. TIPTON.

L. A. 11863.

Supreme Court of California.

May 6, 1930.

1. Divorce ⟹252, 286.

Where divorce is for cruelty, discretion of trial court in disposing of community property is not arbitrary and is subject to revision on appeal (Civ. Code, § 146, subd. 1).

Under Civ. Code, § 146, subd. 1, when ground of divorce is extreme cruelty, community property must be assigned in such proportions as the court, from all facts of case and condition of parties, may deem just.

2. Divorce ⟹252.

Where divorce is for desertion, there is no discretion on part of trial court to divide community property other than equally (Civ. Code, § 146, subd. 2).

Under Civ. Code, § 146, subd. 2, when ground for divorce is desertion, community property must be equally divided.

3. Divorce ⟹252.

When divorce is for cruelty, nonoffending party is entitled to more of community property than that awarded to one who is at fault (Civ. Code, § 146, subd. 1).

In Bank.

Appeal from Superior Court, Los Angeles County; Walter Hanby, Judge.

Action for divorce by Florence Kathrine Tipton against Thompson Ramsey Tipton. Judgment for plaintiff. From a decree awarding all community property to defendant, plaintiff appeals.

Reversed.

Koenig & Brunton, Victor H. Koenig, and A. W. Brunton, all of Los Angeles, for appellant.

C. L. Belt and E. S. Green, both of Los Angeles, for respondent.

SHENK, J.

The plaintiff obtained an interlocutory decree of divorce from her defendant husband on the grounds of desertion and extreme cruelty. Notwithstanding the findings that the defendant was guilty of desertion and extreme cruelty, the court allotted all of the community property, consisting of real estate of the value of $2,500 and an automobile, to the defendant husband. The plaintiff appeals on the judgment roll from that part of the interlocutory decree which awarded all of the community property to the defendant.

[1-3] The sole question for determination is this: May the trial court lawfully award all of the community property to the offending party when the divorce is granted on the grounds of desertion and extreme cruelty? The question must be answered in the negative. When the ground for the dissolution of the marriage is desertion, the community property must be divided equally. Civ. Code, § 146, subd. 2. When the ground is extreme

cruelty, the community property must be assigned "in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just." Civ. Code, § 146, subd. 1. But the discretion of the trial court in disposing of the community property under subdivision 1 is not an arbitrary one and is subject to revision on appeal. Civ. Code, § 148. When the divorce is granted on the ground of desertion alone, there is no discretion to divide the community property other than equally, and the plain inference to be derived from the foregoing Code sections is that when the divorce is granted on the ground of extreme cruelty the nonoffending party is entitled to more than that awarded to one who is at fault. Eslinger v. Eslinger, 47 Cal. 62; Quagelli v. Quagelli (Cal. App.) 277 P. 1089; 5 Cal. Jur. p. 358 et seq., and cases therein cited.

The evidence is not before us, consequently we are not in position to modify and affirm the judgment. That portion of the interlocutory decree appealed from is therefore reversed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.

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209 Cal. 412

PACIFIC EMPLOYERS' INS. CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 11767.

Supreme Court of California.

April 28, 1930.

Rehearing Denied May 26, 1930.

Master and servant ⟹405(6).

Evidence sustained finding of serious and willful misconduct of employer having employee operate unguarded saw injuring hand, authorizing award of penalty (Workmen's Compensation Insurance and Safety Act § 6 (b), as amended).

PRESTON, and RICHARDS, JJ., dissenting.

In Bank.

Proceeding under the Workmen's Compensation Act by Leon S. Thompson, claimant, opposed by the Patterson-Ballagh Corporation, employer, and the Pacific Employers' Insurance Company, insurer. To review an order of the Industrial Accident Commission awarding compensation, the insurer brings certiorari.

Affirmed.

Rehearing denied; RICHARDS and SHENK, JJ., dissenting.

F. Britton McConnell and Ewell D. Moore, both of Los Angeles, for petitioners.

Edward O. Allen, of San Francisco, for respondents.

SEAWELL, J.

This cause presents a single question: Was the industrial, compensable injury sustained by respondent Leon S. Thompson caused by the serious and willful misconduct, within the meaning of section 6, subdivision b, of the Workmen's Compensation, Insurance and Safety Act (Deering's Gen. Laws, Act 4749, pp. 1710, 1715 et seq.), of his employer, petitioner Patterson-Ballagh Corporation, a corporation? A statement of the case follows:

On October 31, 1928, said respondent Thompson, while performing duties arising out of and in the course of his employment by said corporation, sustained severe injuries to his hand by reason of its contact with a revolving circular saw. Petitioner Pacific Employers' Insurance Company, a corporation, the insurer of said employer, assumed liability for the normal benefits due said employee under said act. Upon hearing of the claim before the Industrial Accident Commission, however, that body found that said injury was proximately caused by the serious and willful misconduct of the employer and it therefore awarded said employee, in addition to a permanent disability of 34 per cent., or $2,518.72, the sum of $1,259.36, that is, an increased indemnity of 50 per cent. to be paid by said employer by reason of its said alleged serious and willful misconduct. Petitioners thereupon filed their application for writ of review. The main award is not disputed, but by the instant proceeding they seek to have annulled the latter portion thereof imposing said penalty of 50 per cent. Hence, as above stated, the question is whether, in the light of the evidence adduced upon the hearing and the provisions of said Workmen's Compensation Act, which permit the imposition of such a penalty, respondent Commission was warranted in finding said employer guilty of such serious and willful misconduct as justified them in assessing it. The facts are simple and the evidence is substantially without conflict.

Said employer had been engaged for some months in the manufacture of oil well specialties made of rubber. Shortly before the accident it undertook to install in its plant for the first time power-driven machinery. Mr. Patterson, the president of the corporation, purchased what he considered the best power-driven saw on the market for his purpose—a combined cross-cut and rip saw, so arranged that when in use the rip saw cutting edge could be raised to project through a slot in the table, but when not in use it could be lowered below the table surface. When in use it was unguarded and when not in use it was below the level of the stand and was harmless. Mr.

Patterson employed C. N. Dingle, an industrial engineer, to install said motor power machinery. He had been in the manufacturing business for some months prior to the injury suffered by the employee, Thompson. The saw as delivered was affixed to a stand which was a part of its equipment and was in readiness for action, but the saw proper was unguarded. Mr. Patterson, the employer, was asked the following questions upon the hearing, and gave the answers which follow:

"Q. * * * In other words, when it showed up on the job was it just what you expected? A. No, not in regards to guards, no.

"Q. Did you order at the time any guard or anticipate any guard for the rip saw? A. I anticipated guards, yes.

"Q. Did you discover the fact that there were no rip guards? A. Yes; that is correct.

"Q. Before it was used? A. Before it was used.

"Q. Did you at the time take any steps to remedy its then condition? A. Yes, I did.

"Q. What steps, if any, did you take?" To this question the witness stated that he "purposely" hired a man who represented that he understood saws and saw conditions and that he was the only man to handle the saw. The man to whom reference was made is Thompson, the employee, who by trade is a carpenter, but who professed to have some skill in the use of circular saws. The witness Patterson admitted that he knew as "of course" that there were certain rules adopted by the Industrial Accident Commission dealing with the standards of safety and guarding the equipment in his plant. The state of the evidence is such on the issue of his knowledge of safety requirements—if his failure to inform himself on that subject be a defense—that the Industrial Accident Commission, sitting as judges of the evidence, could well have found and undoubtedly did impliedly find from the testimony of Mr. Patterson, the president of said corporation, as well as from other testimony, that he had knowledge of the existence of "wood working safety orders" adopted by the Commission which required him to place a safety device on the saw; that no guard was practical is rebutted by the photographs of the saw as now used, which appears to be practical and at the same time affords protection to the workman who uses the saw. The testimony of the employee was that had the saw been guarded he would not have sustained the loss of his thumb and portions of two fingers. The evidence seems to sustain this conclusion.

C. N. Dingle, the engineer who installed said machinery, testified that none of the machinery was safeguarded for the reason that it was in the course of construction, and, as he continued, "we hadn't gotten to the safeguarding point yet. * * * At the time of getting the saw in, it was suggested that that would be another thing that we would have to do. * * * In my opinion there should be a safeguard on it [the saw]." He further testified that it was his intention to provide a safeguard for said rip saw. The machinery and saw were in operation about a week before the injury occurred. It seems clear that the Commission was fully justified in finding that the employer was careless and indifferent as to the safety of its employees. Its haste to set in motion its machinery before it was lawfully prepared to do so was the assumption of a hazard which it had no right to assume.

The room in which the saw was installed seems to have been small and quite crowded with lumber and other materials. As another employee entered the room the attention of Thompson was momentarily arrested from his employment and his thumb and fingers were amputated as above described. This circumstance may as likely happen to the most skillful mechanic as to one without skill. It was to insure against such fortuitous cases that the safeguarding of dangerous machinery was made mandatory.

Petitioners' insistence that no sufficient evidence appears in the record to sustain a finding of serious and willful misconduct on the part of the employer cannot be sustained, but must be overruled. "'Willfully,' when applied to the intent with which an act is done or *omitted*, implies simply a *purpose* or *willingness* to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." Sec. 7, subd. 1, Pen. Code. (Italics ours.)

The seriousness of the failure or refusal on the part of the employer to comply with the order of the Commission is self-evident. This case on principle is not distinguishable from Hoffman v. Dept. of Industrial Relations (Cal. Sup.) 287 P. 974.

It is clear to us that the award must be affirmed, and it is so ordered.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.

PRESTON, J.

I dissent. The evidence in this case, though sufficient to sustain the compensatory award, offers no justification whatsoever for the imposition of a 50 per cent. penalty for alleged serious and willful misconduct on the part of the employer, nor, in my opinion, is the case of Hoffman v. Dept. of Industrial Relations (Cal. Sup.) 287 P. 974, controlling here.

The circumstances of each particular case, viewed in the light of the provisions of the Workmen's Compensation Act, must determine the question of whether the acts or omissions of an employer constitute serious and willful misconduct, "* * * conduct which the employer either knew, or ought to have

known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees." E. Clemens Horst Co. v. Industrial Accident Commission, 184 Cal. 180, 188, 193 P. 105, 108, 16 A. L. R. 611.

In this case the record shows that Mr. Patterson, the president of the employer corporation, had purchased what he considered the best machine of its type on the market; that he was not familiar with such machinery and, therefore, took the precaution to employ an experienced industrial engineer to help him and to supervise its installation It appears that this engineer had not found a guard for the saw which was acceptable when it was in operation, and, although he intended to try to guard it in some way, he knew of no absolute safeguard for it. He stated he had no hesitancy in ordering a man to operate it as it then stood. His views, of course, were followed by said employer, but, in this situation, such further steps were taken by it as Mr. Patterson felt might serve to insure the operator's safety. To this end he made certain that the operator he hired thoroughly understood saws. Not only this, but he consulted said operator on the subject. No objection was made to the saw being unguarded, but the operator did ask, as his workroom was congested, that no one else be allowed to enter it, and this request was promptly acceded to.

Serious and willful misconduct involves much more than mere negligence or even gross or culpable negligence. It contemplates actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, on the part of an employer that the thing which he is doing is wrong, coupled with a conscious failure to act to the end of averting injury; that is, it must appear that the circumstances surrounding the act or omission are such as "evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of." See E. Clemens Horst v. Industrial Accident Commission, supra, and Helme v. Great Western Milling Co., 43 Cal. App. 416, 421, 185 P. 510.

It will be noted that in this case there is involved no intentional or willful violation on the part of the employer of any statute or safety order of the Industrial Accident Commission because the evidence shows that it had no knowledge of any requirement with respect to further guarding the piece of machinery in question. It is also clear that in the hiring of said experienced engineer and experienced operator and in its compliance with the suggestions offered by these persons, this employer gave thought to the exercise of reasonable care for the safety of its employees. There is no evidence whatsoever of a reckless disregard for their safety. In other words, I do not believe the record before us contains any justification whatever for the finding on the part of respondent Commission of such serious and willful misconduct on the part of said employer as should subject it to the penalty imposed. The award of the Commission to my mind, in so far as it undertakes to impose said 50 per cent. additional compensation penalty, should be annulled.

I concur: RICHARDS, J.

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209 Cal. 445

ZOBELEIN CO. v. CITY OF LOS ANGELES et al.

L. A. 11328.

Supreme Court of California.

May 7, 1930.

Eminent domain ⟹181.

Description of property condemned in mass in summons complied with statute, where complaint contained description thereof in separate parcels; complaint and summons being served together (Code Civ. Proc. § 1245).

Proceedings for condemnation of property were instituted under Street Opening Act 1903, supplemented by Street Opening Bond Act 1911 (Deering's Gen. Laws 1923, Acts 8198 and 8199). Section 6 of Act 8198, providing that condemnation proceedings should be governed by provisions of Code of Civil Procedure, made applicable Code Civ. Proc. § 1245, requiring a reference to complaint for a description of the respective parcels to be taken.

In Bank.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by the Zobelein Company against the City of Los Angeles and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

E. R. Young, Edward F. Wehrle, and E. L. Searles, all of Los Angeles, for appellant.

Jess E. Stephens, Robert J. Stahl, Erwin P. Werner, Herman Mohr, and Sam H. Erwin, all of Los Angeles, for respondents.

PRESTON, J.

The essence of this appeal is the claim that a certain interlocutory judgment of condemnation is void upon its face, which judgment was entered on the 22d day of June, 1926, pursuant to proceedings theretofore had by the city council of the city of Los Angeles under the Street Opening Act of 1903, sup-

plemented by the Street Opening Bond Act of 1911 (Deering's Gen. Laws, Acts 8198 and 8199, p. 3309 et seq.), in an action instituted by said city in the superior court of the state of California in and for the county of Los Angeles, entitled "The City of Los Angeles, a municipal corporation, plaintiff, v. L. W. Blinn et al., defendants," No. 152083, against plaintiff here and a large number of other persons, all owning property interests within an area necessary to be taken for the widening and opening of Flower street from Washington street to Exposition boulevard, and for the prolongation of said street from Exposition boulevard to the intersection of Thirty-Eighth and Figueroa streets, in said city.

In said action, on January 20, 1925, plaintiff here was duly served with summons, to which was attached a copy of the complaint; it made default; later an award was made by referees which, without objection upon the part of plaintiff, was confirmed by the court; and later, on June 22, 1926, as above stated, said interlocutory judgment of condemnation was entered in due course. Soon thereafter an assessment covering the cost of the entire improvement, including an amount sufficient to pay plaintiff for its property so taken, was prepared and filed with the city council. A hearing was then had upon said assessment as filed, and at this juncture plaintiff for the first time appeared and objected to the confirmation of said assessment upon the ground that the council had no jurisdiction to fix, levy, or collect the same. Its protest was denied and the assessment was confirmed by the council. Within thirty days thereafter, to wit, on January 11, 1928, plaintiff commenced this action against the city of Los Angeles and the other defendants named to have said proceedings taken by the city council and by the board of public works declared invalid and to have issued an injunction against the collection of said assessment or any part thereof. Issue was joined, a trial had on the merits, and thereafter judgment was entered for defendants. Plaintiff has appealed, relying solely upon the ground first above set forth.

It is claimed that the interlocutory decree is void upon its face because the summons did not contain the elements required by statute, in that it failed to make "reference to the complaint for descriptions of the respective parcels" sought to be condemned in said action. Section 1245, Code Civ. Proc.

Section 6 of said act of 1903 (Deering's Gen. Laws, Act 8198, p. 3313), referring to condemnation proceedings, provides: "Said action shall in all respects be subject to and governed by such provisions of the Code of Civil Procedure now existing or that may be hereafter adopted, as may be applicable thereto, except in the particulars otherwise provided for in this act." This, of course, makes applicable the provisions of both section 407 and section 1245 of the Code of Civil Procedure.

It is conceded that the complaint complied with the requirements of section 1244 of the Code of Civil Procedure, and an examination of the summons shows that it contained the names of the parties and a direction that the defendants appear and answer in the manner provided by statute or plaintiff would apply to the court for the relief demanded in the complaint. It further contained a description of the entire area, in one parcel, sought to be condemned to effectuate said improvement, and also contained the following language: "And you, and each of you, are hereby notified to appear and show cause why the property above described should not be condemned as prayed for in the complaint."

It is our conclusion that inasmuch as said summons contained a description of the property in mass, and the complaint contained a description thereof in separate parcels, copy of complaint and summons being served together, the last above-quoted reference in said summons was sufficient to fully comply with the said provision of section 1245 of the Code of Civil Procedure, requiring a reference to the complaint for a description of the respective parcels to be taken. This being our conclusion, it is unnecessary to discuss the other questions treated in the brief.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

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209 Cal. 436

CROCKER NAT. BANK OF SAN FRANCISCO v. SAY et al.

S. F. 13132.

Supreme Court of California.

May 6, 1930.

1. Bills and notes ⚷96.

That makers personally did not receive proceeds did not render note void for want of consideration, detriment to payee lending money being adequate consideration.

The bank whose stockholders executed note received the full benefit from the proceeds of the note which was given to another bank to evidence loan of money.

2. Evidence ⚷418.

Extrinsic evidence is inadmissible to avoid liability of maker signing note in in-

dividual capacity, even if he was then another's agent.

3. Evidence ⟹418.

Refusal to make bank party defendant with stockholders executing note sued on *held* not error where note disclosed no agency.

4. Evidence ⟹418.

Admitting evidence of alleged agency for bank of directors signing notes individually for accommodation *held* error.

5. Bills and notes ⟹106.

Directors individually signing note could not avoid liability because bank receiving proceeds obtained money for ultra vires purpose, where lender did not participate (Bank Act 1909, § 37, as amended [St. 1923, p. 56]).

The directors, sued on note they executed to obtain money for their bank, contended that there was no liability on their part because of fact that money was obtained for the purpose of enabling bank to acquire stock of another bank in violation of Bank Act (St. 1909, p. 96) § 37, as amended (St. 1923, p. 56), which provides that no bank, except as otherwise provided therein, may purchase or invest its capital or surplus or money of depositors in corporate stock of any corporation unless purchase or acquisition shall be necessary to prevent loss to bank on obligation owned or on debt previously contracted in good faith.

6. Bills and notes ⟹59.

In absence of payee's fraud or deceit, it could only sue bank's stockholders and directors who executed note to obtain money for bank not party thereto (Civ. Code, § 3099).

In Bank.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by the Crocker National Bank of San Francisco against W. H. Say and others. Judgment for the defendants, and plaintiff appeals.

Reversed.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, and W. E. Simpson, of Fresno, for appellant.

Everts, Ewing, Wild & Everts, D. F. Conway, and A. W. Carlson, all of Fresno, for respondents.

SHENK, J.

This is an appeal from a judgment in favor of the defendants in an action on the following promissory note:

"$56,214.79 San Francisco, Cal. June 4, 1923.

"On demand, and if no demand be made, then six months after date, for value received in gold coin of the Government of the United States, I, we, or either of us, jointly or severally, promise to pay to the order of Crocker National Bank of San Francisco at its banking house in the city, Fifty-six thousand two hundred fourteen and 79/100 dollars, with interest from date at the rate of six per cent. per annum, until paid, payable quarterly—both principal and interest payable in like gold coin.

"W. H. Say
"Henry Ross
"Ivan C. McIndoo"

The note was executed under the following circumstances: The Valley Bank was a state bank doing business in Fresno. It was contemplating the purchase of the National Bank of Bakersfield for the purpose of establishing a branch at Bakersfield. The Valley Bank either owned or controlled 679 shares of the 1,000 shares of the Bakersfield bank. Before the transaction could be completed it became necessary to repair the capital assets of the Bakersfield bank to the extent of $56,214.79. The members of the executive committee of the board of directors of the Valley Bank discussed ways and means for securing the necessary funds, and it was decided to apply to the plaintiff bank for a loan for the required amount. The Valley Bank had an account with the plaintiff bank. The cashier of the Valley Bank was authorized to proceed to San Francisco to interview the proper officers of the plaintiff bank in an endeavor to obtain the loan. Thereafter the cashier of the Valley Bank had a conference with a vice president of the plaintiff bank at San Francisco at which time the application for the loan was made and the purposes for which the funds were to be used were fully explained to the officers of the plaintiff bank. The latter agreed to recommend the loan provided a note for the amount was signed by responsible and acceptable directors of the Valley Bank. The names of several members of the executive committee were mentioned and approved. The cashier of the Valley Bank then returned to Fresno. The note sued on was prepared and was signed by the defendants who were stockholders and directors of the Valley Bank and were members of said executive committee. On or about the date of the note, the cashier of the Valley Bank transmitted the note in the form above quoted to the plaintiff by mail with the request that the amount thereof be placed to the credit of the Valley Bank. This was done and the Valley Bank received the benefit of the amount of the note. The Valley Bank paid the interest on the note for a time. After due demand on the defendants and default in payment this action was commenced on May 26, 1924.

The defendants resisted the action on four grounds: (1) That there was no effective delivery of the note; (2) that the defendants received no consideration for the note; (3) that they signed the note solely as agents for their principal, the Valley Bank of Fresno, the real debtor, which facts were known to the plaintiff at the time; and (4) that the loan to the Valley Bank by the plaintiff was made for an illegal and unlawful purpose known to the plaintiff.

By their answer and by motion the defendants sought to have the Valley Bank made a party to the action on the ground that a complete determination of the controversy could not be had without its presence as a party. The motion was denied. Over the plaintiff's objection the court admitted evidence on all of the issues raised by the special defenses. Thereafter the court found that the defendants signed the note solely as agents and that the transaction was otherwise as contended by the defendants in this respect; that the Valley Bank itself received the entire proceeds of the loan, and therefore no consideration was received by the defendants; that the note was accepted by the plaintiff "for the purpose of evading the laws of the state of California concerning the purchase of the capital stock of one banking institution by another banking institution"; that the plaintiff knew that the proceeds of said loan were to be used by the Valley Bank in a transaction which involved the purchase by the Valley Bank of capital stock of the National Bank of Bakersfield; and that the plaintiff knew this to be a prohibited transaction.

[1] Delivery of the note is assumed in the findings of the court, and it is not now seriously questioned that the delivery to the plaintiff found to have been made by the cashier of the Valley Bank after the execution of the note by the defendants was not effective as such. The fact that the defendants personally did not receive the proceeds of the note would not, of course, render the note void for want of consideration. The detriment suffered by the plaintiff bank was adequate in that behalf. The first and second defenses therefore need not be further noticed.

The main grounds of the appeal are that the court erred in admitting evidence to contradict the defendants' liability on the note; that the competent evidence is insufficient to support the findings; and that the findings do not support the judgment.

[2, 3] Under some circumstances and in a proper action, extrinsic evidence may be introduced to establish the liability of a principal who is not a party to the contract (see Geary St., etc., R. R. Co. v. Rolph, 189 Cal. 59, 207 P. 539; Pacific Ready-Cut Homes, Inc., v. Seeber, 205 Cal. 690, 272 P. 579; Rubin v. Platt Music Co., 92 Cal. App. 203, 268 P. 396; 1 Cal. Jur. pp. 831 et seq.), but extrinsic evidence is not admissible to avoid the liability of the maker of a promissory note who signs in his individual capacity even though he was the agent of another at the time. Moreover, sufficient evidence of agency must appear on the instrument itself. Sayre v. Nichols, 7 Cal. 535, 539, 68 Am. Dec. 280; Hobson v. Hassett, 76 Cal. 203, 18 P. 320, 9 Am. St. Rep. 193; 19 Cal. Jur. pp. 823 et seq.; 1 Daniel on Negotiable Instruments (6th Ed.) § 300; Mechem on Agency (2d Ed.) §§ 1150, 1162; Story on Promissory Notes, § 68. The principle is so definitely settled with reference to negotiable instruments that further discussion is unnecessary. No contention could be made that the instrument sued on discloses the agency or shows that the defendants executed it for and on behalf of a principal. The court, therefore, did not err in refusing the defendants' request to make the Valley Bank a party defendant to the action.

[4] The record herein discloses a situation wherein the defendants were accommodation makers and the court erred in admitting in this action any evidence of their alleged agency. Without this evidence there would be no basis for the finding that the defendants signed solely as agents.

[5] This leaves for consideration the sufficiency of the evidence to support and the effect of the finding that the plaintiff accepted the note signed by the defendants for the purpose of evading the laws of the state of California concerning the purchase of the capital stock of one banking institution by another and that the plaintiff knew that the Valley Bank was procuring the money for an alleged unlawful purpose. In this connection it is to be noted that the court found that the money loaned by the plaintiff was to be used for three different purposes: First, to repair the capital assets of the National Bank of Bakersfield; second, to purchase the assets of that institution; and third, to enable the Valley Bank to buy the stock of that institution. The plaintiff therefore urges a fatal inconsistency in the findings. The inconsistency is apparent. When the findings are considered in a light most favorable to the defendants' position, viz., that the plaintiff loaned the money to the Valley Bank with knowledge that the latter bank intended to use the funds for the purpose of buying the stock of the Bakersfield bank, we are met with the contention that the plaintiff may not recover because the Valley Bank intended to, or did, violate section 37 of the Bank Act (St. 1909, p. 96) as amended (St. 1923, p. 56), reading in its pertinent parts as follows: "No bank shall, except as otherwise provided in this act, purchase or invest its capital or surplus or money of its depositors, or any part of either, in the capital stock of any corporation unless the purchase or acquisition of such capital stock shall be necessary to prevent loss to the bank on an obligation

owned or on a debt previously contracted in good faith, * * * provided, however, that not more than an amount equal to twenty-five per centum of the capital and surplus of any such bank may be at any one time invested in the capital stock of * * * such other corporation. * * *"

Assuming that the purchase of stock in the Bakersfield bank, as contemplated by the Valley Bank, would exceed the statutory authorization, the contemplated action was, at the most, ultra vires. Whatever remedies might otherwise exist as against the assumed ultra vires act of the bank, such remedies could not have the effect of striking down the entirely lawful transaction between the Valley Bank and the plaintiff herein. The Valley Bank could not urge its own usurpation of power as against a valid obligation created between itself and its creditor in another and distinct transaction. Chambers v. Security, etc., Bank, 51 Cal. App. 212, 196 P. 488. It is not and could not successfully be contended that the Valley Bank was without power to borrow money from the plaintiff or that the plaintiff was without power to lend money to the Valley Bank. Having received the full benefit of the loan from the plaintiff, the Valley Bank would not be heard to complain that it intended to use the money for an unauthorized purpose when, as here, it does not appear that the plaintiff was to participate in any wise in the unauthorized act. Much less may the defendants urge that they are not liable on an obligation to which the Valley Bank is not a party.

The foregoing discussion relates to the effect of the findings most favorable to the defendants' position, namely, that the purpose of the Valley Bank in using the money was to purchase stock of the Bakersfield bank, and to the contention of the defendants that such a transaction was contrary to the statute. However, the evidence more directly and positively supports the finding that the money was to be used for the purpose of repairing the impaired capital stock of the Bakersfield bank. It is not shown that such a purpose was unlawful.

[6] The cases of Bank of Orland v. Harlan, 188 Cal. 413, 206 P. 75, and First National Bank v. Reed, 198 Cal. 252, 244 P. 368, relied upon by the defendants, are widely distinguishable on the facts and are not in point. Here no fraud or deceit is charged against or brought home to the plaintiff bank. Here the documentary evidence establishes the enforceable obligation. It is the well-settled rule of the law merchant generally that only those persons who are parties to a negotiable instrument may be sued upon it (section 3099, Civ. Code), and there is no evidence in the record to remove this case from the operation of the general rule.

We conclude, therefore, that the competent evidence before us is insufficient to support the findings in favor of the defendants and that the findings otherwise do not support the judgment.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.

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209 Cal. 453

McCRAY et ux. v. REESE et al.

L. A. 10352.

Supreme Court of California.

May 13, 1930.

Rehearing Denied June 12, 1930.

Appeal and error ⚷1011(1).

In action to cancel trust deed allegedly delivered only in escrow, decision on question of fact, testimony being irreconcilable, would be upheld.

In Bank.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Wilford J. McCray and wife against W. W. Reese and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

L. E. Dadmun and Davis & Dadmun, all of Los Angeles, for appellants.

W. I. Gilbert and Leo E. Sievert, both of Los Angeles, and Wiley & Harvey, of Bakersfield, for respondents.

WASTE, C. J.

Plaintiffs appeal from a judgment in favor of defendants in an action to cancel and set aside a trust deed. The trial court accepted the theory of the defense, and found, in effect, that appellant Wilford J. McCray and respondent W. W. Reese (who died prior to the trial of the cause) were associated together in mining ventures. McCray, in the early part of 1924, sought to borrow $5,000 from the respondents Reese, representing that, unless he could secure that amount, he and certain other persons were liable to be criminally prosecuted. Learning that the Reeses did not have sufficient funds to make the loan, McCray stated that he could raise the $5,000 provided sufficient security was given, and requested the respondents Reese to deed to him a quarter section of land in Kern county owned by them. The Reeses accord-

ingly executed a warranty deed to McCray, who thereafter obtained a loan of $5,000, giving as security therefor a mortgage on the Kern county property. He agreed with the respondents to pay the interest and principal of the note and to protect their property from foreclosure. Subsequently, McCray and his wife, appellant Anna McCray, reconveyed the property to Mrs. Reese subject to the $5,000 mortgage. At the time of the reconveyance, respondent Reese demanded security against the incumbrance placed on the property, whereupon the McCrays executed a promissory note for $5,000, dated April 1, 1924, in favor of Ella Reese, and secured by the deed of trust here in controversy covering property owned by the appellants in Los Angeles. Appellants failed to pay the interest and principal of the note secured by the Kern county property, and respondent Ella Reese was compelled to make the payments in order to prevent the foreclosing of the mortgage. Appellants likewise defaulted in the payment of interest and principal on their note executed to Ella Reese and secured by the deed of trust, and the property given as security therefor was sold by the trustee, the respondent Leo E. Sievert, to Ella Reese.

Appellants' theory of the case is based on an entirely different set of facts which they sought to prove. According to their contentions, McCray and Reese entered into negotiations with certain parties to raise $25,000 with which to finance the purchase of the property of the Springfield Gold Mining Company. They were to raise in the beginning at least $10,000, of which $5,000 was to be furnished by each of them. McCray not being in a position to put up his share, Reese agreed to advance the amount for him, if McCray would guarantee the payment by signing a note and giving a trust deed covering the Los Angeles property of the appellants. Appellants assert that, with this understanding, they signed the note for $5,000 in favor of respondent Ella Reese, and also signed and acknowledged the trust deed requested by Reese, and left them with a notary public with instructions to deliver them to Reese when the $10,000 had been raised by him; that, in some manner and contrary to appellants' instructions, Reese obtained possession of the note and trust deed which he afterwards had recorded; that this action was brought to cancel and set aside the deed, first, because appellants had not, at any time, delivered it to the respondent Reese, and, secondly, because of the failure of Reese to raise the $10,000, no consideration passed for the execution of the note and deed. The trial court rejected the contentions of the plaintiffs (appellants), and rendered its decision and judgment in favor of the defendants.

The trial court found that, while the trustee's deed of the Los Angeles property to Ella Reese and an amendatory deed were void because defective on their face, in that the sale was not advertised for six weeks in a newspaper of general circulation, as required under the terms of the trust deed, the deed remained a valid lien upon the property covered thereby. The court also found that there was no consideration for the deed to the Kern county property from the Reeses to McCray, and that the mortgaging of the property by the McCrays and the redeeding of it to Mrs. Reese subject to the mortgage constituted a good and sufficient consideration for the execution of the promissory note and trust deed to the Los Angeles property herein sought to be canceled and set aside.

Appellants attack certain findings of the trial court as not sustained by the evidence. As already noted, they claim a delivery of the trust deed in escrow and a failure of respondents to comply with its terms; that there was no delivery of the trust deed to respondents, and no consideration passed therefor. As to the warranty deed from the Reeses covering the Kern county property on which the $5,000 mortgage was placed by McCray, the appellants claim that the deed was given to McCray for an interest in a mining deal. There was evidence that the deed was given to McCray "to enable [him] to raise $5,000 for the purchase of an interest in the contract which [McCray] was one of the owners of," and, again, that for the $5,000 raised by the mortgage Reese was "to get a one-fourth interest in an agreement which [McCray] held against the Springfield Gold Mining Company." On the other hand, there was testimony on behalf of the respondents to the effect that representations were made to the Reeses by McCray and his associates that McCray had issued a check without sufficient funds in the bank to cover it; that, if the check was refused by the bank, it would result in the cancellation of a contract and the inability of McCray and his associates to complete the organization of a corporation, in which event one of the associates, who had sold preorganization certificates of the corporation, would be liable to arrest; and that upon these representations the Reeses executed the deed to the Kern county property in order that the money might be raised.

We have carefully reviewed the record in the case, and find that, while there was evidence in favor of appellants' theory, there was also ample evidence to support the findings of the trial court upholding respondents' contentions. The testimony, in line with the contradictory statements and inconsistent claims of the parties, is irreconcilably conflicting. "It is the duty of the trier of facts to reconcile, if possible, any apparent conflict, whether such conflict is developed upon the whole case or in the testimony of an individual witness, and to give effect to all the

evidence, when the nature of the case will admit of such a disposition, or, if the conflict is irreconcilable, to affix [his] own value to the contradictory evidence." And it is a cardinal rule that where, upon a question of fact, the testimony in the court below involves a substantial conflict, the action of the lower court will not be disturbed. 10 Cal. Jur. 1171, 1172, §§ 382, 383, and cases cited.

The judgment is affirmed.

We concur: SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.

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105 Cal. App. 306

FITCH v. TYLER.

Civ. 6911.

District Court of Appeal, First District. Division 1, California.

April 21, 1930.

Rehearing Denied May 21, 1930. Hearing Denied by Supreme Court June 19, 1930.

1. Pleading ⟹36(2).

Where divorced wife pleaded separation agreement in suit against divorced husband's estate for amount due under agreement, wife *held* bound by pleading.

2. Husband and wife ⟹279(1).

Separation agreement between husband and wife provides not only for maintenance, but likewise settles property rights (Civ. Code, §§ 158, 159).

Under Civ. Code, § 158, spouses may contract respecting property, and under § 159 separation agreements must be in writing and signed by both parties.

3. Husband and wife ⟹278(1).

It is not essential to validity of separation agreement between husband and wife that property rights or inheritance rights are disposed of (Civ. Code, § 159).

4. Husband and wife ⟹278(1).

Statutory requirements as to execution of separation agreements between husband and wife must be complied with (Civ. Code. § 159).

5. Husband and wife ⟹278(1).

Letter from husband to wife's attorney *held* not to constitute valid separation agreement, since not signed by both parties (Civ. Code, § 159).

The letter from husband to wife's attorney was as follows: "Enclosed you will find check for $150 for your separate maintenance for October. Hereafter I will send a similar check on the first of each month."

6. Evidence ⟹397(3).
Husband and wife ⟹279(2).

Promise of husband contained in letter to wife's attorney, relating to payment of certain monthly sum as maintenance, *held* revocable at any time, and could not be varied by parol evidence.

The wife suing divorced husband's estate on alleged separation agreement sought to show by parol evidence that the husband's promise to pay certain sum monthly was to continue for as long as husband lived.

7. Husband and wife ⟹279(2).

Agreement of husband to pay certain sum monthly to wife *held* terminated at time husband made last payment.

The evidence disclosed that the husband stopped making payments in May, 1915, but wife filed no complaint to recover on separation agreement, that in 1919 the wife sought a divorce, and in 1920 obtained divorce, but nothing was said about separation agreement or money due thereon until death of husband in 1925, when divorced wife filed claim against deceased husband's estate.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Amerique B. Fitch against Mary F. Tyler, as administratrix with the will annexed of the estate of George Hamlin Fitch, deceased. Judgment for plaintiff, and defendant appeals.

Reversed.

Thomas, Beedy, Presley & Paramore, of San Francisco, for appellant.

T. C. Van Ness, Jr., of San Francisco, for respondent.

McKENZIE, Justice pro tem.

This is an appeal by defendant from a judgment against the estate of her testate, George Hamlin Fitch, said judgment being based on an alleged separation agreement entered into by plaintiff and decedent during his lifetime.

Respondent and Fitch were married by a justice of the peace at Fairfield, Solano county, on the 7th day of June, 1912. At the date of marriage plaintiff was thirty-six years of age and had two daughters by a former marriage, one of whom was between thirteen and fourteen years of age; the age of the other girl is not shown.

In September, 1912, Fitch and his wife were having marital difficulties, the nature of

which, other than Fitch's statement that he was disappointed, does not appear. Mrs. Fitch consulted James M. Hanley, an attorney, who wrote to Fitch concerning the matter, and the letter brought a reply from James F. Lanagan, an attorney who represented Mr. Fitch. Mr. Lanagan died before the trial, Fitch being dead, and Mrs. Fitch not being competent to testify under the provisions of subdivision 3, section 1880, Code of Civil Procedure, Mr. Hanley appears to have been the only available person who had knowledge of the negotiations that led up to the writing hereinafter referred to, and which is the foundation upon which plaintiff's case rests. Mr. Hanley's testimony is brief and amounts to this: That he discussed the matter with Mr. Lanagan, at Lanagan's office, three times, and that on one occasion Mr. Fitch was present; that he proposed to Lanagan and Fitch that they draw up a property settlement agreement giving Mrs. Fitch a monthly allowance for support of $250 per month; that Fitch said he would pay her $150 per month and no more, and that if she would not take that he would go beyond the jurisdiction and pay nothing; that Fitch said he would start paying immediately and would continue as long as he lived; that after this Mr. and Mrs. Fitch then fixed the matter up without the aid of either lawyer, and that a few days later Mrs. Fitch brought him the following letter: "Enclosed you will find check for $150 for your separate maintenance for October. Hereafter I will send a similar check on the first of each month. Yours sincerely, George H. Fitch;" that Mrs. Fitch told him that Fitch would not sign any other paper, and that a few days later he met Mr. Lanagan and told him, "I think our clients have got together, they have agreed and I guess there is nothing else to do, it is just as good in his writing as if we had written it and if it is acceptable to her and she has taken the money, I suppose that is all right, and I let it go at that."

The evidence shows clearly that the foregoing letter with a check for $150 inclosed was received through the mail by Mrs. Fitch on October 4, 1912, and that she received a similar letter and check for like amount for a while, and then for $170 from Mr. Fitch about the first of every month until and including the first day of May, 1915—a period of two years and eight months. These checks were all accepted and cashed by Mrs. Fitch. From October 3, 1912, to the end, Mr. and Mrs. Fitch did not live together nor communicate with each other except by means of the stereotyped letters accompanied by a check which he sent her every month until May 1, 1915, when he ceased making payments.

In the early part of 1915 Fitch went to New York, remained there a few months; went to Europe for a few months; returned to United States and resided in New York and Florida until 1920, when he returned to California, and resided in the vicinity of Los Angeles until his death on the 25th day of January, 1925.

May 6, 1919, Mrs. Fitch commenced in San Francisco an action for divorce against Mr. Fitch, charging him with having deserted her on the 3d day of October, 1912. The complaint, which was verified by Mrs. Fitch, makes no mention of the contract involved in this action, nor of any agreement concerning property or maintenance agreements. The prayer of the complaint asked for "general relief." Mr. Lanagan, as attorney for defendant, filed an answer denying the desertion. The answer has attached to it Fitch's written authorization for Lanagan to appear for him. An interlocutory and final decree followed in due course on the 28th day of May, 1920.

Mr. Fitch died January 25, 1925, and letters of administration with the will annexed were issued to defendant, who is a daughter of deceased. In August, 1925, plaintiff presented to defendant for allowance her claim against the estate; the claim was disallowed and this suit followed.

[1] In considering this case we must differentiate the facts in this case with those in Estate of Patterson, 46 Cal. App. 415, 189 P. 483, wherein it was held a contract between husband and wife concerning property is not required to be in writing. The exception contained in section 159, Civil Code, is noted in that case. In the instant case plaintiff pleaded a separation agreement, and she is bound by her pleading. In considering this case in the light of the respective briefs, we are not fully enlightened concerning the law because counsel for respondent assumes, without authority or argument, that at all times since October 3, 1912, there existed a valid and binding obligation on the part of Mr. Fitch to pay Mrs. Fitch $150 per month so long as he should live. If this be true, some of the arguments of counsel for appellant are not in point, because, as regards separation agreements, the general rule appears to be that the parties to such an agreement can do almost anything they please, providing they do what they agreed to do and do nothing they agreed not to do.

The all-important allegation of the complaint reads as follows: "That on or about the 3d day of October, 1912, said plaintiff and the said George Hamlin Fitch entered into an agreement to live separate and apart from each other, and at said time, in the City and County of San Francisco, State of California, the said George Hamlin Fitch agreed in writing to pay to the plaintiff the sum of $150.00 per month as and for separate maintenance and to pay the said sum of $150.00 per month to the said plaintiff for and during the term of her natural life; said sum being payable, according to the terms of said agreement on the first day of each and every month from and

after the date of said agreement." The defendant denied this allegation, and during the trial strenuously objected to the introduction in evidence of the letter in question, and likewise objected to the oral testimony of Mr. Hanley. The court found this allegation of the complaint to be true. Judgment was awarded plaintiff for monthly payments and interest thereon during the four years preceding the death of Mr. Fitch. The judgment was entered January 4, 1929, and is for the recovery of $7,200 principal and $3,990.50 interest. Defendant appeals and urges several grounds for reversal. Several of the grounds for reversal advanced by her cannot be intelligently considered until it is determined, first: Did the parties make any valid and binding contract? And, second: If a valid contract was entered into, was it to continue until the death of one of the parties or was it one that could be terminated at any time? If there was not a valid contract, or if there was a valid contract which was terminated when Fitch ceased making payments or when Mrs. Fitch secured a divorce, the trial court was not justified in rendering judgment for plaintiff.

[2, 3] The laws of this state sanction husband and wife making contracts respecting property. Section 158, Civ. Code. They may likewise agree, in writing, to a separation, and make provision for the support of either during such separation. Section 159, Civ. Code. It is almost a universal rule that separation agreements provide not only for maintenance, but likewise settle and determine the property rights of the parties, both as to the present and future; but it is not essential to the validity of a separation agreement that the property right or inheritance rights of the parties are or are not disposed of. In such agreements property rights may be excluded entirely, or they may be included in whole or in part. Jones v. Lamont, 118 Cal. 499, 50 P. 766, 62 Am. St. Rep. 251; Wickersham v. Comerford, 96 Cal. 433, 31 P. 358.

[4-6] Statutory requirements as to the execution of separation agreements must be complied with. R. C. L., vol. 9, p. 527. Our statute requires that separation agreements must be in writing, which implies that the agreement must not only be in writing, but also that the writing must be signed by both parties. In the instant case there was not an agreement in writing, unless the letter sent with the check constituted an agreement which was signed by Mr. Fitch, but Mrs. Fitch never signed any agreement. It is clear that the parties, with the aid of their respective attorneys, were negotiating in regard to a property settlement and separation agreement According to the testimony of Mr. Hanley, the negotiations included "obtaining maintenance and support from Mr. Fitch," "to discuss the domestic relations of Mr. and Mrs. Fitch," "to adjusting and to arrive at a property settlement agreement between Mr. and Mrs. Fitch." Mr. and Mrs. Fitch abandoned their respective attorneys and undoubtedly made some sort of an agreement themselves. What was this agreement? It is not in writing, and how could it be proven by previous negotiations between the attorneys alone? Conceding that Mr. Fitch did say at one time previous to his final agreement with Mrs. Fitch that he would pay $150 per month so long as he lived, how can it be determined that was the final agreement? After the parties had made their agreement, Mr. Fitch did not make any statement to Mr. Hanley or to any one else concerning the terms of the agreement he and Mrs. Fitch had entered into, except by and through the letter in question. This leaves plaintiff with the letter and the facts that subsequently developed to establish her case by. This letter reads as follows: "San Francisco, Cal. Oct. 3rd, 1912. My dear Amerique: Enclosed you will find check for $150.00 for your separate maintenance for October. Hereafter, I will send a similar check on the first of each month. Yours sincerely, George H. Fitch." The case of Carl v. Carl (Sup.) 166 N. Y. S. 961, involved a separation agreement which contained a clause relating to duration of payment almost identical with the one under consideration. It reads as follows: "The party of the first part agrees to give to the party of the second part the sum of $5 per week, for the support and maintenance of the said party of the second part, payment to be made on each Monday, and commencing with the date of this agreement, payment to be made by post office order to the party of the second part." The husband ceased paying, and the wife brought suit to collect installments. The lower court held that the contract contemplated a permanent separation. The upper court in reversing the judgment said: "It will be noted that this contract does not, in any specific terms, say how long it shall continue in force. Is it to have any greater force than ordinary commercial agreements (such as contracts for hiring), which may be terminated at any time, when no fixed term is stated? We think not."

The reasoning and the ruling in Carl v. Carl is to the effect that the terms used in the letter in question imply that the agreement may be terminated at any time. "The law enters, as a silent factor, into every contract. That which is implied by law becomes a part of the written contract, the same, in general, as if it were written therein, and if the contract is thus made clear and complete it can no more be varied or contradicted by parol evidence as to the matter imported into it by law than it can in any other respect." Elliot on Contracts, vol. 2, § 1628. Having in mind that the letter in question relates to a separation agreement, and viewing it in the light of the way it was made and the purpose of the maker (or makers, although Mrs. Fitch signed nothing), we conclude that the terms of the

letter implied that it was revocable at any time, and that this legal implication could not be varied by parol evidence. It then follows that the trial court was in error in allowing the introduction of parol testimony to prove how long the payments were to continue.

[7] Having determined the agreement, such as it was, could be terminated at any time, we are of the opinion that it was terminated by Fitch when he ceased making payments, and that this termination was acquiesced in by Mrs. Fitch. Mr. Fitch stopped making payments in May, 1915, and no complaint was filed to recover on this agreement until Fitch died. In 1919 she filed in San Francisco a complaint seeking a decree of divorce. Mr. Fitch appeared in this action by his attorney, Mr. Lanagan, who was authorized in writing to so appear; nothing was said in the complaint about a separation agreement or any money due thereon, nor after Mr. Fitch appeared in the action was an amended complaint filed so that she could recover the $7,200 that was then due her, if there had been a valid agreement in existence. True, there is some testimony in the record that Fitch disappeared and could not be found, but it is not at all convincing or entitled to serious consideration considering that her claim, if she had any, amounted to more than $18,000 at the time Mr. Fitch died. Mrs. Fitch knew that Mr. Lanagan was his lawyer, yet no inquiry was made of him. Furthermore, a man who for years had held an important position with a great metropolitan newspaper and could write books and sell them could be easily found by one who was his creditor to the extent of thousands of dollars. If Mrs. Fitch had not secured a divorce, or if Mr. Fitch had not left a will disposing of his separate property, the facts herein might have furnished a different theme.

If the rule laid down in Carl v. Carl, supra, is not followed, and we were to hold that the duration of the agreement in question could be established by parol, we would have to rely on the frail memory of man to go back many years to determine if the term was during Mrs. Fitch's life, or during Mr. Fitch's life, or during a term when the husband's income was so much, or during the term Mrs. Fitch's daughters were too young to go to work, which last condition might be fairly inferred from the whole record. The last payment in 1915 was evidently made after Fitch left San Francisco, because it was made through the office of his attorney, Mr. Lanagan. Mrs. Cupples, plaintiff's daughter, testified as a witness, and, while testifying concerning the last check that came through Mr. Lanagan's office, she said it was fixed in her mind because "I was forced to go to work." At that time no one knew Mr. Fitch was going to repudiate any agreement made by him. Furthermore, the later checks sent by Mr. Fitch were for $170 instead of $150. It is fair to assume that the total amount paid by Fitch was $5,000—a significant figure, and the addition of $20 to the later checks is inconsistent with the character of a man, more or less prominent, who would obscure himself to avoid his financial obligations.

These observations are not prompted by the thought that they have anything to do with the findings of the trial court, or that they have anything to do with our determination of this case, other than to emphasize the importance of having all the essentials of separation agreements reduced to writing and signed by both parties, as the law provides. Mrs. Fitch did not sign any agreement, and the mere acceptance of money would probably not have bound her. If, in such a case, one was attempting to bind her, and parol testimony was admitted to explain under what circumstances she took the money, confusion would result.

The exigencies of business and commerce, where at every place at all times people are engaged in everyday business affairs, demand that laws should be flexible and not too exacting; but there is no need for informal rules when applied to separation agreements, and as proof of this we fail to find in any of the law books reference to a case where the agreement has not been signed by both parties; neither have we found a case where an attempt has been made to establish such a claim by a letter which at most only relates to some previous agreement, nor have we found, in the reports of the states where such agreements must be in writing, any instance of where the terms of such an agreement were established by parol evidence.

The law regards with great caution all stale demands made against a decedent's estate. In this case the lips of the parties to the transaction involved herein are closed; one by death, and the other by law. Both were presumed to know that the law required such agreements to be in writing and signed. This requirement they did not comply with; consequently the court must consider the legal rights of plaintiff and *all those* interested in the estate from the position the plaintiff and decedent placed themselves in. It is of no moment that in this particular case the ruling of the court might or might not be of advantage to either side. This seems to be a case of first impression, and the rule announced at this time ought to establish a precedent that will tend to avoid rather than create confusion. Separation agreements are seldom made and there never can be necessity for haste, and there seems to be no good reason why they should not comply with the strict requirements that the statute provides.

We therefore hold, first, that the letter in question did not constitute a valid and binding obligation for the reason that it does not con-

tain an agreement to live separate and apart; that it lacks mutuality, and that it was not signed by both parties; and, second, that the promise or agreement contained in the letter to pay $150 per month was one that could be abrogated at any time by either of the parties, and that it was abrogated.

Judgment reversed, and the trial court is directed to enter judgment in favor of defendant.

We concur: TYLER, P. J.; CASHIN, J.

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105 Cal. App. 293

JOHNSON v. NOLAN.

Civ. 6982.

District Court of Appeal, First District, Division 2, California.

April 19, 1930.

1. Pleading ⟹254.

Where original complaint showed malpractice action was barred, but amended complaint omitted date, court upon demurrer could assume date was correctly alleged originally (Code Civ. Proc. § 340, subd. 3).

After a demurrer pleading the statute of limitations, Code Civ. Proc. § 340, subd. 3, had been sustained, plaintiff amended his complaint, and defendant then interposed a special demurrer attempting to compel plaintiff to plead facts specifically.

2. Limitation of actions ⟹104(1).

Plaintiff in malpractice action had to ascertain at his peril whether to sue within statutory period, notwithstanding alleged concealment of facts (Code Civ. Proc. § 340, subd. 3).

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by B. O. Johnson against T. J. Nolan. From a judgment for defendant, plaintiff appeals.

Affirmed.

C. H. Grayson, of Sonora, for appellant.

Hartley F. Peart, Charles V. Barfield, and Ford & Johnson, all of San Francisco, for respondent.

STURTEVANT, J.

[1, 2] To the plaintiff's fourth amended complaint the defendant interposed a demurrer. The demurrer was sustained, and the plaintiff declined to amend. Judgment in favor of the defendant was entered, and from that judgment the plaintiff has appealed. The plaintiff in his complaint charged the defendant with malpractice. On the face of the original complaint it appeared that the action was barred by the statute of limitations. Therefore a demurrer pleading the statute of limitations was sustained. The only material difference between the allegations of the original complaint and the fourth amended complaint is that in the latter the date of the alleged negligent act is not specifically set forth. Because it was not specifically set forth, the defendant interposed a special demurrer in which he made fifteen attacks, attempting to compel the plaintiff to plead the facts on the face of his complaint. In passing on the last demurrer the trial court, in the absence of a showing to the contrary, was justified in assuming that the date of the wrongful act was correctly set forth in the original complaint and to rule accordingly. Williamson v. Joyce, 137 Cal. 151, 152, 69 P. 980. Furthermore, the defendant's special demurrer was addressed to the date. If the date had been inserted, the plea of the statute was good. If the date was omitted, the special demurrer was good. The plaintiff may not complain in either event. In a further attempt to avoid a plea of the statute of limitations the plaintiff inserted certain allegations pleading that the defendant concealed from him certain facts regarding the plaintiff's case. However, this is not an action in equity, but is an action in malpractice. The statute of limitations which is applicable is subdivision 3 of section 340 of the Code of Civil Procedure. Harding v. Liberty Hospital Corp., 177 Cal. 520, 522, 171 P. 98. Within the period of time so specified in that statute it was the plaintiff's duty to ascertain at his peril whether he desired to maintain this action. In Lattin v. Gillette, 95 Cal. 317, at page 320, 30 P. 545, 546, 29 Am. St. Rep. 115, the court quotes with approval from Wood on Limitations as follows: "Where an attorney is sued for malpractice the cause of action arises from the time when such malpractice occurred, and that without any reference to the circumstance whether the client then knew the fact or not." Continuing, the court cites many other authorities to the same effect. We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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105 Cal. App. 506

COOPER v. QUANDT et al.

Civ. 7199.

District Court of Appeal, First District, Division 2, California.

May 6, 1930.

Rehearing Denied June 5, 1930. Hearing Denied by Supreme Court July 3, 1930.

1. Negligence ⟹136(14).

Negligence of painting contractor, where employee of contractor working on floor below was struck by falling plank, *held* for jury.

The evidence disclosed that the plank that hit the employee was a painter's plank; that it was marked with the name of painting contractor; that employee's boss saw the plank strike; and that he looked up and saw the painting contractor's men; and that it was practically admitted by the men in painting contractor's employ that they dropped the plank.

2. Trial ⟹105(2).

Testimony of witness that men in defendant's employ admitted dropping plank on plaintiff not objected to, and, no motion being made to strike out, had some probative weight.

3. Negligence ⟹121(2).

Laborer struck by falling plank need not prove dropping of plank was negligent and of what negligence consisted.

4. Negligence ⟹136(9).

Owner producing no evidence to remove inference of negligence, from evidence of laborer struck by falling plank suing for injuries, cannot have directed verdict.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by P. Cooper against A. Quandt and others, individually, and as copartners doing business under the name and style of A. Quandt & Sons. Judgment for plaintiff, and defendants appeal.

Affirmed.

Barry J. Colding and Theodore Hale, both of San Francisco, for appellants.

Cooley, Crowley & Gallagher and Lasher B. Gallagher, all of San Francisco, for respondent.

STURTEVANT, J.

While the Hunter-Dulin building was being constructed at the corner of Sutter and Montgomery streets in San Francisco, several different contractors were engaged in their work at the same time. Lindgren & Swinerton were the general contractors, and the plaintiff was employed by them as a common laborer. At the time of the accident, which is the subject-matter of this action, he was working on a tramway which led from a window on the west side out over the sidewalk. At the same time the defendants, A. Quandt & Sons, the painters, were engaged in the performance of their contract. At the time of the accident they were working on the fourth and fifth floors directly over and above the plaintiff. While the plaintiff was so at work a wooden plank fell and struck him, and for the injuries so sustained he commenced this action to recover damages. From a judgment in plaintiff's favor, the defendants have appealed and have brought up a typewritten record.

[1, 2] The defendants assert that in his complaint the plaintiff pleaded specific acts of negligence, that he did not prove those specific acts, and that the judgment should be reversed. The plaintiff introduced proof that the plank that hit the plaintiff was a painter's plank, that it was marked A. Quandt & Sons, that Mr. Hatton, plaintiff's boss, saw the plank strike, and that he looked up and saw defendants' men near the fire escape at the fourth and fifth floors. Almost immediately thereafter Mr. Hatton went up to where defendants' men were at work and there met defendants' foreman. With him Mr. Hatton went to the fire escape and there saw defendants' operators at work, and while there he had a conversation. Mr. Hatton testified that the fact was admitted as to what service dropped the plank—that the actions of the men practically admitted that they had dropped the plank. These statements were not objected to, and there was no motion to strike it out. It has some probative weight. Sanders v. Austin, 180 Cal. 664, 666, 182 P. 449; Walberg v. Underwood, 39 Cal. App. 748, 752, 180 P. 55. There was direct and positive testimony that, at the time of the accident, Joe Terran was one of the painters employed on the job by the defendants, and that at that time he was on the job. After the accident happened Mr. Theodore Quandt, one of the defendants, had a conversation with one of the attorneys for the plaintiff. In that conversation Mr. Quandt stated that Terran dropped the plank. The foregoing evidence was some proof of plaintiff's allegations, whether it be said they pleaded negligence in general or specific terms.

[3] The defendants assert that the plaintiff did not prove that the dropping was negligent and of what that negligence consisted. Of course, under the facts, he was not bound to do so. Dixon v. Pluns, 98 Cal. 388, 389, 33 P. 268, 20 L. R. A. 698, 35 Am. St. Rep. 180: Michener v. Hutton, 203 Cal. 604, 607, 265 P. 238, 59 A. L. R. 480.

[4] At no time did the defendants explain or attempt to explain how or why they allowed the plank to fall. After all the evidence had been taken the defendants asked an instruction directing a verdict in their favor. The request was denied, and the denial is assigned as error. Of course, under such circumstances no such instruction should have been given because the defendants had not introduced any evidence to remove the inference of negligence which arose by reason of the evidence introduced by the plaintiff. We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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105 Cal. App. 503

PALMER v. MEDICO DENTAL BLDG. CORPORATION et al.

Civ. 7368.

District Court of Appeal, First District, Division 2, California.

May 5, 1930.

Rehearing Denied June 4, 1930. Hearing Denied by Supreme Court July 3, 1930.

1. Appeal and error ⟹724(1).

Specification of errors should be clearly set forth, and sufficient portion of record should be printed to demonstrate error (Rules of Supreme Court and District Courts of Appeal, Rule 8).

2. Appeal and error ⟹901.

All presumptions are in favor of judgment and proceedings on which it is based, and appellant must affirmatively show existence of error.

3. Appeal and error ⟹757(1).

Where appeal is taken upon alternative method, if appellant fails to meet statutory requirements, appellate court need not make independent investigation of voluminous typewritten transcript for error (Code Civ. Proc. § 953c).

4. Appeal and error ⟹1126.

Where appellant failed to comply with statutory provisions by affirmatively showing existence of error, judgment should be affirmed upon motion (Code Civ. Proc. § 953c).

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by P. A. Palmer against the Medico Dental Building Corporation and others. From the judgment, plaintiff appeals.

Affirmed.

W. H. Metson and E. B. Mering, both of San Francisco, for appellant.

John Francis Neylan and J. Paul Miller, both of San Francisco, for respondents.

SPENCE, J.

This is a motion to affirm the judgment based upon a directed verdict in favor of defendants on the ground of appellant's failure to print or set forth in his brief or any supplement thereto, as required by section 953c of the Code of Civil Procedure, any portion of the record sufficient to justify a reversal of the judgment.

[1] Appellant's brief is unusual in form and entirely insufficient to give the court any adequate understanding of the case. Only fragmentary portions of the pleadings are set forth, from which it is impossible to determine the issues thereby made, the theory of appellant's case, or the relief sought. In fact, it does not appear from anything set forth in the brief that appellant's fourth amended complaint stated a cause of action against any of the respondents. Further, the brief is lacking in any orderly specification of alleged errors to aid in ascertaining the issues on this appeal. "The briefs must present each point separately under an appropriate heading showing the nature of the question to be presented." (Rule VIII, Rules of the Supreme Court and District Courts of Appeal.) By inference from the space devoted, it may be surmised that appellant's main contention is that the trial court erred in refusing to admit in evidence certain exhibits set forth in the appendix. We should not be compelled to resort to inference. The specifications of error should be clearly set forth, and a sufficient portion of the record should be printed to demonstrate such error. By reason of the deficiency of the brief, it is impossible to determine therefrom whether the exhibits were relevant to any material issue made by the pleadings. Again we are given no aid by anything printed or set forth in the brief in determining whether the evidence offered at the trial was sufficient to prove other material issues that may have been made by the pleadings. The action of the trial court in directing a verdict in favor of the defendants was proper unless the evidence offered tended to prove all of the material issues. To affirmatively show error it would be necessary to print or set forth adequate portions of the pleadings and evidence, and we find appellant's brief entirely lacking in this regard.

[2, 3] All presumptions are in favor of the judgment and the proceedings upon which it

is based, and the duty is upon the appellant to affirmatively show the existence of error upon which he asks for a reversal. Where an appeal is taken upon the alternative method, the provisions of section 953c of the Code of Civil Procedure must be complied with, and, if appellant fails to meet these requirements, no duty devolves upon this court to make an independent investigation of a voluminous typewritten transcript in search of error upon which to base a reversal. Scott v. Hollywood Park Co., 176 Cal. 680, 169 P. 379.

[4] On oral argument of the motion to affirm the judgment the requirements of the law were called to appellant's attention, but no request was made for leave to file a supplemental brief. The provisions of section 953c have been repeatedly pointed out in the decisions, and, the appellant having failed to comply therewith by affirmatively showing the existence of error, the judgment should be affirmed upon motion. Bryant v. Kelly, 203 Cal. 721, 722, 265 P. 817; Dahlberg v. Dahlberg, 202 Cal. 295, 260 P. 290; Jeffords v. Young, 197 Cal. 224, 239 P. 1054; Chandlee v. McCalla, 179 Cal. 678, 178 P. 709; Riffee v. Gray Top Cab Co., 84 Cal. App. 110, 257 P. 447.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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105 Cal. App. 340

JOHNSON et al. v. SOUTHERN PAC. CO. et al.

Civ. 3995.

District Court of Appeal, Third District, California.

April 22, 1930.

As Corrected May 9, 1930.

Rehearing Denied May 22, 1930. Hearing Denied by Supreme Court June 19, 1930.

1. Railroads ⟹348(8).

Evidence, in action for death of guest in automobile struck by train, *held* to support conclusion that railroad's negligence proximately contributed to death, notwithstanding negligence of automobile driver.

Negligence of railroad relied on was failure to ring bell and sound whistle when approaching street crossing, as required by Civ. Code, § 486.

2. Railroads ⟹337(5).

Fact that automobile driver approaching railroad crossing saw wigwag signal in motion *held* not to discharge railroad from duty to give statutory warning signals (Civ. Code, § 486).

3. Appeal and error ⟹930(1).

Allegations of complaint and testimony in support thereof on which action was tried are presumed included within verdict.

4. Railroads ⟹307(3).

Fact that railroad tracks and wigwag signal constitute general notice of danger *held* not to relieve railroad of duty to give statutory signals (Civ. Code, § 486).

5. Railroads ⟹316(4).

Absence of limitation on speed of trains through cities *held* not to permit excessive speed constituting negligence in itself.

6. Railroads ⟹350(11).

Whether speed of train at street crossing is so excessive as to constitute negligence depends on circumstances, and is for jury.

7. Negligence ⟹93(1).

If concurrent negligence of railroad and automobile driver resulted in death of guest in automobile, railroad would be liable, notwithstanding driver's concurrent negligence, unless deceased was contributorily negligent.

8. Negligence ⟹141(11).

Instruction, in action for death of guest in automobile struck by train, on effect of driver's gross negligence, *held* properly refused.

Instruction refused, in substance, told jury to render verdict for defendant railroad, if it believed from evidence that gross negligence, which is total lack of care in approaching and going on crossing immediately in front of train, was proximate cause of collision. Such instruction was instruction on facts, and omitted all elements relative to negligence of railroad and question whether, notwithstanding gross negligence in failing to stop, look, and listen, driver would not have stopped had required signals of approach of train been given.

9. Railroads ⟹327(12).

Fact that guest riding in automobile was intoxicated *held* not to render him contributorily negligent in wholly intrusting himself to driver.

10. Railroads ⟹327(1).

Driving motor vehicle while under influence of intoxicating liquor constitutes negligence per se (California Vehicle Act, § 112).

11. Railroads ⟹350(21).

Knowledge of automobile guest that driver is intoxicated constitutes contributory negligence within province of jury.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

12. Railroads ⟹351(16).

Instruction, in action for death of guest in automobile, relating to driver's intoxication, must be based on injury resulting from driver's negligent operation.

13. Railroads ⟹327(12).

Contributory negligence of guest in getting into automobile operated by drunken driver will not defeat recovery for injuries, unless injury resulted from driver's negligence.

14. Railroads ⟹327(12).

If injuries to automobile guest are joint result of driver's intoxication, constituting negligence and concurrent negligence of third person, guest knowing of driver's condition would likewise be chargeable with contributory negligence.

15. Appeal and error ⟹882(15).

Where trial court's failure to instruct was due to defendant's failure to submit instructions, defendant cannot assign failure to instruct as error.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Ethel G. Johnson, individually and as guardian ad litem of Dorothy Johnson and another, against the Southern Pacific Company, a corporation, and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Devlin & Devlin & Diepenbrock, of Sacramento, George F. Jones, of Oroville, and Jerome D. Peters, of Chico, for appellants.

J. Oscar Goldstein, of Chico, for respondents.

PLUMMER, J.

The plaintiffs had judgment in the sum of $30,000 in an action for damages suffered on account of the death of Hallie Lindsley Johnson, occurring at about 12:30 a. m., December 24, 1926, alleged to have resulted from the negligence of the appellants in the operation of a railroad train over a street crossing in the city of Chico. The deceased, Johnson, at the time in question, was riding as a guest in an automobile driven by one Jack Salyer. The plaintiff, Ethel G. Johnson, is the surviving widow, and Dorothy Johnson and Gordon Johnson are the minor children of the deceased and of the plaintiff Ethel G. Johnson.

The complaint, after alleging certain preliminary matters not necessary to mention, sets forth that on the 24th day of December, 1926, Hallie Lindsley Johnson was riding as a passenger in an automobile, along a public highway known as First street, in the city of Chico, traveling in a westerly direction, and in so doing reached a point where First street crosses the right of way of the Southern Pacific Company. It is then alleged that the said deceased was using and exercising due care in his own behalf, and that said defendants, at said time, carelessly and negligently caused one of its regular passenger-carrying trains, owned and operated by the defendant company, and then and there in charge of William Edgar Field, as engineer, and Joseph Wilson Laurant, as fireman, to approach said crossing at a high and dangerous rate of speed, and that, while approaching said crossing, the defendants negligently and carelessly omitted to give any signal by the ringing of any bell or sounding of any steam whistle, as required by law, and that, by reason of such negligence and carelessness, the locomotive drawing said train collided with the automobile in which said Johnson was riding, resulting in his immediate death.

It is further alleged in the complaint that the crossing in question is situated in a thickly populated portion of the city of Chico; that it is so built up that one approaching the railroad crossing from the east is not able to perceive a train coming from the north, until after passing the last building on the north side of First street. It is further alleged in the complaint that the defendants were aware of the fact that First street is a much-traveled highway. Other matters are alleged in the complaint, but, as the gravamen of the action is the alleged failure of the defendants to give proper warning of the approach of the train and running at a high and dangerous rate of speed, it is unnecessary further to follow the allegations of the complaint.

The answer of the defendants admits the running of the train drawn by a steam locomotive. Denies that the deceased was riding as a passenger, in an automobile, along First street, in the city of Chico; denies that the said deceased was using due care, or any care; denies that the train was being drawn or propelled at a high or dangerous rate of speed. The answer then admits that the crossing was frequently used; but alleges that said crossing was properly protected, and, in addition to the ordinary crossing signs, the defendant company maintained an electric wigwag signal which was operating at the time of the approach of the train in question. The answer then further alleges that the death of Hallie Lindsley Johnson was caused solely by his own negligence. There is no issue tendered by the answer of the defendants that Hallie Lindsley Johnson's death was caused by the negligence of the driver of the automobile in which Johnson was riding, the negligence of the deceased only being pleaded.

The evidence, as set forth in the transcript, shows that the defendants were operating a south-bound passenger train known as "Number 13," drawn by a steam locomotive, and that the train consisted of 12 cars. No. 13 was due in the city of Chico at about 12:20 a. m., but on the morning of December 24, 1926, apparently was a few minutes late. The deceased was a resident of Chico, by occupation a cement contractor and bridge builder. He, in company with Percy Dow and George Malloy, was riding as a guest in an automobile owned and driven by Jack Salyer. At the crossing heretofore referred to, the automobile was struck by the locomotive of train No. 13, and all four of the occupants instantly killed. First street is a well-paved street running in an easterly and westerly direction across the northern boundary of the business section of the city of Chico, and crosses the right of way of the Southern Pacific Company at right angles. First street for many years has been, and on the day in question was, the main artery of travel connecting the east and west sides of the city of Chico. First street is also the connecting highway between the east and west sides of the Sacramento valley. The population of the city of Chico at the time of the accident was estimated to be about 14,000. The record likewise shows that First street and First street crossing was much used by the traveling public at all times. The main line of the railroad at said crossing runs about due north and south. At the crossing in question there are also five spur tracks maintained by the defendant company. All four corners of the intersection are well built up. From the direction in which the deceased was traveling, no view could be had of an approaching train, until one had reached a point about 58 feet from the center of the main-line track. The main-line track is practically straight for a distance of something over 600 feet north of First street, when it curves gently to the westward. Paralleling the main-line track of the defendant company, for a distance of over 3,000 feet, is a certain highway known as "Nord avenue." This avenue varies from 350 to something over 400 feet distant from the main line of the railroad. North of First street the main line of the railroad is intersected by a highway known as "Sacramento avenue," distant from First street 3,080 feet. On the four corners of First street, where it intersects the right of way of the defendant company, were buildings, one used by the Diamond Match Company as a planing mill, one as a packing plant by the California Packing Corporation, one used as a warehouse by the Pacific Fruit & Produce Company, and one used by Pacific Gas and Electric Company; all of these buildings are shown to be quite large.

On December 24, 1926, no electric light was maintained by the city of Chico at the intersection of First street with the right of way belonging to the defendant company; the red light on the wigwag signal being the only illumination.

The record shows that during the early part of the evening of December 23, 1926, Jack Salyer, George Malloy, and Percy Dow had spent most of their time in and about two pool rooms in the city of Chico, one maintained by a person named Walker, and the other by a person named Quilter. These pool rooms were near a café known as "Max's Café"; that some time about 11:30 p. m. they were joined by the deceased; that, after repairing to Max's Café and having some refreshments, the four persons just mentioned got into an automobile owned and driven by Jack Salyer, and started in a westerly direction on First street, and proceeded at what some of the witnesses testified to be a high rate of speed, until the crossing was reached. The automobile was a "Moon" touring car, with the curtains down, or at least down so far as the rear portion of the car was concerned. The deceased was riding at the right of the driver.

The testimony on the part of the defendants shows that the train was approaching from the north at a speed of between 45 and 48 miles per hour, until it reached a point somewhere in the vicinity of Sacramento avenue, where the brakes were applied and the train from that point on was rolling without the use of steam, and, when it reached First street crossing, the speed had been reduced to approximately 30 miles per hour.

On the part of the plaintiff, a witness was introduced who testified that he was driving an automobile southerly on Nord avenue between Sacramento avenue and First street, at a rate of approximately 45 miles per hour, and that the engine was running abreast of his automobile; that he slowed down slightly when reaching First street, in which street he turned easterly and traveled a very short distance when he witnessed the collision and heard the noise made by the engine striking the "Moon" touring car.

There is practically no dispute as to the whistling signals given by the defendants. The testimony is to the effect that the station signal was sounded approximately one mile from the depot, which, by the way, is situate about 1,320 feet south of First street; that shortly thereafter a crossing signal was given before the locomotive reached Sacramento avenue. Just what distance from the avenue this signal was sounded cannot be determined from the testimony. Thereafter no whistle was sounded until the train was approximately on the intersection. The testimony of the engineer was that he was giving the semaphore call of four blasts while he was passing over First street. His testimony is as follows:

"Q. You gave these four blasts of the whistle about where? A. I was coming over First street.

"Q. You gave the four blasts of the whistle as you were coming over First street? A. Yes, sir.

"Q. Was the whistle blowing as you crossed First street? A. Yes, sir.

"Q. Did you see this automobile before you struck it? A. No, sir.

"Q. What was the first intimation that you had that your engine had struck an automobile? A. The fireman told me."

The record shows that the automobile was approaching from the fireman's side of the engine; that, as the automobile came past the buildings, the fireman called to the engineer to stop the train, but that the engineer was then blowing the semaphore whistle and did not hear him, and that he (the fireman) stepped to the engineer's side, again spoke to the engineer, and applied the emergency brakes.

A number of witnesses testified to hearing the station whistle, and also as to the crossing whistle when the train was north of Sacramento avenue, and that no other whistle sounded until the giving of the semaphore calls which we have just mentioned, while the train was crossing the street where the collision took place.

It thus appears, by the testimony of witnesses for both the plaintiff and the defendant, that compliance was not had with the provisions of section 486 of the Civil Code, relative to the sounding of a whistle at least 80 rods distant from a crossing, and the sounding of the same at intervals thereafter until the crossing is passed. The crossing whistle given was sufficiently distant. The same may be said of the station whistle, which was still farther distant, but, after giving the crossing whistle at some point north of Sacramento avenue, which avenue we have stated is 3,080 feet north of First street, no other whistling signals were given until the locomotive was practically upon the "Moon" automobile. The fireman testified that the bell was set ringing at about the time the crossing signal was sounded. The engineer testified concerning the ringing of the bell as follows:

"Q. Was the bell on that locomotive ringing as you came into Chico that night? A. Yes.

"Q. How was that bell ringing on that locomotive? A. By a little air motor."

The testimony of the fireman as to the ringing of the bell is as follows:

"Q. Was the bell on that locomotive ringing as you approached Chico? A. Yes, sir.

"Q. How do you know that? A. Because I was ringing it myself.

"Q. You turned it on? A. Yes, sir.

"Q. Was the bell ringing when the locomotive stopped at the station? A. Yes.

"Q. How do you know that? A. Because I shut it off."

The fireman further testified that he set the bell ringing more than 80 rods distant from the First street crossing.

On the part of the plaintiff, there was introduced the testimony of the witness to which we have heretofore referred as having driven the car on Nord avenue approximately parallel with the main line of the railroad on which train No. 13 was approaching, for a distance of over 3,000 feet; that he heard the crossing whistle given north of Sacramento avenue, and that, from the giving of such crossing whistle, no other whistle was sounded until the train was upon and crossing First street, and that during the time he was traveling abreast of the locomotive, as herein mentioned, he heard no bell, and that no bell was rung, but that, after the collision had occurred, he heard the bell ringing on the locomotive. This witness further testified that he was driving with what is called the "cutout" open, but that it made little noise; that the window to his left, and which would be toward the train, was about halfway down. This witness further testified that the train was not making very much noise; that the wigwag was working at the time of the accident appears to be established by uncontradicted testimony.

On the part of the plaintiff, a number of witnesses were introduced who testified that on the night in question all of the four men were sober. On the part of the defendant, testimony was introduced to the effect that the driver of the car, Jack Salyer, was drunk, and that, just preceding the time when Johnson got into the automobile, Johnson obtained a flask of liquor from one of the party, gave it to Jack Salyer, who took a drink, and that all of the parties took a drink therefrom. A reading of the testimony would lead to the conclusion that all four of the men had been drinking to some extent. The fact that they had been drinking to some extent does not appear to be contradicted; the testimony in behalf of the plaintiffs going only to the effect that the men were not intoxicated.

Upon this appeal it is contended by the appellants that the plaintiffs failed to prove any negligence of the defendants as the proximate cause of the accident, and that it conclusively appears that the sole, proximate cause was provided by the driver of the automobile; that the plaintiffs failed to prove that the whistle was not sounded and the bell not rung, as required by statute; and that the court erred in refusing to submit to the jury the theory of the defendants that the negligence of the driver of the automobile was the sole, proximate cause of the accident; that

the court erred in refusing to give certain instructions offered by the defendants, concerning the intoxication of the driver of the automobile; likewise that the court erred in refusing to instruct the jury upon the effect of intoxication on the part of the deceased.

In so far as the negligence of Jack Salyer, the driver of the automobile, is concerned, it is conceded that his negligence has been established, the testimony showing that he was propelling the automobile toward the railroad crossing at a high rate of speed, and did not stop to look and listen, as the circumstances and conditions surrounding the intersection required.

As we read the record, the cause was tried upon the theory that Jack Salyer was negligent, and also upon the theory that the defendants were likewise negligent in their failure to signal the approach of a rapidly moving train, as required by section 486 of the Civil Code, and that the excessive speed of the train and the lack of signals contributed to the collision; and that the deceased, being a guest in the automobile driven by Jack Salyer, and having no control thereof, was not responsible for his acts, and that the negligence of the driver was not attributable to the deceased.

A rather severe attack upon the testimony of the witness Odom, who was the one testifying as to the nonringing of the bell while he was traveling alongside of the defendants' locomotive, is made upon this appeal, but, as we have nothing to do with the credibility of the witness, the attack of the appellants on, and the defense of the respondents of, this witness, need not be further considered.

[1-4] Disregarding the effect of the verdict of the jury for a moment, the testimony shows conclusively that no warning signal was given of the approach of the train, by sounding of the locomotive whistle, for considerably over a half mile before the locomotive reached the intersection of First street. If the warning signal, by sounding the whistle, was given as required by law, at least 80 rods north of Sacramento avenue, then the last locomotive whistle was sounded approximately three-quarters of a mile north of the intersection of First street. The finding of the jury, even though upon negative testimony, that the bell was not rung, is conclusive upon this appeal. The verdict of the jury is also conclusive relative to the sounding of the whistles. Thus, if it be conceded as it must be, that Jack Salyer, as the driver of the automobile, was guilty of gross negligence in failing to stop, look, and listen for the approach of the train, yet the jury was warranted, under the testimony, in coming to the conclusion that, had the proper signals been given, then and in that case Jack Salyer would have heard the same and taken proper precautions to avert the accident; or, at least, that the deceased Hallie Lindsley Johnson would have heard the signals of the approaching train and taken such precautions, in the way of warning Jack Salyer of the approach of the train as might or would be reasonably necessary to insure his own safety. With these premises in view, there is sufficient testimony in the record to support the judgment that, notwithstanding Jack Salyer's negligence, the negligence of the defendants proximately contributed to the death of Hallie Lindsley Johnson, and that the defendants are liable in damages therefor, even though Jack Salyer, if alive, would also be liable in damages. That Jack Salyer should have seen the wigwag signal in motion, and should have responded to its admonition that the company was about to claim the right of way, and that a train was approaching, does not discharge the defendants from complying with the provisions of section 486 of the Civil Code in giving the warning signals as therein required. The jury having rendered a verdict for the plaintiffs upon testimony sufficient to support the same, arguments of appellants that Jack Salyer was alone responsible in carrying Johnson to his death, when he (Salyer) knew that the train was approaching, has no foundation for its support. The allegations of the complaint and testimony in support thereof, upon which the action was tried, are presumed to be included within the verdict of the jury, and therefore, upon this appeal, we are held to a finding that the proper signals were not given; and, if the proper signals were not given, the jury was warranted in concluding that Jack Salyer's negligence in failing to stop, look, and listen was not the sole or proximate cause of the death of Hallie Lindsley Johnson, but rather enforces the conclusion that the death of Johnson was due to the concurrent negligence of both the automobile driver and the defendants. There is no testimony in the record showing that the deceased knew of the approach of the train. That the driver should have known does not charge the deceased. Therefore the argument based upon such assumption is really assumption only, and need not be answered. The fact that railroad tracks are a sign of danger and constitute a general notice of danger, and the fact that the installation of a wigwag signal which, in operation, is additional warning or notice of danger, does not relieve the situation in which the appellants have been placed by reason of the testimony to which we have referred, and the verdict of the jury.

A long list of authorities are cited by appellants, all of which tend to establish that the appellants would not be liable in an action for the death of Jack Salyer, but, as they do not trench upon the rights of the decedent or of the heirs of the decedent in this case, we do not need to follow them in detail.

[5, 6] We come next to the question of speed. So far as this case is concerned, there

is neither statute no ordinance limiting the speed of trains. However, that does not open the gates wide for the running of trains through a populous city, or a city no larger than that of Chico, estimated to have a population of about 14,000, at such a high rate as to render it dangerous and a negligent act in and of itself. In some states, as set forth in Ann. Cas. 1914B, p. 602, the general rule is that, in the absence of a prohibitory statute or ordinance, a railroad company may ordinarily run its trains at such speed as it sees fit, and that a charge of negligence cannot be predicated on the rate of speed at which a train is run, unless there are attendant circumstances which make such speed negligence (citing a long list of cases). Further, on page 603 of the same volume, the modern rule is thus stated: "The recent cases are in accord with the general rule that while no rate of speed is of itself negligence, it may be negligence to run a train at a high rate of speed through a populous community and over a much-frequented crossing"—citing a long list of cases.

In Wyseur v. Davis, 58 Cal. App. 598, 209 P. 213, 214, this court had before it consideration of a crossing accident where the speed of a train was involved, and it was there said: "The uncontradicted evidence shows that the train was running at the speed of 45 miles an hour at the time of the accident. * * * The court instructed the jury: 'That it is for the jury to determine from all of the circumstances, whether the rate [of speed] at which said train was being operated was negligent.' It must be presumed in support of the verdict that the jury decided the issue of negligent speed against the defendant. This implied finding of the jury is conclusive on appeal." Whether the speed of a train in approaching a crossing is so dangerous or excessive as to constitute negligence is a question for the jury has been likewise held in the following cases: Badostain v. Pacific Ry. Co., 83 Cal. 290, 256 P. 576; Bilton v. Southern Pacific Co., 148 Cal. 443, 83 P. 440; Tousley v. Pacific Ry. Co., 166 Cal. 457, 137 P. 31. The latest case holding that negligence in relation to the speed is a question for the jury is that of Young v. Pacific Electric Ry. Co., 208 Cal. Sup. 568, 283 P. 61, where the cases which we have cited are approved and a quotation therefrom is set forth to the effect that whether the rate of speed at a crossing is so dangerous or excessive as to constitute negligence must depend upon the circumstances and the conditions involved, etc., which must be determined by the jury.

As to the right of the jury to accept negative rather than positive testimony concerning the giving of signals, we need only refer to Jones v. Southern Pacific Company, 74 Cal. App. 10, 239 P. 429, and the late case of Switzler v. Atchison, Topeka & Santa Fe Ry. Co. et. al. (Cal. App.) 285 P. 918, where the cases on this subject are quoted and referred to.

The next assignments of error necessary to be considered relate to the giving and refusal of instructions. The court, of its own motion, in relation to the speed of the train, instructed the jury as follows: "The speed of the train, standing alone, does not constitute negligence, and you cannot base a verdict in favor of the plaintiffs, under the evidence in this case, upon proof of excessive speed of the train, unless you also believe from the evidence that the defendants failed to give appropriate warning signals of the approach of the train to said crossing, and that deceased Johnson was not guilty of negligence." Excessive speed must be considered in relation to the circumstances, but the error is in favor of the appellants. And further that: "In cases where the question of excessive speed is in controversy, it is a question of fact for the jury to decide." The court further instructed the jury that: "Negligence is omitting to do something which a reasonably prudent person would do under the circumstances." And that: "If you believe from all the evidence in the case that the defendants failed and neglected to give such signal and warning of the approach of the train to the First street crossing in Chico, as required by law, as a reasonably prudent person would have done under the conditions and circumstances prevailing at the time, and that Hallie Lindsley Johnson was killed by reason thereof, then the plaintiffs are entitled to a verdict at your hands, unless the defendants make out the defense of contributory negligence, as elsewhere explained in the instructions." What would constitute contributory negligence on the part of the deceased was then set forth. The jury was also instructed that, the deceased riding as a guest with Jack Salyer, if the jury believed he was so riding, and had no control over the management of the automobile, the negligence of Salyer could not be attributed to the deceased Johnson. The court instructed the jury in accordance with the wording of section 486 of the Civil Code, and therefore we do not think that the objection to the words "as provided by law," inserted by the court in the instruction relative to the giving of signals, constituted error, or, if error, not of sufficient significance to warrant reversal. Nor is the objection of the appellants as to the instruction wherein reference is made to the life expectancy of the deceased of any moment, as the only testimony in the case was just as stated in the instruction.

[7] The court also instructed the jury that they could not find a verdict in favor of the plaintiff unless they believed "from the evidence that said negligence, if any, was the sole, efficient and proximate cause of the collision of the train with the automobile, result-

ing in the death of Hallie L. Johnson, and that said Hallie L. Johnson was not guilty of any contributory negligence on his part." This, of course, was a far more favorable instruction for the defendants than one to which they were entitled, the law being that, where two joint tort-feasors, by their concurrent acts, result in the death of a third person, an action for damages may be maintained. Thus, if the negligence of the defendants and the negligence of Jack Salyer, concurrent in point of time and act, resulted in the death of Johnson, liability would be fixed on the defendants, even though there was a concurrent negligent act on the part of Salyer, unless there was some contributory negligence on the part of the deceased.

[8] A review of the instructions given, without further particularizing the different ones, leads to the conclusion that no cause for reversal exists by reason of the giving of any of them. The appellants set forth in this behalf the refusal of the court to give three instructions which we will copy. Defendants' proposed instruction No. 11 is in these words: "The driver of the automobile involved in this action was guilty of gross negligence, that is, a total lack of care in approaching and going upon the crossing immediately in front of the train involved in this action, and had it not been for this negligence on the part of the driver, no collision would have resulted between the train and the automobile. If you believe from the evidence that such negligence on the part of said driver was the proximate cause of the collision, you will render your verdict for the defendants in this action." Besides being an instruction upon the facts, this instruction omits all the elements which we have considered relative to the negligence of the defendants, and the question whether, notwithstanding his gross negligence in failing to stop, look, and listen, the driver would not have stopped had the required signals of the approach of the train been given.

Defendants' proposed instruction No. 13 reads: "If you believe from the evidence in this case that the decedent Hallie L. Johnson was in such condition, by reason of the use of intoxicating liquor, that he was unable to exercise the care an ordinarily prudent person would exercise under the circumstances shown in evidence, you must find him guilty of contributory negligence in wholly entrusting his care and safety to the driver of the automobile, and must render your verdict for the defendants."

Defendants' proposed instruction No. 14 is in these words: "You are instructed that a person who rides as a guest in an automobile which is driven by a person who is under the influence of intoxicating liquor, is guilty of negligence, and if you believe from the evidence in this case that the driver of the automobile in question was under the influence of liquor, and that the decedent Hallie L. Johnson, knew that he was under the influence of liquor, then I instruct you that for Hallie L. Johnson to ride in said automobile was negligence in and of itself, which precludes a recovery in this case by the plaintiffs and your verdict must be for the defendants."

[9] Instruction No. 13 above set forth scarcely calls for comment. It certainly is not the law that an intoxicated person may not ride as a guest in an automobile without placing himself at the mercy of every negligent person who may also be using the same highway. If instruction No. 13 is the law, no intoxicated person could be safely taken home while in that state. The intoxication of a guest alone does not take away from him all the protection accorded by the laws of the state, and he is not liable to be killed or injured with impunity, as this instruction would imply.

[10, 11] Defendants' proposed instruction No. 14 is somewhat nearer the law, but is not a correct statement thereof. It does not include the negligent driving of the person who is under the influence of liquor. Section 112 of the California Vehicle Act (St. 1923, p. 553) makes it unlawful for any one to drive a motor vehicle while under the influence of intoxicating liquor, and thus per se, makes it negligence for one in that condition to drive a motorcar, and likewise the knowledge of such intoxication of the driver on the part of the guest is a question of contributory negligence on his part for the jury to determine.

[12-14] Again, a correct instruction in relation to intoxication must be based upon the injury occurring by reason of the negligent operation of the person who is under the influence of intoxicating liquor. In the recent case of Jones v. Pacific Gas & Electric Co., 285 P. 709, 713, this court reviewed at some length the cases bearing upon the intoxication of automobile drivers. We therein pointed out, where it was shown that the driver of the car was under the influence of liquor, and that the accident was due to his contributory negligence or the manner in which the car was driven by reason of the use of intoxicating liquor, and also the further fact that the plaintiff in that case knew that the driver of the car was under the influence of intoxicating liquor, the plaintiff was guilty of contributory negligence. We also called attention in that case to the language of the California Vehicle Act, which reads, "under the influence of intoxicating liquor"—not that the driver must actually be intoxicated or in a drunken condition, but that he is driving while under the influence of an intoxicant. We there quoted from the case of Schwartz v. Johnson, 152 Tenn. 586, 280 S. W. 32, 47 A. L. R. 323, the following language: "When one gets into an automobile which is to be operated by a drunken driver, through the traffic of a popu-

lous city, such person takes his life in his hands. All the authorities are to the effect that such contributory negligence prevents a recovery by one taking such a chance, if he is injured as a result of the driver's negligence" —citing a number of cases. The injury, however, must be due to the result of the driver's negligence. We think it also true that, if the injury is due to the joint result of the driver's negligence and the concurrent negligence of a third person, the guest in the automobile, knowing of the driver's condition, would likewise be chargeable with contributory negligence in riding with the driver under the influence of intoxicating liquor. That the proposed instruction simply, in part, followed the language of the statute, without defining the degree of the influence of the intoxicant, does not seem to militate against its correctness. This question was presented in the case of People v. McKee, 80 Cal. App. 200, 251 P. 675, and it was there held that an instruction following the language of the statute was unobjectionable. Whether the degree of intoxication need be specified in the instruction would seem to be questioned in the case of Trotter v. Bullock, 148 Wash. 516, 269 P. 825, 826, where the Supreme Court of Washington uses this language (after mentioning the fact that intoxicating liquor has a different effect upon different mentalities): "Nor can substantial dispute arise over the claim that one who partakes of liquor, even in a moderate degree, is not able to drive a car with the same degree of judgment as if he was wholly sober. While the modern automobile is a machine that may be driven by one with a very ordinary amount of mechanical knowledge, its extreme flexibility, which permits almost instant response to the action of the driver, makes it an exceedingly dangerous instrumentality to intrust to one not in the full possession of all of his faculties"—citing Crowell v. Duncan, 145 Va. 489, 134 S. E. 576, 50 A. L. R. 1425. The court then refers to the common fact that one who is careful and competent as an operator of an automobile, when perfectly sober, may become incompetent and reckless after indulgence in one or two drinks. The question of driving an automobile when under the influence of liquor is quite fully considered in the case of Crowell v. Duncan, as reported in A. L. R. supra.

The case of Jensen v. Chicago Ry. Co., 133 Wash. 208, 233 P. 635, contains an instruction approved by the Supreme Court of Washington, which refers to the fact that the intoxicating liquor must to some degree weaken the judgment, lessen the discretion, or increase the recklessness, of the driver. But, if all of these elements, or any of them, may be said to be implied in the use of the term "under the influence of intoxicating liquor," the proposed instruction is nevertheless an incorrect statement of the law. There is testimony in the record from which the jury might conclude that Jack Salyer was under the influence of intoxicating liquor, within the prohibitory provisions of section 112 of the California Vehicle Act, and that the deceased had knowledge thereof, and also that the deceased, by his own act, aided in placing the driver of the automobile under such influence, and, if the requested instruction had correctly stated the law, we are not prepared to say that such an instruction would not have had some bearing upon the verdict of the jury.

[15] It is further contended by appellants that, if the instruction is incorrect, it should have been modified and given by the court. This contention, however, appears to be without merit. In Garlick v. Bowers, 66 Cal. 122, 4 P. 1138, the court disposed of such a contention as follows: "The plaintiff requested the court to give several instructions which were not given. We think none of them should have been given without modification, and that of itself constituted sufficient ground for the refusal." The question of whether the driver of the "Moon" automobile was under the influence of intoxicating liquor was not presented by the pleadings. It was a special issue brought out by the testimony.

In Sherman v. Kirkpatrick, 83 Cal. App. 307, 256 P. 570, it was held that: "The trial court need not, of its own motion, give special instructions in the absence of a request therefor by counsel."

In Dover v. Archambeault, 57 Cal. App. 659, 208 P. 178, the question of what duty devolved upon the court in considering erroneous proposed instructions, we find the following language: "Moreover, the proposed instruction omitted the element of negligence in operation of the car. Where instructions offered are such that they cannot properly be given without modification, that of itself constitutes a sufficient ground for refusing them." Citing the case of Garlick v. Bowers, supra.

Upon the same point as to the duty of the court, reference may be had to 3 C. J. p. 850 et seq. See, also, as to "Necessity for requests," 24 Cal. Jur., p. 796, § 74. Under these authorities it must be held that the failure of the court to instruct on the subject of the use of intoxicating liquor was due to the failure of the appellants to propose a proper instruction, and therefore cannot now be assigned as error.

Other reasons have been assigned as error which we have not discussed, but we will content ourselves with the simple statement that they have been fully considered, and we find nothing in any of the assignments of error justifying a reversal. No contention is made that the damages allowed are excessive.

The judgment is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

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DOW et al. v. SOUTHERN PAC. CO. et al.

Civ. 3991.

District Court of Appeal, Third District, California.

April 26, 1930.

As Modified on Denial of Rehearing May 26, 1930. Hearing Denied by Supreme Court June 23, 1930.

1. Railroads ⟹350(11).

Pleadings and evidence, in action for death of guest riding in automobile struck by train at street crossing, *held* to raise issue of fact as to train's speed.

Complaint alleged that defendants carelessly and negligently caused one of their regular passenger trains to approach crossing and then and there pass over track at very high and dangerous rate of speed. Answer did not actually deny high rate of speed, but denied that defendants carelessly and negligently caused train to pass over track at very high or dangerous rate of speed. Cause was tried on theory that complaint sufficiently alleged train was being operated at negligent rate of speed and that defendants had sufficiently denied same.

2. Trial ⟹296(3).

Instruction, in action for death of guest in automobile struck by train at street crossing, eliminating issue of speed of train, *held* reversible error, notwithstanding further instruction.

Instruction complained of told jury, in substance, that railroad had right to operate trains at any rate of speed, except where such speed was limited by law, and further instructed jury that there was no law of the state, county, or city regulating speed of trains over crossing in question. Subsequent instruction advised jury that railroad was required to operate trains over obstructed crossing with due regard to safety of persons who might be using crossing.

3. Appeal and error ⟹930(2).

Where instructions are conflicting, appellate court cannot presume jury disregarded erroneous instruction and followed proper instruction.

4. Railroads ⟹316(2).

Speed of train proper in open country might be highly dangerous and constitute negligence as matter of law in city or thickly populated center.

5. Railroads ⟹316(2).

Whether speed of train, absent statute or ordinance regulating same, constitutes negligence, depends on circumstances and place.

6. Railroads ⟹350(11).

Whether speed of train in well built-up or populated section of city constitutes negligence is question for jury.

7. Railroads ⟹346(5).

Law presumes that automobile guest will exercise reasonable care, but does not require him to interfere with management of machine.

8. Railroads ⟹350(21).

Whether speed of train prevented automobile guest from exercising reasonable care for his own safety after danger of collision became imminent *held* for jury.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Ada Carline Dow, individually and as guardian ad litem for Bernice Dow, a minor, against the Southern Pacific Company and others. Judgment for defendants, and plaintiffs appeal.

Reversed.

J. Oscar Goldstein, of Chico, for appellants.

George F. Jones, of Oroville, and J. D. Peters, of Chico, for respondents.

PLUMMER, J.

The defendants had judgment in an action prosecuted by the plaintiffs to obtain damages suffered by them for and on account of the death of Percy Everett Dow, on the 24th day of December, 1926, alleged to have been caused by the carelessness and negligence of the defendants. From this judgment the plaintiffs appeal.

The complaint in this action, after alleging a number of preliminary matters unnecessary to be set forth herein, contains two paragraphs specially involved upon this appeal. These paragraphs are as follows:

"V. That on the 24th day of December, 1926, said Percy Everett Dow was traveling as a passenger in an automobile and along the public highway on First Street, in Chico, Butte County, California, from an easterly to a westerly direction, near and at a point where said First Street crosses the right of way of said Southern Pacific Company. That as said Percy Everett Dow had reached said crossing and was using and exercising due care on his own behalf for his own safety, the said defendants carelessly and negligently caused one of its regular passenger-carrying trains, with locomotive attached, owned and operated by the defendant Southern Pacific Company, and then and there in charge of and being driven by the defendant William Edgar Field, then and there the regularly employed engineer of said defendant Company, and Joseph Wilson

Laurant, then and there the regularly employed fireman of said defendant-Company, at the time on said Railroad, to approach said crossing, and then and there pass over the track of said Railroad at a very high and dangerous rate of speed, and said defendants negligently and carelessly omitted the duty incumbent upon them and which they owed the said Percy Everett Dow, while approaching said crossing, to give any signal by ringing any bell or sounding any steam whistle, as provided by law, and that by reason of said negligence and carelessness, the said Percy Everett Dow was unaware of the approach of the said railroad train.

"VI. That said steam train complained of herein, was traveling in a southerly direction, and was approaching said crossing, and was being operated and driven in a negligent and careless manner, at a high, rapid and dangerous rate of speed, through Chico, and over said highway crossing at said point."

This action is a companion case to that of Ethel G. Johnson et al. v. Southern Pacific Co. (Cal. App.) 288 P. 81. Both cases are based upon practically the same state of facts, save and except as otherwise stated herein, and the opinion in the Johnson Case is hereby referred to as containing a statement of the facts shown by the testimony in this case as fully and completely as though recopied herein.

In addition to what we have recited of the testimony in the Johnson Case, the transcript in this case shows that the deceased, Percy Everett Dow, was riding as a guest in an automobile owned and operated by Jack Salyer, and came to his death by a collision which occurred about 12:30 a. m. on the morning of December 24, 1926, between the automobile driven by Jack Salyer and the locomotive drawing train No. 13, owned and operated by the defendant corporation. The transcript further shows that First street in the city of Chico where the collision occurred is one of the main arteries or highways; that said street is a well-paved and much-traveled street, connecting, as it does, the east and west sides of the Sacramento valley leading to the city of Chico; the population of the city of Chico being estimated at about 14,000. The record shows, without much contradiction, that First street crossing in the city of Chico comes within the class of what is generally termed a "blind crossing"; all four corners of the crossing being well built up, and the approach of a train from the north being obscured from the view of one traveling easterly on First street. The record in this case likewise establishes that, after the locomotive struck the automobile being driven by Jack Salyer, it carried the automobile on the pilot a distance of about 1,000 feet. The record further shows that Percy Everett Dow occupied the rear seat of the automobile driven by Jack Salyer. The collision resulted in the immediate death of Percy Everett Dow. Ada Carline Dow is the widow of the deceased, and Bernice Dow is a minor daughter of the deceased and of the plaintiff Ada Carline Dow.

At the request of the defendants, the court gave the following instruction, designated as "Instruction No. 7," which is assigned as error, to wit:

"You are instructed that a Railroad Company has the right to operate its trains at any rate of speed, except where such speed is limited by law, and you are further instructed that there is no law of the State of California, or of the County of Butte, or of the City of Chico, regulating the speed of trains over the First Street crossing in the City of Chico." In addition to the testimony set out in the opinion in the Johnson Case, relative to the speed at which the train was traveling, we herewith set forth the testimony of the engineer operating the locomotive of train No. 13 at the time of the collision which shows a somewhat different state of facts, as to the question of speed, shown by the testimony in the Johnson Case. The testimony of the engineer is as follows:

"Q. You mean the speed restriction of the Company? A. Yes, sir.

"Q. What was it? A. 50 miles an hour.

"Q. 50 miles an hour? A. Yes, sir.

"Q. In other words, the Company restricts you to 50 miles an hour, and you believe, as an engineer, if you were late, you had a right to make up that time by going across crossings at 50 miles an hour? A. I don't believe it but I know it.

"Q. Now, is it not a fact that the curve you have reference to is where the track straightens out just a little above the bridge? A. I don't know how far it is; I don't remember how far it is.

"Q. You don't know how far it is? A. It is as I said here.

"Q. Pardon me, Mr. Field. Did you begin first to reduce your speed when you got around that curve? A. Yes, sir.

"Q. And you did that to reduce your speed going into the station, didn't you? A. Yes, sir.

"Q. Why didn't you reduce your speed to go over that crossing? A. Because there is neither rule nor law that requires it to be done.

"Q. So you thought, did you, Mr. Field, that you had a perfect right to drive over that crossing at First Street, at that hour of the night or day, at any rate of speed up to 50 miles an hour? A. So far as the rules were concerned."

In so far as what the engineer thought, the testimony might have been objected to as immaterial, but it is produced here as bearing

upon the question of speed. The testimony shows, without any contradiction, that, prior to the reduction of speed, the train had been running at from 45 to 48 miles per hour. In the Johnson Case the testimony indicated that the first reduction of speed was had further from the crossing, just how far is not definitely stated. Here the testimony shows that the reduction of speed was had just as the engine rounded the curve, and came upon the straight track leading to the crossing. Other testimony in the case shows that the distance of the curve from the crossing, or, rather, the distance from the crossing to where the track curved gently to the westward, is 600 feet. From this fact the jury may well have concluded that the rate of speed when train No. 13 reached First street crossing was much in excess of 30 miles per hour, as testified to by the engineer and fireman.

[1] Upon this appeal it is contended by respondents that the rate of speed at which the train No. 13 was being operated was not really put in issue, and therefore, if it be conceded that the instruction which we have set forth is erroneous, no prejudice has resulted. The contention of the respondents in this particular, however, does not appear to be well taken. Paragraph V, while not a model pleading, does, when stripped of unnecessary verbiage, contain the following allegation relative to speed: "The defendants carelessly and negligently caused one of the regular passenger trains, with locomotive attached, owned and operated by defendants, Southern Pacific Company, to approach said crossing, and then and there pass over the track of said railroad at a very high and dangerous rate of speed." The paragraph then contains a further allegation as to the negligence of the defendants in not giving any signals.

[2] Paragraph VI contains an allegation that the train was being operated and driven in a negligent and careless manner, at a high, rapid, and dangerous rate of speed, through the city of Chico and over said highway crossing. The answer of the defendants does not really deny the high rate of speed. The clerk's transcript shows the denial to be in the following language: "Deny that defendants carelessly and negligently caused the regular passenger-carrying train with locomotive attached * * * to pass over the track of said railroad at a *very* high or dangerous rate of speed." An examination of the transcript, however, shows that the cause was tried upon the theory that the complaint sufficiently alleged that the train was being operated over First street crossing at a negligent rate of speed, and that the defendants had sufficiently denied the same, and therefore the question of speed was an issue of fact in the case. That instruction No. VII eliminated this issue from consideration by the jury must be conceded. By the instruction the court told the jury that a railroad company possesses the right to operate its trains at any rate of speed, except where such speed is limited by law, and then informed the jury that there was no law of the state of California, or of the county of Butte, or of the city of Chico regulating the same. From this instruction the jury could not very well conclude otherwise than that, at the time and place in question, the defendants had the right to operate train No. 13 at any rate of speed it saw fit. This instruction is not a correct statement of the law. The fact that the Legislature has not, nor has the county of Butte, nor the city of Chico, attempted to regulate the rate of speed over the crossing in question, does not open the gates to any rate of speed which either the company or the defendants' agents might see fit. Being an obstructed crossing, or a crossing in which the approach of the train is more or less obstructed, the record showing sufficient testimony from which the jury might very well conclude that the approach of a train from the north could not be perceived or seen by any one traveling in a westerly direction until a point was reached about 58 feet from the center of the main line on which the train was approaching, an entirely different situation is presented from that where a train is being propelled through an open country. The testimony shows that First street is a much-used highway, and that the crossing is in the vicinity of a rather thickly populated section of the city.

In the annotation to the case of St. Louis & San Francisco Ry. Co. v. Moore et al., as reported in Ann. Cas. 1914B, 597, we find the law relative to the two situations very aptly stated, to wit: "The running of a train at a high rate of speed over a grade crossing in the country is not ordinarily deemed negligence" —citing a number of cases. And then: "The fact that the view of one approaching a railroad crossing is obstructed may make it negligence to propel a train across such a crossing at a high rate of speed"—citing a number of cases.

In Bilton v. Southern Pacific R. Co., 148 Cal. 443, 83 P. 440, 442, the Supreme Court, in effect, approves just what we have here stated. In that case the following language appears in the opinion: "It is true that, in the absence of any statute or ordinance on the subject, no rate of speed is negligence per se. When taken in connection with other circumstances, however, the situation is very different. We can conceive of cases where, independent of any statute or ordinance, a speed of 35 miles an hour in approaching a crossing would, under the circumstances there existing, be so dangerous as at once to force all sensible and impartial men to the conclusion that those operating the train were not using reasonable care to avoid injury to others, and thus constitute negligence per se. However

this may be, there can be no doubt that the question as to whether or not a rate of speed at a crossing is so dangerous or excessive as to constitute negligence must depend upon the particular circumstances there existing, and, if the circumstances are such that reasonable and impartial men may well differ as to whether the speed maintained at the particular place showed a want of reasonable care, the question as to whether the railroad company was guilty of negligence in maintaining such speed is one for the jury."

[3, 4] The respondents call our attention to plaintiffs' instruction No. 15, and present the argument that this instruction cures any error in the giving of defendants' instruction No. 7. This argument, however, does not appear to us to be logical. By instruction No. 7 the jury was advised that the company possessed the right to propel its train at any rate of speed it saw fit. By instruction No. 15 the jury was advised that the defendant company was required to run its train across First street crossing in Chico with due regard to the safety of persons who might be using said crossing, etc. This must be read in connection with instruction No. 7 which eliminates the issue of speed from the management of the train. If it does not have this effect, then and in that case the two instructions are conflicting, and we cannot presume that the jury disregarded instruction No. 7 and followed instruction No. 15. Hoffman v. Southern Pacific Co. (Cal. App.) 281 P. 681. This case also shows that the question of speed is for the jury. The only manner in which these instructions could be read together is, as we have stated, that the jury was advised that the defendants were required to operate their trains over the crossing in question, with due regard to the safety of persons using the same, not considering the issue of speed. In other words, if the defendants took the other ordinary precautions to insure the safety of persons using the crossing, then and in that case it might propel its trains over First street crossing at any rate of speed. This is not the law. A rate of speed which would be perfectly proper in an open country would be highly dangerous, and in some instances so dangerous as to be negligence as a matter of law. The conditions and circumstances are to be taken into consideration, and a rule which has no application in an open country may have binding effect and restrictive powers in thickly populated centers.

In Cooper v. L. A. Ry. Co., 137 Cal. 229, 70 P. 11, 13, where the rate of speed of a train through a city of the sixth class was being considered, the court said: "Whether the rate of speed was reckless as well as dangerous was for the jury to determine from all the evidence. Certainly, the court was not warranted in saying, as a matter of law, that 30 miles an hour was not a reckless rate of speed for a train to make within the boundaries of a city of the sixth class." Being of the sixth class, the conclusion is reasonable that the city there referred to was less in population than the city of Chico at the time of the accident involved herein.

The recent case of Southern Pacific Co. v. Stephens (C. C. A.) 24 F.(2d) 182, does not in any wise limit the rule relative to the propelling of trains through cities or relatively thickly populated districts. In the Stephens Case the crossing where the collision occurred was in the country, and was a crossing which would be generally spoken of as unobstructed, and where one approaching the crossing could from time to time see, likewise, the approach of a train. Under such circumstances it was held that a speed of 50 miles per hour did not present the question of negligence as an issue for the jury to decide. With this holding we readily agree.

In Young v. Pacific Electric R. Co., 279 P. 438, 440 (see, also, 283 P. 61), the court spoke of the rule there being considered as follows: While it is well established that proof of a given high rate of speed, in the absence of a statute or ordinance, does not establish negligence per se, it is equally well established that a car traveling at the same high rate of speed is not necessarily operated in a manner free from negligence.

[5, 6] The cases which we have cited, and the following cases from which we will not quote, establish the law in this state that whether a given rate of speed, in the absence of a statute or ordinance regulating the same, is or is not negligence, depends upon the circumstances and the place where the train is being operated, and, if the train is being operated in a well-built up or populated section of a city, it is an issue for the jury as to whether the speed of the train involved constituted negligence as a matter of fact. Wyckoff v. Southern Pacific Co., 4 Cal. App. 94, 87 P. 203; Burr v. United Rys. of San Francisco, 163 Cal. 663, 126 P. 873; Ellis v. Central California Traction Co., 37 Cal. App. 390, 174 P. 407; Badostain v. Pacific Electric Ry. Co., 83 Cal. App. 290, 256 P. 576. See, also, cases cited in Johnson v. Southern Pacific Co. et al., heretofore referred to in this opinion involving the same crossing and accident. Other cases might be cited, but the foregoing we deem sufficient.

In support of their contention that the giving of instruction No. 7 constituted no error, the respondents call attention to the case of Davenport v. Waters (Ga. App.) 148 S. E. 772. The instruction in that case, however, is readily distinguishable from the one under consideration. The opinion in the case of Davenport v. Waters sets forth the instruction, which reads: " 'There is no law in this State regulating the speed of trains approaching public crossings. The law as to trains approaching public crossings is as set

forth in the Code section which I have just read to you in the charge.' The judge had just read to the jury as a part of his charge the language of the act of 1918. * * * That section sets forth the duty of a railroad engineer when his train is approaching public crossings. It requires him to blow for the crossings, to maintain a constant and vigilant lookout along the track ahead of the engine while approaching a crossing, and to otherwise exercise due care in order to avoid injuring any person or property on the crossing or at any point on the track within 50 feet of the crossing. However, there is no specific provision regulating the speed of trains approaching public crossings, and the charge complained of was not error."

Respondents also cite the case of Eaton v. Southern Pacific Co., 22 Cal. App. 461, 134 P. 801, 806, where the court refused to give the following instruction: "A speed of 15 or 20 miles an hour is not of itself negligent." And the further instruction: "No unusual speed of the engine could have misled the plaintiff unless he saw or heard the engine and undertook to cross ahead of it, and to make such an attempt and fail is conclusive evidence of contributory negligence." The speed of the train was not involved in that action, but, if it had been, there is nothing in what is said concerning the instruction, pertinent to the case at bar. In the Waters Case the instruction as quoted shows clearly that it had reference only to some statute regulating the speed at crossings, and it may be conceded that there is no law in this state which regulated the speed of the train involved in this action, but that is readily distinguishable from an instruction that tells the jury that a railroad company has the right to operate its trains at any rate of speed it may see fit, except where the speed is limited by law, referring to regulations imposed either by statute or ordinance. Such is the effect of the given instruction.

[7, 8] Again, it is argued at considerable length that, even though the train was passing over First street at a high rate of speed, the speed had nothing to do with the collision. This is all based upon the negligence of the driver of the automobile with whom Dow was riding as a guest. The argument presented is on the theory that Dow is held to the same liability and responsibility as the driver of the car. The decisions, however, are all to the contrary, and are so numerous that they need not be cited. The law presumes that a guest riding in an automobile will take reasonable precautions to protect himself from injury, but does not require him to interfere with the management of a machine over which he has no control. Applying the doctrine that Dow was under the necessity of using reasonable precautions to protect himself, and following the presumption that one takes such precautions, it was for the jury to determine whether the speed of the train was such that Dow was prevented from exercising such precautions, after the danger became imminent, or whether he was prevented from taking the last chance to save himself. The evidence is conflicting as to the ringing of the bell; and, as to the blowing of the whistle, the evidence in this case, just as in the Johnson Case, shows that the signals were not sounded as required by section 486 of the Civil Code.

A considerable portion of the briefs of counsel for both appellants and respondents is devoted to arguing the effect of the testimony introduced, but, as we cannot say that the withdrawal of the question of speed in connection with the other acts set forth relative to the operation of the train was not prejudicial, it would serve no useful purpose to follow the arguments of counsel as to what it was claimed on one side that the evidence establishes, and asserted on the other that the evidence proves.

It is sufficient to say that our attention has not been called to anything which cures the error committed by the giving of the instruction known as "Number 7," withdrawing from the consideration of the jury one of the issues involved in the action upon which the jury alone was entitled to pass.

The judgment is reversed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

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105 Cal. App. 509

WULFERDINGER v. PICKWICK STAGES SYSTEM.

Civ. 4050.

District Court of Appeal, Third District, California.

May 6, 1930.

1. Appeal and error ⚷659(3).

Appellate court could not direct certification of rejected deposition of party, where deposition did not impeach party on ground claimed (Code Civ. Proc. § 2022).

2. Appeal and error ⚷659(3).

Appellate court could not direct deposition to be certified as part of record, where deposition was not marked for identification (Code Civ. Proc. § 2022).

3. Evidence ⚷502.

Where party had opportunity to fully cross-examine witness on speed of auto stage, right to further cross-examination *held* discretionary with court (Code Civ. Proc. § 2050).

4. Depositions ⟹101.

Adversary could read deposition of party in evidence, despite her personal appearance, provided deposition contained anything material to issues not covered by examination at trial (Code Civ. Proc. § 2021, subd. 1).

5. Depositions ⟹90.

Permission to read deposition of party when all material evidence therein contained has been fully covered by examination at trial is discretionary with court (Code Civ. Proc. §§ 2022, 2050).

6. Appeal and error ⟹616(1).

Documents which are not part of judgment roll must be authenticated as having been used at trial to entitle them to become part of transcript on appeal.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by Frances M. Wulferdinger against the Pickwick Stages System. Judgment for plaintiff, and defendant appeals. On motion for diminution of record.

Motion denied.

Theodore Hale and Barry J. Colding, both of San Francisco, B. P. Gibbs, of Los Angeles, Mannon & Brazier, of Ukiah, and Carroll B. Crawford, of San Francisco, for appellant.

McEnerney, Reagh & Morris, Philip R. McEnerney, and Charles Reagh, all of San Francisco, Martin Pence, and Thomas Anglim, of Napa, for respondent.

R. L. THOMPSON, J.

This is a motion on the part of the appellant for a diminution of the record by requiring the court reporter to certify as a part of the transcript of testimony the deposition of the plaintiff which was duly taken pursuant to law prior to the trial. The appeal was perfected pursuant to section 953a of the Code of Civil Procedure.

[1, 2] It is asserted that this deposition is a proper and necessary part of the record, since it was offered in evidence by the appellant under section 2022 of the Code of Civil Procedure, and for impeachment purposes. It was, however, properly rejected by the court. This court may not direct it to be certified as a part of the record on appeal for two reasons. It does not impeach the witness upon the ground claimed by the appellant. It was not marked for identification during the progress of the trial.

[3-5] The appeal was taken from a judgment for plaintiff for injuries sustained while riding as a passenger in the auto stage of the defendant. Prior to the trial her deposition was duly taken and returned to the court in the manner provided by statute. The plaintiff was called and examined at the trial as a witness in her own behalf. With respect to the speed of the stage upon which she was riding at the time of the accident in question she testified: "Q. At what speed was the car going when you passed that bridge (just before the accident)? A. Well, it was going faster—faster than we were coming from the Springs; I should say perhaps forty-five miles an hour." Upon cross-examination the plaintiff was asked no question regarding the speed of the stage. Subsequently, as a part of the defendant's case, the deposition of the plaintiff was offered in evidence under the provisions of section 2022 of the Code of Civil Procedure. Counsel for the defendant stated that he wished to read it as the testimony of the plaintiff which was taken pursuant to section 2055 of the Code of Civil Procedure. Upon objection this was refused. By permission of the court she was then called by the defendant and further cross-examined under the provisions of the last-mentioned section. Having had an opportunity to fully cross-examine the witness upon this subject-matter, the right to further cross-examine her in this manner was discretionary with the court. Section 2050, Code Civ. Proc. Upon further cross-examination the witness was asked if in the giving of her deposition she did not say, "The bus was going along at a rate of speed of about thirty-five miles an hour until about seven miles before we came to Ukiah, where it left the road and went down into a river bed, * * *" to which inquiry she replied, "If that's my deposition, I must have said it; I don't remember." This was not a denial that she had made the statement read to her from the deposition. Moreover, the deposition was not thereafter offered to impeach her. No purpose for reading the deposition in evidence except to impeach the plaintiff upon her testimony with respect to the speed of the stage was assigned. When the reading of the deposition was first offered by the defendant, the attention of the court was not called to any material subject-matter which it contained that was not fully covered by her previous oral examination at the trial. The deposition of the witness having been taken under subdivision (1) of section 2021 of the Code of Civil Procedure as a party to the action, the defendant would have been entitled to read it in evidence, notwithstanding her personal appearance at the trial, provided it contained anything material to the issues which were not covered by her oral examination at the trial. It is not claimed any such omitted evidence is contained in the deposition. The permission to read the deposition of a witness, under section 2022 of the Code of Civil Procedure, when he is a party to the action and all the material evidence therein contained has been fully covered by

an examination of the witness at the trial, is discretionary with the court. Section 2050 of the Code of Civil Procedure applies to this sort of an examination like the re-examination of the same witness at the trial of the case. That section provides that: "A witness once examined cannot be re-examined as to the same matter without leave of the court, but he may be re-examined as to any new matter upon which he has been examined by the adverse party. And after the examinations on both sides are once concluded, the witness cannot be recalled without leave of the court. Leave is granted or withheld, in the exercise of a sound discretion."

[6] Moreover, this deposition was not marked or requested to be marked for identification. Documents which are not a part of the judgment roll must be authenticated by the proper court officer as having been used or referred to at the trial, to entitle them to become a part of the transcript on appeal. In the Estate of Broome, 169 Cal. 604, 147 P. 270, 271, it is said: "It is axiomatic that papers not properly authenticated as having been used on a hearing * * * cannot be considered on appeal." Somers v. Somers, 81 Cal. 608, 22 P. 967.

The motion for a diminution of the record is denied.

We concur: FINCH, P. J.; PLUMMER, J.

PEOPLE v. DAVIS. *

Cr. 1884.

District Court of Appeal, Second District, Division 1, California.

April 22, 1930.

Rehearing Denied May 6, 1930.

Hearing Granted by Supreme Court May 22, 1930.

1. Criminal law ⟹507½.

In prosecution of deputy district attorney for receiving bribe, testimony of prosecuting witness *held* to show he was accomplice required to be corroborated (Pen. Code, § 1111).

The testimony of the prosecuting witness was to the effect that the deputy district attorney asked the prosecuting witness to ask a defendant in a criminal prosecution to give attorney bribe money, and that the bribe, when paid, was paid by such defendant through the prosecuting witness to the deputy district attorney.

2. Criminal law ⟹511(1).

Evidence corroborating accomplice must be effective for more than merely raising suspicion of defendant's guilt (Pen. Code, § 1111).

3. Criminal law ⟹511(2).

Corroborating evidence is sufficient to support conviction if it, of itself, tends to connect defendant with offense (Pen. Code, § 1111).

4. Criminal law ⟹696(3).

Refusal to strike out testimony offered to show consciousness of guilt by conduct in face of accusation *held* error, it not being shown that defendant understood he was accused of criminal act.

5. Criminal law ⟹407(2).

Before failure to deny statement can be received as evidence of admission of guilt, it must appear that accused understands he is accused of criminal act.

6. Criminal law ⟹683(1).

Where witness testified concerning conversation with another over defendant's objection, refusing to permit the other to deny conversation *held* error.

7. Criminal law ⟹511(1).

In prosecution of deputy district attorney for receiving bribe, corroboration of accomplice *held* insufficient to support conviction (Pen. Code, § 1111).

8. Criminal law ⟹814(3).

Submitting case on theory evidence would authorize conviction of asking for bribe *held* erroneous, there being no evidence to support theory.

9. Criminal law ⟹1186(4).

Errors occurring in prosecution of deputy district attorney for receiving bribe *held* to require reversal, evidence being weak and unsatisfactory (Const. art. 6, § 4½).

10. Criminal law ⟹1186(4).

Where errors have been committed and it is doubtful whether without errors defendant would have been convicted, errors require reversal (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Harold L. Davis was convicted of crime of asking, agreeing to receive, and receiving a bribe, and he appeals.

Reversed.

Jerry Giesler, Paul B. D'Orr, and Thomas A. Reynolds, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 293 P. 32.

CONREY, P. J.

In the indictment it is charged, and the record shows, that at the times to which the indictment refers the defendant was the duly appointed, qualified, and acting chief deputy district attorney of the county of Los Angeles; that at and during said time there were pending undetermined in the superior court of said county two certain criminal actions wherein the defendants were charged with the commission of felonious crimes; that the defendant Davis, as such chief deputy district attorney, was charged with the duty of prosecuting said criminal actions; and that one E. H. Rosenberg was one of the defendants in each of said criminal actions. In one of these actions, No. 31043, the defendants, S. C. Lewis, E. H. Rosenberg, Jacob Berman alias Jack Bennett, were accused of the crime of conspiracy to obtain money by false pretense, and of the crime of conspiracy to violate the corporate securities act. In the other of said actions, No. 31044, I. L. Rouse, E. H. Rosenberg et al., were charged with the crime of conspiracy to violate the act to regulate the interest of money, known as the Usury Law. The indictment against Davis charges that on or about the 15th day of August, 1927, said Davis knowingly, etc., did ask, agree to receive, and did receive from the said E. H. Rosenberg, also known as Ed Rosenberg, charged as a defendant in said actions 31043 and 31044, and from one Ben Getzoff, a bribe, to wit, the sum of $7,500, with a corrupt intent, and an agreement thereupon then and there made that the action of him, the said Davis, as chief deputy district attorney, would be knowingly, willfully, unlawfully, corruptly, and feloniously influenced thereby, in that he, the said Davis, then agreed that as such chief deputy district attorney, he would control and direct the prosecution of each and both of said causes so pending, to the end and in the manner that in so far as each and both of said causes related to the said E. H. Rosenberg, that each and both of said causes would be disposed of in such manner as to result in the discharge of the said E. H. Rosenberg without conviction. Upon trial of this cause before a jury, defendant Davis was found guilty as charged in the information. Pursuant to that judgment he has been sentenced to imprisonment for the term prescribed by law. He appeals from the judgment and from an order denying his motion for a new trial.

There is no evidence of any direct negotiation or transaction between appellant and Ed Rosenberg in relation to the alleged crime of appellant. If there were any such negotiations or transactions, they occurred between appellant and one Ben Getzoff acting as some kind of agent or go-between in said negotiations and in the alleged payment of the bribe. The prosecution is in no position to claim that the defendant ever did anything to comply with his supposed corrupt agreement; for if any of the evidence for the prosecution could be given that construction, it would follow that the court erred in refusing the offered evidence concerning his actual conduct, some of which defendant was not allowed to produce. The first and foremost contention of appellant is based upon the proposition that Ben Getzoff, according to his testimony, was an accomplice in the commission of the crime charged against appellant. It is further contended by appellant that "the evidence is legally insufficient to sustain the verdict of guilty as there is no legal corroboration of Ben Getzoff, the only witness who testifies to any of the essentials of the crime charged, and who is an accomplice, according to his own testimony."

In order to obtain a clear understanding of the most important elements of fact in the case, and as a basis for consideration of the various errors alleged to have been committed at the trial, it is necessary to have before us the testimony of Ben Getzoff. We shall here summarize that testimony as we find it in the record. In making this summary it should be understood that we are not quoting his exact words, except where they are placed within quotation marks. Ben Getzoff said: For some years I have been engaged in the tailoring business in the city of Los Angeles. In the year 1925 the defendant Davis was introduced to me by Asa Keyes, the district attorney. Thereafter I met Davis at my places of business on Spring street, including my latest location at 609 South Spring street; also at his office in the Hall of Justice. I have known Ed Rosenberg for five or six years. He was introduced to me by his brother Jack Rosenberg. I have visited in the homes of the Rosenbergs and in the home of defendant Davis. In the year 1927 the Rosenbergs were engaged in the sale of stock of the Julian Petroleum Company. In May, 1927, the Julian Company was in financial difficulties. In May, 1927, I called on Davis in his office. He asked me, "What seems to be the trouble?" I told him the trouble was that Ed and Jack Rosenberg were subpœnaed before the grand jury. The defendant said: "You can talk to me about it. I have full charge of the case of the Julian Petroleum." I said, they don't want to be indicted. He said that he believed that they would be indicted. He promised that if there was any possible way he would stop the indictment, at least against Jack Rosenberg. I told him, "If you do anything for them they will appreciate it." He said, "All right, I will see what I can do."

In June there were two indictments returned against Ed Rosenberg and other defendants. That evening Davis called me up and said he had saved Jack, but Ed is in-

dicted but not to worry about it. The next day I phoned him, and he told me to come over at 2 o'clock that day, which was Saturday. I was in his office at 2 o'clock; no one else was there. He asked me if it was really true that Ed Rosenberg is worth $3,000,000. I said, I don't know, but I do know they are wealthy. I said, what are you going to do with the indictment? He said: "It is too early in the game. Public sentiment is too strong against it right now to do anything." Later we will see what we can do. During July, 1927, I saw Davis at my place, 609 South Spring street, perhaps twice, and also saw him at his office. When I went to his office I would meet Mrs. Barrett, his secretary.

In August, 1927, Davis came to my store and told me to come to his office at 2 o'clock, which I did. When I came into his office, he asked me whether I had seen Ed Rosenberg and whether he was worried. I said yes, and he wants to know what you are going to do for his dismissal. He said, "I sure would love to dismiss Ed's case but it is time yet, don't have to worry." Then I asked him, "Buddy, is that true, you are going to run for district attorney?" And he asked me who told me, and I told him Asa Keyes told me that. He said, "That is correct." And he said, "Do you realize, Ben, it would cost me between $35,000 and $50,000 to make the run" for his office. I said "Does it take that money, Buddy?" He said, "Yes." He said, "It will take every penny of it, but," he said, "I have some friends, if they only come through with it." Then he told me, "Ben," he says, "if I want to make myself $100,000 or $200,000, I can do it right now, but," he said, "a man in my position you have got to be very careful with whom you do business."

Q. Well, what else was said, if anything? A. Then I told him, I said, "Buddy," I said, "I will tell you what I will do, I will talk to Ed Rosenberg, and I am sure that he is going to do his share." He said, "What do you mean, money?" I said, "Yes." He said, "You think he is going to come through with anything?" I said, "He is not a cheap piker, he will come through." I said, "Now, Buddy, I want to tell you something, I am going to talk to Ed as soon as I get back to the store." He picked himself up from the chair, and he says, "Do you realize, Ben—do you think, Ben," he said, "that he will come through with $10,000?" I says, "I do." He says, "That ought to be worth to him $10,000." I says, "If you will dismiss that case, Buddy," I said, "he will give you more than that, and I am sure of it."

Q. Anything else about that matter? A. Then I told him, "As soon as I get back to the store, I will get in touch with Ed Rosenberg," and I did.

After I left Mr. Davis' office I had a talk with Ed Rosenberg. Then I called up defendant Davis and said to him, "I have got what you asked for." He told me to meet him in the basement of the Hayward Hotel. A few minutes later he met me there, in the basement between the telephone booths. I said to him, "I have got for you $5,000." He said he wanted me to ask Ed Rosenberg for $2,500 more as a loan; that he had to make good on some stock he had bought on margin. I said, "All right, you can have the $5,000, and tomorrow I will get you the balance of $2,500." He said: "No I wouldn't need it tonight. You can get that tomorrow, the whole thing." Then I left and telephoned to Ed Rosenberg, and he came to my place of business. The next morning I telephoned to Buddy Davis and told him I have got the balance what he wanted. He said, "I will meet you in the same place." Later in the day he telephoned me, and we did meet in the same place, in the basement of the Hayward Hotel. (This was next door to Getzoff's tailor shop.) When I left the store I spoke to my son David, who was working in the store. I went to the appointed place. I said to Davis: "I have got the balance of $2,500 for you. That makes $7,500." I had received that sum from Ed Rosenberg. It was in seven single $1,000 bills and one $500 bill. I handed it over to Buddy Davis. He said, "The first thing tomorrow I am going to get in touch with Asa, and tell Ed not to worry anything about it, as I will take care of it." He said: "You know what I done for Jack, Ed's brother. I prevented his indictment. He knows I will do the right thing by him." I said I thought it was Asa that prevented the indictment. He said, "Asa was a liar." While we were talking there, my son came down and told me that there was an urgent call from Ed Rosenberg. Then I went out through the Spring street side, and Davis went out through the Sixth street side.

In September I saw Davis at his office, when he got back from up north. I was up to see him the morning when Jack Bennett came. We were figuring he was going to dismiss the case in September, and Ed and I were supposed to leave town for a vacation. Davis told me he doesn't get any help from Asa Keyes. That he believed that Keyes feels that Ed is guilty. I saw Davis again the following day. He said that Ace was yellow and had no backbone. After that I left Davis alone entirely. I next saw him in January. In November I went to Chicago with Mr. Keyes. We got back the latter part of November. After we got back I saw Davis again. That was in November or December. He said he was unable to fix it. "I am going to send Ace a letter of resignation, and that will bring him to time." I did not see Davis again until the trial was on, not until the

day before Keyes was to deliver his argument before the jury. The trial of the case in which Ed Rosenberg was defendant ended some time in May, 1928. A day or two after the trial ended, Keyes and Davis and Jack Bennett and Ed Rosenberg and myself met in my office. They were having a few drinks and congratulating one another on the outcome of the trial. It was on Saturday. Keyes left first, then Jack Bennett, then Ed Rosenberg. Then Harold Davis said to me, "Is Ed going to come through with the balance of the $2,500?" I said to him: "You have an awful lot of nerve to ask him for the $2,500. If you want the $2,500 you have got to ask him yourself." He said, "According to the circumstances, Ben, I have done the best that I knew how to do." I had a man named Joseph Sherman working for me at the time. His cloth table was right near the window outside the office. When he worked at the cutting table he stood just by that window.

On cross-examination of the witness Ben Getzoff, he said:

"Defendant Davis visited my house on Christmas eve, in December, 1926. He and his wife and Forrest Murray came to my apartment at Wilshire and Shatto Place. Prior to May, 1927, I had been to his house twice. I had been there in the summer of 1926. My son David took me over there. Mrs. Davis was there. Davis had been to my place and asked me if I had a bottle of whiskey. He gave me his address. I went over there and gave the bottle of whiskey to him. Again I went to Davis' house. I think it was in the spring of 1927, on a Sunday. Nobody was home. My son went with me. I brought a reading lamp. I went there and left it right in that little hallway. I was there again in May or June. Jack Rosenberg's brother drove me there and I delivered some booze. Davis was not at home. His wife was at home and she accepted it. Again I was at Mr. Davis' home in 1928. It was at night. I went there with Mr. Keyes. Davis was there but not Mrs. Davis. Again I went there and delivered a piece of white flannel for his wife's skirt. That was in 1927. Jack Rosenberg drove me over there. He did not go in with me. I took two pieces of white flannel. I gave them to Davis. Mrs. Davis was there. When I first talked with Davis, in his office, in May, 1927, I told him, "The Rosenbergs will do the right thing by you.' The lamp which I took out to Mr. Davis' house was a tall standing lamp with a shade for reading. I got the lamp from my son-in-law, who manufactures lamps. I took one to Asa Keyes the same Sunday. When I took the lamp to Davis' house I left it in the alcove in front of the house. 'There is a neighbor who lives upstairs, and the door is opened and I am going in the house, and Forrest Murray came out from the house and he says to me, Ben, you can leave the lamp stand right here in the little hall.' Also a man upstairs told me the same thing. Asa Keyes and E. H. Rosenberg and I were convicted of the crime of bribery in the Superior Court a few months ago." (Date of present testimony being July 3, 1929.)

"Q. Now, the first time that you ever told this story about having paid Mr. Davis money in consideration for his promising to do something for Ed Rosenberg was after you had been convicted of bribery in the Superior Court; isn't that true? * * * A. As soon as we were indicted for accepting or giving a bribe and when we had received our transcript, and when I read in that transcript where Buddy Davis has deliberately committed perjury, before the grand jury * * * so that is the time that I was ready * * * to go to the district attorney and tell him the whole story."

During the time of the trial before I was convicted "I told Buron Fitts (district attorney) that it doesn't make no difference whether it will be a conviction or a hung jury or an acquittal, I will tell him all about the whole transaction, and even told him about Buddy Davis, and so I done this right after we were convicted * * * and I told him the whole history of it." That was the following day after my conviction.

[1] According to the testimony of Ben Getzoff, the defendant Davis, through Getzoff, asked Rosenberg to give him bribe money. Likewise, according to that testimony, the bribe, when paid, was paid by Rosenberg, through Getzoff, to Davis. There is no evidence whatever of the asking for a bribe to be given by Getzoff, or the agreeing to receive or the receiving of a bribe from Getzoff. Undoubtedly, the testimony of Getzoff places him in the category of an accomplice. "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Pen Code, § 1111. Upon the statement of facts contained in the testimony of Ben Getzoff, he was liable to prosecution for the identical offense charged against Davis. Pen. Code, §§ 31 and 971; People v. Anderson, 75 Cal. App. 365, 374, 242 P. 906.

[2, 3] The evidence relied upon to corroborate the testimony of an accomplice must be effective for more than merely the raising of a suspicion of the defendant's guilt. But the corroborating evidence is sufficient if it, of itself, tends to connect the defendant with the commission of the offense, although it is

slight, and entitled, when standing by itself, to but little consideration. People v. Kempley, 205 Cal. 441, 456, 271 P. 478.

David Getzoff, twenty-eight years old, is a son of Ben Getzoff. During the year 1927, David was associated with his father in the tailoring business at 609 South Spring street. He testified substantially as follows:

In August, 1927, I returned from a vacation which I had taken during that month. One or two weeks after I came back from my vacation, an incident occurred with which the defendant and my father were concerned. This incident occurred in the basement of the Hayward Hotel. My father spoke to me and then went out of the store. After that I received a telephone call. Then I went to the basement of the hotel to call my father. At that place, in a little corner between the telephone booths, I saw Mr. Davis and my father. I told my father there was a phone call for him. He asked who it was, and I told him it was Ed Rosenberg. I said, "How do you do Mr. Davis," and he said, "Hello, Dave."

"Q. Did you see anything occur at that time between your father and Harold Davis as you walked toward them? A. My father handed Mr. Davis some money.

"Q. Could you tell how much it was? A. No, sir.

"Q. Could you see it? A. I saw it was money.

"Q. What did Mr. Davis do with it? A. I don't recall."

I left immediately. I did not stay there.

The foregoing testimony of David Getzoff is evidence which, if believed, would be sufficient to corroborate the testimony of Ben Getzoff upon the single fact that, at the stated time and place, money passed from the hands of Ben Getzoff to the defendant. But in view of the fact that there was in this case no evidence (other than the testimony of the accomplice) that any bribe was asked for, agreed upon, or paid—and no evidence, even in Ben Getzoff's testimony, that the defendant ever asked him, the said Ben Getzoff, for a bribe—it cannot reasonably be said that the testimony of David Getzoff had any force as evidence tending to connect the defendant with the commission of *the offense*. First, *there must be* the offense, the crime, the corpus delicti. If there had been evidence produced (other than that of the accomplice) that Ed Rosenberg, defendant in the criminal action then being prosecuted by Davis, had delivered money into the hands of Ben Getzoff, for payment to Davis (or, perhaps, even for some not reasonably explained purpose), then the further evidence that Ben Getzoff thereafter paid money to Davis might be sufficient to support the theory of a corrupt purpose, and so connect Davis therewith. In the absence of any evidence (other than that of Ben Getzoff) of any connection of Ed Rosenberg with the transaction, there remains no ground for claiming that the transaction said to have been observed by David Getzoff had any connection whatever with the payment of a bribe. In the absence of any corroborating evidence connecting Ed Rosenberg with the transaction, the mere delivery of "some money" (as stated by David Getzoff) by Ben Getzoff to Davis was not evidence of guilt. To make such an act criminal there must be legally sufficient evidence connecting the act with a criminal transaction, intent or purpose. "The corroborating evidence is sufficient if it, of itself, tends to connect the defendant with the commission of the offense." People v. Kempley, 205 Cal. 441, 271 P. 478, 484. But it must do that much.

What other evidence has been produced that could support a verdict against the defendant in this case? Ben Getzoff testified, as we have seen, concerning a visit of appellant and appellant's wife at his home, and certain other visits of himself at the home of Davis. He further testified to certain presents made by him to Davis, or to the wife of Davis. All of these are denied both by Davis and by his wife. Mr. Forrest Murray says that he never visited the home of Ben Getzoff in company with defendant and Mrs. Davis or at all, and that he never, at any time, saw Ben Getzoff come to the house of Davis with a lamp. Mrs. Davis denies the alleged visit said to have been paid by her and the defendant to the Getzoff home. She denies the incident relating to the lamp, and denies that she has ever had such a lamp. She denies the alleged present of the white flannel goods and denies that she ever had any such materials coming from Ben Getzoff. She denies that he was ever in her home or that she ever was in his home. But let it be assumed that these incidents, or some of them, as related by the witness Ben Getzoff, did take place. They had no evidentiary force concerning the crime charged, more than to create an atmosphere of suspicion.

[4] Besides the testimony of David Getzoff, to which we have referred, the evidence offered by way of corroboration is found in the testimony of Joseph Sherman, of Mrs. Jessie Barrett, and of John J. Kessler and his wife. Sherman testified that his place of work in the Getzoff shop was not more than five feet away from a window of the office; that in June, of 1928, several days after the verdict returned in the Rosenberg case, he overheard a conversation between defendant Davis and Ben Getzoff in which he heard Davis say to Getzoff: "Why doesn't he come across with the money? I am waiting too long." Cross-examined about the date of this occurrence, Sherman said that it was several days after the verdict, "Either about two weeks or three weeks; I can't remember exactly the date." Mrs. Barrett testified that she was secretary to the defendant in his office of chief deputy

district attorney during the months of May, June, July, August, and September, 1928; that she knew Ben Getzoff during that time; that he came to the office frequently and would ask for Mr. Davis and be admitted to his office; that she also made telephone connections between the defendant and Getzoff on frequent occasions.

The testimony of John J. Kessler and his wife is the only other testimony claimed to have corroborative value. That of Mrs. Kessler requires no separate mention, since that of her husband more fully covers the same matters. Apparently the purpose of this testimony was to prove that in the face of an accusation personally made by Kessler to defendant Davis, the conduct of Davis in response to that accusation was such as to show a consciousness of guilt. It appears that at some time prior to the trial of the Rosenberg case there had been a transaction between Mrs. Kessler and Jack Rosenberg, in which Jack Rosenberg received from Mrs. Kessler 200 shares of Julian stock, and that she had been unable to obtain from him any accounting therefor. Kessler testified to an interview which he had with Davis in the office of Davis, on May 17, 1928. He went there with Mrs. Kessler and asked Davis to take Jack Rosenberg before the grand jury for an investigation of that transaction. He said that he had found out that Jack Rosenberg had sold the stock of Mrs. Kessler, and he had told Jack that if he (Jack) did not return the money to Mrs. Kessler that he (Kessler) would go to the district attorney and swear to a warrant, and "you will be arrested, just like your brother."

"Q. Is this what you told Mr. Davis? A. Yes, I told Mr. Davis everything. He started to laugh. He said, 'I am not afraid. The Julian case is fixed by Mr. Getzoff.'"

Further on it appeared that what the witness meant to say was that in response to Kessler's threat of arrest, Jack Rosenberg laughed and said: "I am not afraid. The Julian case is fixed by Mr. Getzoff." Further on, Kessler said, "Mr. Davis, when I told him that—I said, 'Jack Rosenberg says he is not afraid, because the case is fixed.' He says, 'John, don't worry; wait until the trial will be over, and I will get you the money.'" Davis said that.

At the conclusion of the direct examination of Mr. Kessler, defendant moved to strike out said testimony as not illustrative of any of the issues in the case and not tending to prove anything in the indictment. Strenuous but unsuccessful efforts had been made by counsel for defendant to have this witness confine his statements to his conversation with Davis and to exclude direct statements of the conversation that he had had with Jack Rosenberg. The motion of defendant to strike out the testimony was denied. Upon a very similar record of the testimony of Mrs. Kessler, similar objections and motions made by defendant were overruled.

[5] The testimony of the Kesslers was offered as showing an accusatory statement made to the defendant, and showing consciousness of guilt as exhibited by the conduct of defendant in the face of such accusation. The statement made by Kessler to Davis, in the form of an alleged quotation from Jack Rosenberg, was not an accusation directed personally to Davis. The record shows that in the then pending trial of the Rosenberg case the district attorney and several deputies other than Davis were also actively connected with the prosecution. There was also the possibility that any "fixing" of the case had been effected through contact with jurors. Before the failure of a person to deny a statement of fact can be received as evidence of an admission of guilt or of consciousness of guilt, it must appear that he understands that he himself is accused of the criminal act. Wharton on Criminal Evidence (10th Ed.) vol. 2, § 680, p. 1407; People v. Hartwell, 37 Cal. App. 799, 175 P. 21. We are of the opinion that the court erred in denying the motions to strike out said Kessler testimony.

[6] Another error of the court in relation to the Kessler testimony occurred at a later point in the trial. Jack Rosenberg was called as a witness for the defendant, and was asked whether he had a conversation with Kessler during the trial of the Rosenberg case, in which he told Kessler that he wasn't afraid of being taken before the grand jury because the case had been fixed by Getzoff. The district attorney objected to this question upon the ground that it was irrelevant and immaterial and that the conversation testified to by Kessler was a conversation of Kessler with Davis. The objection was sustained. If in fact the testimony of Kessler had been confined to his conversation with Davis, the objection to the question addressed to Jack Rosenberg would have been properly sustained for the reason that the question whether or not there had actually been such prior conversation with Jack Rosenberg would have been immaterial. But in fact Kessler had been permitted to testify and had testified, notwithstanding objections thereto, concerning a previous conversation with Jack Rosenberg, and had given a statement of that conversation. If the defendant had been permitted to produce the testimony of Jack Rosenberg denying the conversation, it would have been to that extent an impeachment of the Kessler testimony. The evidence of such prior conversation should not have been received by the court and retained in evidence by the court as against the defendant's objections, without permitting the defendant to produce testimony contradicting the same. The general rule, which excludes evidence in

rebuttal of testimony concerning an immaterial matter, is based upon the fact that controversies about such matters are likely to "lead to endless confusion." Donelly v. Curran, 54 Cal. 282; People v. Mitchell, 62 Cal. 411. In the cases last cited, the irrelevant evidence had been received without any objection thereto. Moreover, the testimony which appellant sought to contradict was closely connected with the principal fact, to-wit, the supposed accusation. Without such contradiction, the defendant stood helplessly prejudiced before the jury.

[7] Taking the testimony of the several witnesses offered in corroboration of the story told by Ben Getzoff, it is exceedingly doubtful whether any of it, or all of it together, in and of itself amounts to corroborative evidence tending to connect the defendant with the commission of the crime charged. In order to give it effect even as tending in that direction, it seems at every point necessary to interpret and explain this "corroboration" in the light of the testimony of Ben Getzoff. It requires the testimony of Ben Getzoff to give it direction to the alleged crime, before it can be said to connect the defendant with the commission of the crime. But the law requires that such testimony offered in corroboration of the testimony of an accomplice shall *of itself* tend to connect the defendant with the offense charged. The following quotation seems appropriate: "As to all of the claimed corroborative evidence the prosecution must fail, for it does not even show 'the commission of the offense or the circumstances thereof' within the rule laid down in section 1111 of the Penal Code, and must further fail under the well-established rule approved in People v. Robbins, 171 Cal. 466, where, at page 470, 154 P. 317, 319, it is said that—'Where the circumstances when proved, taken separately or collectively, are consistent with the innocence of the accused, there is no corroboration, and a verdict of conviction thereon will be set aside.' Therefore, eliminating, as we must, the evidence of the accomplice in order to determine whether the other evidence is sufficient to connect the defendants with the crime of bribery, we conclude that such other evidence falls far short of the legal requirements to constitute corroboration." People v. Kempley, 205 Cal. 441, 461, 271 P. 478, 487. The Attorney General suggests that the statements contained in the foregoing quotation should not be accepted as authority for the proposition that the corroborative evidence must show the commission of the crime. The general rule no doubt is that the corpus delicti, such as, for instance, that a certain man was murdered, may be established by testimony of an accomplice showing that the man was found dead under described circumstances indicating murder. In such case it would be only that part of his testimony implicating the defendant that would have to be corroborated by other evidence. But in the case of a prosecution of a public officer on a charge of bribery, the fact that the crime was committed and the connection of the defendant therewith are of a single inseparable nature. In such case to hold that the testimony of the accomplice alone may be accepted as sufficient proof of the corpus delicti would wholly destroy the rule requiring corroboration of the testimony of an accomplice, as that rule is set forth in section 1111 of the Penal Code.

[8] Counsel for the people claim that the defendant "was convicted of the crime of asking a bribe of Ben Getzoff." This is true, because this was a part of the crime charged by the indictment, and the jury found the defendant "guilty of asking, agreeing to receive, and receiving a bribe, a felony, as charged in the indictment." Under instructions 23 and 26, reading them together, the court presented the case to the jury upon the theory that there was evidence which, if believed by the jury, would authorize them to find the defendant guilty of asking for a bribe, and upon the theory that this corrupt solicitation might be one occurring solely between defendant and Ben Getzoff. This theory was erroneous, because there was no evidence that the defendant asked a bribe of Ben Getzoff.

[9, 10] And even if it be assumed that the so-called corroborative testimony is technically sufficient to prove the asking, agreeing to receive, and receiving a bribe from Ed Rosenberg, nevertheless it leaves the case in that weak and unsatisfactory condition in which errors become important, because in such case they much more easily lead to a miscarriage of justice than in those cases where there is abundance of reliable evidence of the defendant's guilt. Section 4½ of article 6 of the Constitution was not intended to mean that the mere fact that the evidence may legally be able to stand up under the weight of the judgment is sufficient reason in all cases for refusing to set aside the judgment. The phrase "miscarriage of justice," used as descriptive of that condition of a cause which justifies the reversal of a judgment, has no hard and fast definition. It seems assured, however, that where errors have been committed, and where the appellate court finds that upon the record it is seriously doubtful that without such errors the defendant would have been convicted, then it may well be that errors which otherwise would not be considered to be seriously prejudicial, will require a reversal. See People v. Adams, 76 Cal. App. 178, 186, 244 P. 106, and numerous cases there cited.

There are numerous assignments of error, other than those to which we have referred. We do not find it necessary to elaborate upon them here. Let it be assumed that none of them would be sustained, or that if sustained they would not be of great importance. The

fact that the verdict rests upon the testimony of a self-confessed accomplice in the crime of bribery (a crime which necessarily impeaches the integrity of one who takes part in its commission), the fact that there is evidence indicating that the accomplice had interested motives for testifying against the defendant, the fact that the so-called corroborative evidence is of that inconclusive character which appears in the record, and the fact that those errors occurred to which we have given attention—these things together have left the cause in a condition which entitles the appellant to a new trial.

The judgment, and the order denying defendant's motion for a new trial, are reversed.

We concur: HOUSER, J.; YORK, J.

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105 Cal. App. 475

In re CASWELL'S ESTATE.

CASWELL v. CASWELL.

Civ. 4037.

District Court of Appeal, Third District, California.

May 3, 1930.

1. Husband and wife ⟹259.

Where husband or wife owns business before marriage and continues to conduct it thereafter, portion thereof attributable to personal activity and ability is "community property" (Civ. Code, § 164).

[Ed. Note.—For other definitions of "Community Property," see Words and Phrases.]

2. Husband and wife ⟹259.

Earnings acquired by skill of either spouse become "community property" (Civ. Code, § 164).

3. Husband and wife ⟹262(1).

Presumption is that property acquired by either spouse after marriage otherwise than by gift, bequest, or descent is community property (Civ. Code §§ 163, 164).

4. Husband and wife ⟹262(2).

Burden rests on party contending property acquired after marriage is not community property to establish contention by fair and convincing evidence.

5. Husband and wife ⟹255.

Interest of husband and wife in business *held* measurable by their respective contributions thereto in determining extent of community and separate property on husband's death (Civ. Code, §§ 163, 164).

The evidence disclosed that the husband made direct contribution of $5,600 and wife of $3,750 in purchase of billboard advertising business.

6. Husband and wife ⟹264.

Property of deceased husband *held* community property, where evidence did not show when or how property was acquired, or that it was separate property of deceased (Civ. Code, §§ 163, 164).

7. Husband and wife ⟹266.

Deed to realty and bill of sale of business from wife to husband *held* ineffective, where executed without consideration and without wife's knowledge of contents.

8. Husband and wife ⟹266.

In dealings with wife, husband must stand unimpeached of any abuse of confidence, or he must show transaction was fair and fully understood by wife.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Accounting of Gwendolyn Caswell, administratrix of the estate of W. H. Caswell, also known as William Henry Caswell, also known as Wm. H. Caswell, deceased. From portions of a decree directing distribution of part of the estate to E. W. Caswell and another, the administratrix appeals.

Reversed, with directions.

Ralph H. Lewis and George E. McCutchen, both of Sacramento, for appellant.

Bradford, Cross & Prior, of Sacramento, and J. Raleigh Kelly, of San Francisco, for respondent.

JAMISON, Justice pro tem.

This appeal is from certain portions of the decree of distribution rendered by the court in the estate of W. H. Caswell, deceased, wherein certain of the assets of said estate were held to be the separate property of decedent.

By said decree one half of the assets so decreed to be separate property of deceased was ordered distributed to respondent and Maud Caswell, brother and sister of deceased, and the other half to appellant, the surviving wife of deceased. Appellant, who is the administratrix of said estate and who petitioned the court to order the distribution of the assets of said estate, contends that all of the assets of said estate are community property, and that as the surviving wife of deceased she is entitled to have the whole thereof distributed to her.

It appears from the evidence that appellant and deceased were married on February 11, 1911, and that his death occurred on December 1, 1926. At the date of said marriage deceased owned an inchoate right to a half interest in a certain billboard advertising business known as the Caswell Company, which interest arose in the following manner:

On March 1, 1927, W. A. Caswell, the father of deceased and respondent, who was then the owner of a billboard advertising business known as the Caswell Company, entered into an agreement with them by the terms of which it was agreed that he lease said business, together with its equipment, to them for a rental of $15,000, same to be paid in installments of $100 per month, they to become the owners thereof when the full sum of $15,000 was paid to him. At the date of the marriage of appellant and deceased there had been paid on the said agreement the sum of $4,600.

W. A. Caswell died April 28, 1914, and by his will he bequeathed to his said sons the unpaid portion of the said $15,000, namely, the sum of $6,600, they having paid on said agreement from the date of said marriage up to the death of said W. A. Caswell the sum of $3,800.

On March 30, 1915, respondent leased to deceased his half interest in said business for a period of five years from that date at a monthly rental of $200 per month, and on April 1, 1920, respondent executed a new lease to deceased for another period of five years with the privilege therein given to deceased to purchase, during said five years, respondent's half interest in said business at a price of from $20,000 to $25,000, depending, for the amount to be paid, on the year in which the option was exercised. In 1921 deceased exercised the option for a purchase price of $22,000, having in the said year 1921 sold the said business and equipment to Foster & Kleiser for the sum of $100,000, $25,000 of which was paid in cash, a note was executed for $15,000 and for the remaining $60,000, 600 shares of the capital stock of the said Foster & Kleiser Company, of the par value of $60,000, were delivered to deceased.

The court found that these 600 shares of the capital stock of the said Foster & Kleiser Company were the separate property of deceased.

At the date of his death deceased had title to certain lots or parcels of real estate. One of the lots or parcels was deeded to respondent and deceased in 1909. The purchase price of this parcel is not stated. A mortgage for $700 was placed upon this parcel in the deal, but just when this mortgage was paid is not stated; however, respondent deeded his half interest in said parcel to deceased in the year 1916. The title to all the other lots or parcels was acquired after the said marriage and payment for same was made from the profits arising from the said business.

The court found that all of the lots or parcels of land owned by deceased at the time of his death was his separate property, except one parcel, presumably the home of appellant and deceased.

Appellant contends that all of these lots and parcels of land are community property. Appellant testified that at the date of her marriage she had in cash the sum of $3,750, which she turned over to deceased immediately after the said marriage. She further testified that at this time deceased was needing money for his business; that he was running on a shoestring; that he had very little money and was forced to pay the bills of the company weekly; that she turned the money over to him to be used in said business, and that she did this upon the understanding that it was to be used in the business and that it would give her an interest therein. A witness produced by appellant, a Mrs. Garliepp, testified that she was employed by the Caswell Company in March, 1911, and continued in that employment until 1915; that for the first year and three or four months she was deceased's secretary, and after that both secretary and bookkeeper until 1915; that in June, 1912, she had a conversation with deceased in which he told her that appellant had an interest in the said business; that she had put some three or four thousand dollars in it.

Respondent testified that he and deceased took over the business of the Caswell Company in 1907; that thereafter he and deceased conducted the said business until 1912, deceased having charge of the office and respondent having charge of the outside work; that on March 12, 1912, they entered into an agreement which was to continue in force for one year from that date, by the terms of which deceased was to have the sole charge of said business at a salary of $250 per month; that at the end of said year respondent returned and again took charge of the outside work until the execution of the lease in 1915. He testified that deceased never mentioned to him that appellant had ever turned any money over to him; that deceased never put any outside money in the business; that, had deceased put any outside money in the business, respondent would have known it.

The trial court found that, at the time of the marriage of appellant and deceased, appellant had as her sole and separate property the sum of $3,750 in cash, which she delivered to deceased, and that at that time deceased said: "This is for both of us; it goes into one pot for both of us; it is jointly for both of us." The court further found that no community property, nor any community earnings, went into the business of Caswell Company, or in any of the property found to be the separate property of deceased. And in its conclusions of law it found that the separate estate should be charged with the $3,750, which it found to be community property.

Section 163 of the Civil Code provides that "All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property." Section 164 of said Code provides that all other property acquired after marriage, including real and personal property situated within the state, is community property.

All of the real estate, except the half interest in the parcel deeded to deceased and respondent in 1909, was acquired after the marriage. The half interest in the business of the Caswell Company was not owned by deceased at the date of said marriage. He had at that date an executory right only to become such owner, though it may be said that he did have an interest in the said business at the date of said marriage to the extent that he had paid his part of the installments under the agreement with his father, that is to say, to the extent of $2,300. From the date of his marriage to the death of his father on April 28, 1914, he had paid the further sum of $1,900 upon the said agreement, and upon the death of his father, by bequest under his father's will, he became a half owner in the said business, the said bequest amounting to the sum of $3,300. It therefore appears that at the time deceased became the owner of the half interest in the said business he had paid thereon up to the time of his marriage the sum of $2,300; $1,900 was paid thereon after his marriage, and the payment of his portion of the said $15,000 was completed by the bequest of the $3,300 willed to him by his father. There is no positive evidence as to the source from which the $1,900, paid on the said agreement after the marriage, was derived, though it must have come either from the money appellant turned over to deceased, or from the deceased's earnings from the said business, for the evidence clearly shows that when the sons entered into the agreement with the father neither of them had any means, and this condition continued for several years thereafter. Relative thereto respondent testified as follows: "Well, when we first took the business over my father gave us, under the agreement there, my father gave us the same amount. * * * We didn't have to pay anything because he knew we didn't have no money; then we started in drawing just what we had to draw. * * * It was twenty-five dollars a week apiece we drawed, that went on for a year or two years, then we drawed thirty-five dollars a week, then he brought it up to fifty later on as the business increased." He further stated that by 1912 they were each drawing $50 per week, that they had no difficulty in meeting the payments to their father because they didn't go ahead with improvements only when they had money to spare.

It is evident from this testimony of respondent and from the testimony of appellant that at the date of said marriage deceased, outside of his interest in the said business to the extent of the installments he had paid, had little, if any, means of his own. It is also evident whether the said $1,900 was paid from the earnings of said business or from the money turned over to deceased by appellant it was community property.

[1, 2] Where a husband or wife owns a business before marriage and continues to conduct it thereafter, the portion thereof attributable to the personal activity, ability, and capacity of the person conducting the business will be regarded as community property. 5 Cal. Jur. 299; Pereira v. Pereira, 156 Cal. 1, 103 P. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107. Earnings acquired by the industry and skill of either husband or wife are to be credited to the community. Estate of Pepper, 158 Cal. 619, 112 P. 62, 31 L. R. A. (N. S.) 1092.

[3, 4] No evidence was produced indicating in any way that this $1,900 was acquired from any other source than from the community property. The presumption is that all property acquired by either spouse after marriage, otherwise than by gift, bequest, devise, or descent, is community property. 5 Cal. Jur. 311. And while this presumption is not conclusive, the burden rests upon the party affirming the fact to the contrary, and such fact must be established by clear and convincing evidence. Dimmick v. Dimmick, 95 Cal. 323, 30 P. 547; Morgan v. Lones, 78 Cal. 58, 20 P. 248.

There is substantial evidence that the money turned over to deceased by appellant went into his said business, while upon the other hand the evidence produced by respondent to the contrary is far from being so. The only evidence offered by respondent that this money did not go into deceased's said business is his own testimony to the effect he did not see it set forth or mentioned in the books of the company; that deceased never told him about having received it, and his conclusion from this that he would have know about it had it occurred. It is evident that the money was not turned over to deceased for the purpose of acquiring an interest in respondent's half of said property, but only an interest in deceased's half thereof. The separate property of deceased that went to the purchase of the half interest in the said business was the sum of $2,300 paid by him before marriage and the $3,300 willed to him by his father, making a total of $5,600. The $3,750 turned over to deceased by appellant undoubtedly went into and was used in deceased's half interest in the said business. We think that the language used by the appellate court in the case of Vieux v. Vieux, 80 Cal. App. 222, 251 P. 640, 643,

can be very appropriately applied to the facts of this case. Therein the court said:

"In the instant case, the husband having acquired an inchoate right, on compliance with certain conditions, to become an absolute owner of the property in question, and the facts showing that the required conditions were met with funds furnished by the community, aided by other funds issuing directly from the property agreed to be purchased, justice demands that the rights of the parties should be measured by the direct contributions made by the respective parties to the purchase price of the property."

[5] In the purchase of the said business deceased made direct contribution on the purchase price thereof in the sum of $5,600, while appellant made direct contribution on the purchase price in the sum of $3,750; therefore, the interest of each in the said business should be measured by the contribution made by each.

We are of the opinion that, except the half interest in the tract of land purchased from Nellie Reed and husband before the marriage, being the north half of the south half of lot 1, and the north half of the south half of lot 2, and the west 70 feet of lot 2 in the block bounded by R and S and Sixth and Seventh streets in the city of Sacramento, which the court found to be the separate property of deceased, and except the west half of lot 2 in the block bounded by and between P and Q and Tenth and Eleventh streets in said city, found by the court to be community property, all of the other parcels or lots of land owned by deceased at the time of his death, and the 600 shares of the capital stock of the Foster & Kleiser Company were separate property to the extent of $^{112}/_{187}$ thereof, and was community property to the extent of $^{75}/_{187}$ thereof.

[6] We are also of the opinion that the promissory note of C. R. Ray for $1,820, the five shares of the Sacramento Hotel Company and the 100 shares of the Sacramento Riverside Bath & Power Company, which the trial court found to be separate property of deceased, is community property, for the reason that there is nothing in the record showing or tending to show when or how this last-mentioned three pieces of property were acquired, nor any evidence that any of them was separate property of deceased. In passing upon this question in the Estate of Jolly, 196 Cal. 547, 238 P. 353, 356, the court said:

"The property in the possession of one of the spouses at the close of a long marital relation must be presumed to be community, unless a better right can be established by the spouse claiming it to be his or her separate property."

And, unless this presumption is controverted, the court or jury is bound to find according to the presumption. Stafford v. Martinoni, 192 Cal. 724, 221 P. 919.

[7] Respondent produced in evidence a deed executed by appellant to deceased dated October 24, 1918, for the undivided one-half interest in two of the said tracts of land, and also produced in evidence a bill of sale dated August 23, 1921 (erroneously marked 1911 in the copy of said bill of sale set forth in the transcript as Exhibit P), by which appellant conveyed to deceased all her right, title, and interest in the business of the Caswell Company. Appellant testified, relative to the circumstances under which she signed the said deed and bill of sale, that deceased would come home and present a paper to her and tell her to sign it, and when she would ask him what it was he would say for her to never mind, but to sign it. That trusting him implicitly, she sometimes didn't even look at the paper to see what it was, but at once signed it; that no consideration of any kind or character passed from deceased to her for either of these two conveyances.

Respondent offered no evidence tending to show that appellant received any consideration for these two conveyances, or for either of them, nor to controvert the testimony of appellant as to the circumstances under which she signed them. Inasmuch as in his brief respondent makes no mention of either of these conveyances, presumably he does not rely upon them.

[8] Confidential relations are presumed to exist between husband and wife, and, in his dealings with his wife, the husband, if he obtains any advantage over her, must stand unimpeached of any abuse of the confidence presumptively reposed in him by his wife and resulting from the marital relation, and, failing in this, he must bear the burden of showing that the transaction was fair and just and fully understood by the party from whom the advantage was obtained. Estate of Cover, 188 Cal. 133, 204 P. 583; Locke Paddon v. Locke Paddon, 194 Cal. 73, 227 P. 715.

Under these circumstances neither the said deed nor the said bill of sale was effective to convey to deceased appellant's interest in the property mentioned therein.

The decree is reversed, and the trial court is directed to enter a decree in accordance with this opinion.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

105 Cal. App. 331

PEOPLE v. HEAD.

Cr. 1560.

District Court of Appeal, First District, Division 2, California.

April 22, 1930.

Rehearing Denied May 7, 1930. Hearing Denied by Supreme Court May 22, 1930.

1. Criminal law ⟹161.

Statutory jeopardy lacks essential elements of common-law jeopardy and bars further prosecution solely because Legislature has so decreed.

2. Criminal law ⟹161.

Plea of former jeopardy, when based on common-law jeopardy, is favored.

3. Criminal law ⟹163.

Plea of statutory jeopardy cannot be extended to cases wherein it does not clearly appear that Legislature intended statutory bar to exist.

4. Criminal law ⟹178.

Failure to state reasons for dismissal of action in order does not bar further prosecution, where court records at time show good reason for dismissal, and it clearly appears to have been made in furtherance of justice (Pen. Code, §§ 1385, 1387).

Pen. Code, § 1385, authorizes dismissal of action or indictment on court's own motion or district attorney's application "in furtherance of justice" and requires that reasons be set forth in order entered on minutes, while section 1387 provides that order of dismissal is no bar, if offense is felony.

5. Criminal law ⟹170.

Pendency of information did not bar proceedings on indictment for same offense.

6. Criminal law ⟹178.

Failure to state in order dismissing information that indictment was pending for same offense, as already disclosed by court records, did not bar further prosecution under indictment.

7. Homicide ⟹332(2).

Jury's implied finding, supported by evidence, that defendant did not act in self-defense, will not be disturbed on appeal.

8. Homicide ⟹116(5).

To justify homicide in self-defense, it must appear, not only that defendant believed himself in imminent danger, but that he had sufficient grounds for such belief as reasonable person (Pen. Code, § 198).

Pen. Code, § 198, provides that circumstances must be sufficient to excite fears of reasonable person and that killer must have acted under influence of such fears alone.

9. Homicide ⟹276.

Whether circumstances were sufficient to excite fears of reasonable person and defendant acted solely under influence of such fears in killing deceased are essentially questions for jury in practically every case (Pen. Code, § 198).

10. Homicide ⟹244(2).

Defendant's testimony he believed himself in danger and testimony as to deceased's character and possession of knife *held* not conclusive on issue of self-defense, but for jury's consideration with all testimony.

11. Homicide ⟹244(1).

Evidence *held* to warrant jury's finding in murder trial that defendant did not act in self-defense.

12. Homicide ⟹231.

Evidence in murder trial *held* to warrant jury's finding that there was no considerable provocation precluding implication of malice (Pen. Code, § 188).

13. Criminal law ⟹938(1), 1156(3).

Motion for new trial on ground of newly discovered evidence is directed to sound discretion of trial court, whose action will not be disturbed, in absence of clear abuse thereof.

14. Homicide ⟹319.

Denial of new trial for newly discovered impeaching testimony as to how deceased left defendant's premises after shooting *held* not abuse of discretion.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Richard Head was convicted of second degree murder, and he appeals.

Affirmed.

Hearing denied by Supreme Court; Nourse, Justice pro tem., not voting.

Nathan C. Coghlan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Ralph O. Marron, of San Francisco, for the People.

SPENCE, J.

Appellant was convicted of murder of the second degree and sentenced to the state pris-

on. He appeals from the judgment and the order denying his motion for a new trial.

Upon this appeal it is contended: First, that the appellant had once been in jeopardy for the offense charged in the indictment; second, that the evidence does not support the verdict for the reason that it appears therefrom that the appellant acted in self-defense, and, third, that the evidence does not support the verdict for the reason that it appears therefrom that the killing was done without malice.

In the early morning hours of May 30, 1929, the appellant shot and killed one Edward Prouty. On two or three occasions on the previous day the deceased and two companions had visited the "bootlegging establishment" conducted by appellant. The final visit was made at about 10 o'clock in the evening and lasted until 4 o'clock in the morning, at which time the shooting occurred. It is unnecessary to set forth all of the sordid details of the events of the evening. The testimony shows that appellant's patrons engaged in a drunken debauch in the flat where appellant carried on his illegal occupation. Several persons present, including the deceased and his companions, had engaged in prolonged drinking, accompanied at various times by hilarity, quarreling, and drunken slumber on the part of some of the participants. As might well be expected, there is considerable conflict in the testimony concerning the circumstances preceding and following the shooting. The body of the deceased was found about two hours later on a dump some distance from the house where the shot was fired. The appellant was arrested that night and denied knowing the deceased or having any knowledge of the shooting.

On his plea of once in jeopardy the appellant relies upon a so-called "statutory jeopardy" rather than a "common law jeopardy." No previous trial was had, but two proceedings were instituted, one by information and the other by indictment, each charging the appellant with the murder of the deceased. Appellant was tried and convicted upon the indictment. While both the information proceeding and indictment proceeding were pending, the former was dismissed, and the order of dismissal did not set forth the reasons for such dismissal. Under the provisions of sections 1385 and 1387 of the Penal Code appellant contends that the failure to set forth the reasons for the order of dismissal of the information bars a further prosecution and makes the plea of once in jeopardy sustainable. We deem it proper to fully set forth the facts concerning these two proceedings.

The information proceeding was instituted by filing a complaint in the police court on June 3, 1929. A preliminary examination was held, appellant was held to answer, and an information was filed in the superior court on July 18, 1929. On August 1, 1929, and before appellant had entered his plea to the charge contained in the information, the information was dismissed on motion of the district attorney. The order granting the order to dismiss did not state the reasons therefor. In presenting the reasons for the motion to the trial court, the district attorney stated that appellant had been charged by indictment with the identical offense, had entered his plea thereto, and that said indictment proceeding had been theretofore set for trial. He further stated that the purpose of proceeding by way of preliminary hearing in the police court was to perpetuate the testimony of certain witnesses, as he believed that said witnesses might not be available at the time of trial.

The indictment proceeding was commenced on June 7, 1929, by filing the indictment here involved. On June 24 a plea of not guilty was entered. On the 31st day of August, and after the dismissal of the information proceeding, oral and written pleas of once in jeopardy and former acquittal were entered. Trial resulting in conviction was had on September 3. At the time the case was called for trial appellant moved to dismiss the indictment. The motion was based upon the above facts, being the same facts relied upon to support his plea of once in jeopardy. The motion was denied, and, under the instructions of the court, the jury found in favor of the people on the pleas of once in jeopardy and former acquittal.

[1-3] We find no merit in appellant's first contention that he had been once in jeopardy for the offense charged by reason of the filing and dismissal of the information, as above set forth. A statutory bar or statutory jeopardy, as it is sometimes termed, has been recognized, but such bar lacks the essential elements of common-law jeopardy and constitutes a bar solely for the reason that the Legislature has so decreed. Ex parte Hayter, 16 Cal. App. 211, 221, 116 P. 370. The plea of once in jeopardy, when based upon a common-law jeopardy, is a favored plea for the reason that the accused has once been placed on trial for the offense charged, and under the common law and constitutional guaranty is shielded from successive prosecutions for the same offense. On the other hand, where this plea is based upon a statutory bar, the accused ordinarily never stands trial for the offense charged, and such plea is not to be extended to cases in which it does not clearly appear that the Legislature intended the statutory bar to exist. Referring to the statutory provisions herein involved, section 1385 provides: "The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order an action or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes." Section 1387

provides: "An order for the dismissal of the action, as provided in this chapter, * * * is no bar if the offense is a felony."

[4-6] Although by the terms of section 1387 a dismissal of a felony made pursuant to section 1385 is not a bar to any other prosecution of the same offense, it is argued that the clause in section 1385 requiring the reasons for the dismissal to be set forth in the order is mandatory, and that the failure to set forth such reasons results in a bar to any further prosecution. The requirement of section 1385 is mandatory in its terms, and the reasons for the dismissal should have been set forth in the order. However, we cannot agree that under those sections the mere failure to embody the reasons for the dismissal in the order will result in a bar to further prosecution, where, at the time such dismissal is made, the records of the court show good reason for such dismissal, and it clearly appears that the dismissal was made in "furtherance of justice," as contemplated by section 1385. The procedure adopted of filing two proceedings charging the same offense is unusual and is not to be commended. The pendency of one, however, did not bar proceedings on the other. As stated in Bishop's New Criminal Law, volume 1, page 610, in discussing double jeopardy: "A man may be held on two or more indictments at the same time for one offense, and the pendency of the one will be no bar to proceedings on the other. Yet if justice to him requires, the court in its discretion will quash one or more of them." Here both proceedings were promptly commenced following the commission of the offense. The indictment proceeding was on the calendar for trial. No prejudice could result to the appellant, nor could his right to a speedy trial in the indictment proceeding be jeopardized by dismissing the information subsequently filed before he entered his plea thereto. It is apparent that the pendency of two proceedings constituted good reason for the dismissal of one, and the dismissal of the information under the circumstances was obviously in the interests of justice, as contemplated by section 1385. The failure to state in the order of dismissal the fact that another proceeding was pending charging the identical offense constituted a mere omission to state a fact which the records of the court already disclosed, and here constituted, at most, a mere irregularity in procedure without prejudice to appellant. It does not appear that the Legislature intended by the sections above mentioned to create a bar to further prosecution under the circumstances in the present case.

Appellant relies mainly upon certain language in the decision of People v. Disperati, 11 Cal. App. 469, 105 P. 617. The facts therein involved are clearly distinguishable, and the decision in that case is not in conflict with the views herein expressed. There the district attorney made the motion to dismiss almost two years after the alleged offense was committed, nearly six months after the complaint was filed, and just prior to the expiration of the sixty-day period following the disagreement of the jury in the first trial on the original information. From a reading of the decision it appears that the district attorney, at the time the motion was made, was endeavoring to get further time to prepare his case, and it does not appear that he could have made a sufficient showing to obtain a continuance. The order for dismissal was made, but failed to state the reasons. On the same day the district attorney filed a new complaint, and, after a second preliminary examination, proceeded to try the defendant upon a second information charging the identical offense. Aside from the reasons there stated by the district attorney at the time the motion was made, the records of the court showed no reason for the dismissal, and, as indicated on page 476 of 11 Cal. App., 105 P. 617, 620, the reasons stated by the district attorney in presenting his motion, even if embodied in the order of dismissal, would not have been sufficient to show that such dismissal was made in furtherance of justice, as contemplated by section 1385. In that case, not only did the order of dismissal fail to show the reasons for dismissal, but in addition it did not appear that the dismissal was made in furtherance of justice. On the contrary, it appeared that the motion for dismissal was made by the district attorney for his own convenience in securing further delay. He sought to accomplish this delay by dismissing the pending information and subsequently filing another proceeding charging the defendant with the same offense. Such procedure entirely ignored the defendant's constitutional right to a speedy trial on the offense charged. It may be noted that in discussing certain cases the court said, on page 475 of 11 Cal. App., 105 P. 617, 619: "The foregoing cases are certainly authority for holding—if authority other than the provision of the statute is needed—that the dismissal of an information in the interests of justice is not a bar to another prosecution for the same offense."

[7] It is next claimed that it appears from the evidence that appellant acted in self-defense. Much of the conflicting testimony is referred to in support of this contention. From a review of the entire record, it may be said that there was sufficient evidence to make self-defense an issue for the jury under instructions from the court. This issue was properly submitted to the jury, and they impliedly found against appellant. There was ample evidence to support this implied finding.

[8, 9] In order to justify the commission of a homicide in self-defense it must not only appear that the defendant believed himself

to be in imminent danger, but also that as a reasonable person he had sufficient grounds for his belief. The circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone. Pen. Code, § 198. In practically every case it is essentially a question for the jury to determine whether the circumstances were sufficient to excite the fears of a reasonable person, and whether the defendant acted solely under the influence of such fears. People v. Emerson, 130 Cal. 562, 62 P. 1069; People v. Anderson, 57 Cal. App. 721, 208 P. 204.

[10, 11] Obviously, neither the testimony of appellant to the effect that he believed himself in danger, nor the testimony concerning the character of the deceased, nor the testimony that the deceased had a knife in his possession would be conclusive upon the issue of self-defense. They were proper matters for the consideration of the jury, together with all the testimony concerning the circumstances preceding the killing. Briefly relating some of these circumstances, the testimony of the prosecution witnesses showed that, for some time prior to the shooting, the deceased and McCarthy, one of his companions, had been in the kitchen drinking with other patrons of appellant's place. This room was furnished with a couch, morris chair, and other furniture not usually found in a kitchen, but adapted to the use of appellant in making his customers comfortable. About 4 o'clock in the morning, Malezia, deceased's other companion, who had been asleep in an adjoining room, entered the kitchen and sat on the couch. He said to one of the women present, "Come over here, baby, and sit by me." Another patron, a man of large stature, resented this remark and a quarrel ensued. No blows were struck, but a fight was threatened between the various patrons, including the deceased and his companions. Appellant said: "There will be no fight go on in here." The deceased then said: "What are you going to do about it?" Appellant then pulled out a gun and said to the deceased: "You have been looking for it." The deceased said: "You haven't guts enough to shoot that." Whereupon the appellant shot the deceased. During the remarks between the deceased and appellant the deceased was standing several feet from the defendant with his hands behind his back. Several witnesses testified that they saw no knife in the possession of the deceased at the time. There was some conflict in the testimony regarding the positions of the various persons in the room, their actions, and their words, but the details of the tragedy, as told by some of the witnesses, fully warranted the jury's conclusion that the circumstances were insufficient to render the homicide justifiable under the plea of self-defense.

[12] The recital of the foregoing testimony disposes of appellant's third point that the killing was done without malice. Section 188 of the Penal Code defined malice as follows: "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." It is not necessary to consider whether the evidence was sufficient to constitute express malice, as above defined. Malice is implied where no considerable provocation appears, and the jury was warranted in finding upon the conflicting evidence that there was no considerable provocation for the killing of the deceased.

[13, 14] Although not referred to in the briefs, appellant, during oral argument, urged a reversal of the order denying his motion for a new trial, claiming that a new trial should have been granted on the ground of newly discovered evidence. The evidence referred to in the affidavits in support of the motion related solely to the testimony of one witness who claimed to have seen one of deceased's companions and another person apparently assisting a man into an automobile in front of appellant's place at about 4:30 that morning. The testimony offered at the trial left in doubt the manner in which deceased had traveled or been conveyed from appellant's place to the place where his body was found two hours later. The newly discovered evidence, if produced, would tend to show the manner in which the deceased left the premises after the shooting, and to impeach certain testimony of deceased's companions. It had no direct bearing upon the shooting or the events preceding the shooting. It is extremely doubtful whether such evidence would have produced any different result upon the trial. The motion for a new trial under such circumstances is directed to the sound discretion of the trial court, and the action of the trial court will not be disturbed, except in cases manifesting a clear abuse of such discretion. People v. Sing Yow, 145 Cal. 1, 78 P. 235. It does not appear that the trial court abused its discretion in denying the motion for new trial.

The judgment and order are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

105 Cal. App. 521

ROARK v. SOUTHERN TRUST & COMMERCE BANK et al.

Civ. 4059.

District Court of Appeal, Third District, California.

May 7, 1930.

1. Judgment ⟹251(1).

In suit for specific performance and accounting, judgment that plaintiff was entitled to deed on payment of certain sum *held* proper; issue being tendered by cross-complaint.

2. Specific performance ⟹117.

In action for specific performance and for accounting, refusal to receive evidence respecting partition *held* not error where before trial appellant dismissed cross-complaint "in so far as he asks for a partition."

3. Appeal and error ⟹1071(6).

Court's failure to make findings on certain issues is immaterial where appellant suffered no prejudice.

4. Tenancy in common ⟹28(4).

On accounting owners of apartment building *held* properly charged only with rents collected rather than rental value of apartments in possession.

Plaintiff had eight apartments in his possession, while defendant was in possession of four; but notwithstanding a scramble by each for the management of the property, there was a degree of co-operation between them.

5. Tenancy in common ⟹32.

On accounting between owners of apartment buildings, defendant *held* not entitled to credit for amount paid housekeeper.

It appeared that each party employed a housekeeper for a time, and that during the period covered by the accounting plaintiff himself did all work in connection with eight apartments and the greater part of the general work about the premises, but made no claim for such services. It did not appear from the evidence that defendant had authority to employ housekeeper at the common expense or that he had rightfully taken the management of the property or the four apartments away from plaintiff.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action for specific performance and for an accounting by A. T. Roark against the Southern Trust & Commerce Bank and others, in which Daniel A. Deacon filed a cross-complaint. From the judgment, cross-complainant appeals.

Affirmed.

Glen H. Munkelt, of San Diego, for appellant.

Sloane & Sloane and A. T. Roark, all of San Diego, for respondent.

FINCH, P. J.

In April, 1920, the plaintiff and the defendant Daniel A. Deacon purchased an apartment house, containing twelve apartments, in the city of San Diego. Title was taken in Deacon's name with the understanding and agreement that he would convey a one-half interest in the property to the plaintiff upon payment by the latter of a specified part of the purchase price of the property. At the time of the trial Deacon was the owner of a one-fourth interest in the property as tenant in common with his divorced wife, who owned a one-fourth interest, and the plaintiff, who owned a one-half interest, subject to an indebtedness of $6,500. The case was tried on issues raised by Deacon's cross-complaint and the plaintiff's answer thereto.

The prayer of the cross-complaint is for a judgment determining the rights of the parties in the property, adjudging that the plaintiff's rights therein are subject to an indebtedness of $6,500, partitioning the property and settling the accounts between the parties. By a supplemental cross-complaint Deacon alleged that "at all times since the first of May, 1926, cross-defendant A. T. Roark has been in sole possession" of eight of the apartments and "has held the same adversely to the said Daniel A. Deacon, and has refused possession of said apartments, or any of them, to the said Daniel A. Deacon, and has exercised sole and absolute control over each and all of said apartments; that the said A. T. Roark has forcibly prevented the said Daniel A. Deacon from entering into possession of said * * * apartments, or any of them; that said Daniel A. Deacon was entitled to possession thereof." Based on these allegations, Deacon demanded that the plaintiff "account for the rental value of each and all of the apartments so held to the exclusion of the cross-complainant."

An accounting was had and, based thereon, judgment was entered in favor of the plaintiff for $27.57. The judgment also requires the cross-complainant to execute a deed conveying the undivided one-half of the property to the plaintiff on payment by the latter of $6,500. The cross-complainant has appealed from the judgment.

[1, 2] Appellant contends that the court "erred in refusing to receive evidence on the issues of partition" and in adjudging that the plaintiff is entitled to a deed upon payment of the sum of $6,500, basing the latter conten-

tion on the ground that there was no such issue before the court. That issue, however, was tendered by the appellant's cross-complaint. In answer to the point first mentioned, it is sufficient to say that, prior to the trial, the appellant dismissed his cross-complaint "in so far as he asks for a partition of the property."

[3, 4] It is urged that the court erred in failing to find on the issues raised by the supplemental cross-complaint, in which appellant attempted to plead an ouster. Disregarding all objections urged by the respondent to the sufficiency of that pleading, it does not appear that the appellant has suffered any prejudice from the failure to find thereon. He has not called attention to any evidence warranting a finding of ouster. As stated by the trial judge: "The evidence appears to show that up to a certain time Mr. Roark was, by an agreement to which the cross-complainant, Daniel A. Deacon, at least, was a party, entrusted with managing and renting the entire building. It appears to show that subsequently Mr. Deacon took the physical possession of four out of the twelve apartments and placed locks upon the same, and that Mr. Roark responded by placing locks on the other eight; that apparently neither act was done with the idea of denying the legal title of the parties thus locked out, nor of dispossessing him of his share of any rental actually collected for any of the apartments involved; but these acts of the parties were what has been described by counsel for the cross-defendant as 'a matter of scrambling possession for purposes of management and administration.'" Notwithstanding the scramble for the management of the property, it appears that there was a degree of co-operation between them. The appellant's sister-in-law was employed by him as housekeeper of the apartments in his exclusive possession. He testified: "If the apartments were called for, people desired to look at them, she would attempt to show them the apartments. If she was blocked by a special keyhold, keys that Mr. Roark has been inserting to keep us out, then she asked Mrs. Roark for the key, and Mrs. Roark showed the apartment." Attention is not directed by the appellant to any evidence to the effect that the plaintiff's right to manage the property was ever canceled. Some of the appellant's testimony indicates that he attempted to cancel such right, but it does not appear that he had authority to cancel it. In fact, the trial appears to have been conducted on the theory of an accounting for rents received by the parties with little effort to prove an ouster. Under the circumstances, no finding on that question was required, and if one had been made it would necessarily have been in favor of the plaintiff. It follows that the plaintiff was properly charged only with the rents collected by him rather than the rental value of the eight apartments in his possession. The court applied the same rule to the appellant and charged him only with the rents collected by him for the four apartments in his possession.

[5] It appears that each party employed a housekeeper for a time, but that during the period covered by the accounting the plaintiff himself did all the work in connection with the eight apartments and the greater part of the general work about the premises. During the same period the appellant employed his sister-in-law to manage the four apartments and do part of the general work in connection with the hallways. The plaintiff made no claim for his services and was allowed nothing therefor in the accounting. The appellant claimed credit for the amount he had paid his housekeeper, but the court disallowed the claim. In addition to the natural injustice of the appellant's claim, under the circumstances, it does not appear from the evidence that he had authority to employ a housekeeper at the common expense or that he had rightfully taken the management of the property or the four apartments thereof away from the plaintiff.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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105 Cal. App. 584

GUSTAFSON v. BYERS.

Civ. 57.

District Court of Appeal, Fourth District, California.

May 10, 1930.

1. Appeal and error ⟹1010(1).

Appellate court would not disturb trial court's fact finding substantially borne out by evidence.

2. Attachment ⟹373.

Allegation in complaint respecting damages for wrongful attachment and detention of automobile by sheriff *held* sufficient as against general demurrer.

The allegation was, in effect, that defendant unlawfully withheld and detained an automobile from the possession of plaintiff to his damage in sum of $500 for detention thereof.

3. Pleading ⟹205(3).

General demurrer does not reach mere defects in allegations in matter of form.

4. Damages ⟹106.

For detention of personalty and having usable value which exceeds lawful rate of interest, reasonable value of use may be recovered as damages, notwithstanding statute (Civ. Code, § 3336).

Civ. Code, § 3336, provides that measure of damages for detention of personalty, when wrongfully converted, is value of property at time of conversion, with interest.

Appeal from Superior Court, San Diego County; Eugene P. McDaniel, Judge.

Action by Axel Gustafson against James C. Byers. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hamilton & Lindley and Emmett L. Fitzpatrick, all of San Diego, for appellant.

P. M. Andrews and A. E. Rogers, both of San Diego, for respondent.

OWEN, Justice pro tem.

On the 13th day of May, 1926, the defendant, as sheriff of San Diego county, attached a Buick automobile as the property of one Lillian L. Elphick. On the 15th day of May, 1926, the plaintiff herein filed with the defendant a third party claim, alleging his ownership of the attached property. On the 26th of the month, judgment was entered against Lillian L. Elphick, and an execution on the judgment was duly issued on the 29th of said month. Pursuant to the execution, and after due and legal notice, the sheriff sold the said automobile on the 8th day of June, 1926, and immediately parted with its custody.

On July 1, 1926, the plaintiff instituted this action against the defendant, said sheriff, for the sum of $850, the alleged value of the automobile, and the sum of $500 for the loss of its use.

After denying the allegation of the complaint, the defendant, as a further defense, alleges that Lillian L. Elphick had transferred the said automobile to the plaintiff herein, without any consideration, that the transfer was without immediate delivery, and was not accompanied by an actual or continued change of possession, and that the attempted sale was fraudulent as to creditors.

The court found that on April 17, 1926, while she was the owner and in possession and control of the automobile, Lillian L. Elphick had sold it to the plaintiff for a valuable consideration, that, after the sale and delivery thereof, there was an actual and continued change of possession, and that plaintiff thereupon became the lawful owner. The court further found that the defendant seized the automobile without right or authority of law, and that the allegations of his answer were untrue. Judgment followed for the plaintiff in the sum of $1,350.

On appeal, the defendant urges his demurrer to the complaint, attacks the court's findings as to the immediate delivery to plaintiff from Elphick of the automobile, and its actual and continued change of possession. He also excepts to the award for loss of use, and raises the question of the correct measure of damage.

[1] 1. The court's finding that there was a valuable consideration for the sale, followed by an immediate and actual delivery, and accompanied by a continued and actual change of possession, is substantially borne out by a reading of the transcript. We will not disturb that finding. 2 Cal. Jur. p. 919; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157; Kern Valley Bank v. Koehn, 10 Cal. App. 679, 103 P. 173; Davies v. Angelo, 8 Cal. App. 305, 96 P. 909; Thom v. Stewart, 162 Cal. 413, 122 P. 1069; Stockton Combined Harvester & A. Works v. Glens Falls Ins. Co., 121 Cal. 167, 53 P. 565.

[2, 3] 2. While the plaintiff may well have set out with more particularity his statement of damage for the detention of the automobile, it must be said that his allegation is neither ambiguous nor uncertain. An allegation in effect that the defendant unlawfully withholds and detains an automobile from the possession of the plaintiff to his damage in the sum of $500 for the detention thereof, all other facts essential to a cause of action being stated, is sufficient as against a general demurrer. A general demurrer "does not reach mere defects in allegations, defects in matter of form, as that essential facts appear only inferentially, or as conclusions of law, or by way of recital." 21 Cal. Jur. p. 109. Defendant proceeded to trial without urging his demurrer, or making any objection to the admission of evidence. Had such an objection been made, the trial court could have permitted an amendment curing the defect if there be a defect, but in this instance there is not a total absence of allegations essential to a statement of a cause of action. 2 Cal. Jur. 242.

[4] 3. The correct measure of damage for the detention of personal property when wrongfully converted is the value of the property at the time of conversion, with interest from that time. Civ. Code, § 3336. But where "the property has a usable value which exceeds the lawful rate of interest, the successful party is entitled to recover as damages for the detention, the reasonable value of such use." 5 Cal. Jur. 208; 8 Cal. Jur. 800; Morneault v. Natl. Surety Co., 37 Cal. App. 285–287, 174 P. 81.

In the instant case the court found upon competent testimony that the plaintiff had

been damaged by being deprived of its use while the automobile was wrongfully detained, in the sum of $500. We believe the correct measure of damage was used by the trial court in reaching his judgment.

The judgment is affirmed.

We concur: BARNARD, Acting P. J.; MARKS, J.

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105 Cal. App. 516

PEOPLE v. DE VAUGHAN.

Cr. 1569.

District Court of Appeal, First District, Division 2, California.

May 7, 1930.

Rehearing Denied May 20, 1930. Hearing Denied by Supreme Court June 5, 1930.

1. Infants ⟹20.

Evidence *held* insufficient to support conviction of doctor for violating Juvenile Court Act, where only evidence of guilt showed treatment of prosecutrix for gonorrhea (Juvenile Court Act, § 21, as amended by St. 1921, p. 773).

2. Witnesses ⟹274(2).

Character witness may be cross-examined respecting knowledge of reports of specific charges inconsistent with character he is called to prove.

3. Criminal law ⟹1170½(3).

Cross-examination of character witnesses, though improper, *held* not prejudicial, where questions were not answered (Juvenile Court Act, § 21, as amended by St. 1921, p. 773).

> The witnesses were asked: "Did you ever hear that C. M. plead guilty to the charge and is now in San Quentin Prison? * * * You don't know what the medical profession think of him?"

Appeal from the Superior Court, Alameda County; Fred V. Wood, Judge.

O. W. De Vaughan was convicted of an offense, and he appeals.

Reversed.

Clarence W. Morris, of San Francisco, James Allyn Myers, H. L. Richardson, of Oakland, and Granville T. Burke, for appellant.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for the People.

STURTEVANT, J.

By information the district attorney charged O. W. De Vaughan with having committed (1) a conspiracy to commit an abortion, (2) a conspiracy to commit a violation of section 21 of the Juvenile Court Law, and (3) that this defendant alone violated said section. The defendants pleaded not guilty. They were tried before the court sitting with a jury. The court advised the jury to acquit. The jury did not do so, but returned a verdict finding McCoy guilty on the second count and De Vaughan guilty on the first and second counts. Each moved for a new trial. The court granted McCoy's motion. It granted De Vaughan's motion as to the first count and denied it as to the second count. From the judgment of conviction and the order denying a new trial, the defendant has appealed.

On the 3d day of July, 1929, the prosecutrix went to work for Mr. and Mrs. McCoy, 1050 Sanchez street, in San Francisco. She testified that on the evening of the 6th of July, 1929, when Mrs. McCoy was away from home, Mr. McCoy gave her a glass of port wine. She dimly remembered that later she was on her bed. She did not remember anything else till Mrs. McCoy came home at 2 a. m. At that time she did not know that she and McCoy had had intercourse. Later, July 13, 1929, she discovered that she had had intercourse with him. On that same date Mr. and Mrs. McCoy took her to Dr. De Vaughan.

On the trial the prosecution claimed that Mrs. McCoy took the witness to have an abortion performed. The defense claimed that she was taken to receive treatment for gonorrhea. Judging by the orders made by it, we assume the trial court adopted the theory of the defense and rejected the theory of the prosecution on this part of the charge.

[1] As to the second count the prosecution contended that the commission of an abortion, or an attempt to do so, would bring the perpetrators within the purview of section 21 of the Juvenile Court Act (St. 1915, p. 1246, as amended by St. 1921, p. 773). But an abortion cannot be performed on a woman who is not pregnant. There is not in the record a particle of evidence that the prosecutrix is, or ever was, pregnant. The rulings of the trial court, as above shown, have, in legal effect, so held. If we consider that section 21 of the Juvenile Court Act commonly applies to acts committed to arouse the passions (People v. Cohen, 62 Cal. App. 521, 217 P. 78), there was some slight, but most highly improbable, evidence on that score as against the defendant McCoy, but, as to him, a new trial has been granted. As to this defendant there is not a word in the record which tends to support the charge, unless we assume he was guilty because he treated the prosecutrix for gonorrhea. To so hold would find no support in any language contained in the Juvenile Court Act.

In other words, we think the trial court was clearly right when it advised the jury to acquit the defendant. Thereafter, when the motion for a new trial was presented, it should have been granted as made.

[2, 3] The defendant took the stand in his own defense. Later the prosecution called witnesses to impeach his character for *truth and integrity*. In surrebuttal the defendant called witnesses to sustain his reputation for *truth and integrity*. The word truth needs no definition, it is understood by all. The word "integrity" has been defined as being synonymous with probity, honesty, and uprightness in business relations with others. Estate of Bauquier, 88 Cal. 302, 26 P. 178, 532. On cross-examination of the defendant's character witnesses many questions were asked, objections made, and objections sustained. The defendant claims misconduct on the part of the district attorney. "The rule is that a character witness may be cross-examined as to his knowledge of reports of particular and specific charges of acts inconsistent with the character which he is called on to prove." People v. Steele (Cal. App.) 280 P. 999. We have examined each question so complained of, and have weighed it by that rule. Two transgressed, "Did you ever hear that Clarence Martin plead guilty to the charge and is now in San Quentin prison? * * * You don't know what the medical profession think of him?" We cannot say that the mere asking of those two questions, neither of which was answered, constituted prejudicial error.

The judgment and order are reversed.

I concur: NOURSE, P. J.

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96 Cal. App. 203

PEOPLE v. AVERY.

Cr. 1061.

District Court of Appeal, Third District, California.

Jan. 8, 1929.

Criminal law ⟹1130(4).

Conviction of sex perversion *held* affirmed, where no brief was filed nor appearance made in behalf of appellant (Pen. Code, § 1253).

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

William Avery was convicted of sex perversion, and he appeals.

Affirmed.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was convicted in the superior court of Sacramento county of a felony, to wit, the crime of sex perversion.

The transcript on appeal was filed in this court October 18, 1928. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on January 8, 1929. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code the judgment and the order are affirmed.

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105 Cal. App. 555

McATEE v. McATEE.

Civ. 7260.

District Court of Appeal, First District, Division 2, California.

May 9, 1930.

1. Appeal and error ⟹1011(1).

Finding of trial court on conflicting testimony cannot be disturbed on appeal.

2. Frauds, statute of ⟹56(9).

Complaint seeking accounting of partnership funds, including money received from sale of land, was not for enforcement of contract affecting real property (Civ. Code, § 1624).

3. Frauds, statute of ⟹129(3).

Operation of partnership owning real estate for nearly four years was sufficient performance to take contract out of statute of frauds (Civ. Code, § 1624).

4. Partnership ⟹273.

Conduct of partner in selling all assets of partnership without consent of other justified decree of dissolution (Civ. Code, §§ 2425, 2426).

Civ. Code, § 2425, provides that dissolution of partnership may be had by decree of court under section 2426, which latter section provides that on application by or for a partner court shall decree a dissolution whenever partner has been guilty of such conduct as tends to affect prejudicially carrying on of business.

5. Partnership ⟹273.

Court on ordering partnership accounting should have decreed dissolution, where

one partner without consent of other had sold all assets of partnership (Civ. Code, §§ 2425, 2426).

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by I. S. McAtee against George W. McAtee. Judgment for plaintiff, and defendant appeals.

Modified, and as modified affirmed.

D. Joseph Coyne, of Los Angeles, for appellant.

Hiram E. Casey and Rohe & Freston, all of Los Angeles, for respondent.

BURROUGHS, Justice pro tem.

Plaintiff prosecutes this action for an accounting of partnership assets and for a decree that the partnership out of which the accounting arose was dissolved on or about March 22, 1922. The plaintiff was awarded a judgment, and the defendant appeals.

The first point advanced for a reversal of the judgment is the insufficiency of the evidence to support the findings. The court found that on July 7, 1919, the defendant was the owner in fee simple of one acre of land in the city of San Gabriel, Cal., together with the improvements thereon, consisting of a dwelling house, a wooden frame chicken house, two small paper chicken houses, and other minor improvements; that at said time and located on said property defendant owned and was raising approximately 400 chickens; that there were also a number of household furnishings and fixtures in the dwelling house on said property; that on said date defendant was financially involved and in need of money to maintain himself and said property; that on said date defendant made a proposition to the plaintiff that, if plaintiff would go into partnership with him, give him some money in cash, secure employment, and turn his wages over to the defendant, work on said premises after the regular hours of plaintiff's employment elsewhere by assisting defendant in and about the premises, in particular, feeding the chickens, washing and cleaning eggs, cleaning hen houses, and doing other incidental duties and chores about said place, attend to these matters on Sundays and holidays, and assist defendant in paying for groceries and household commodities, defendant would transfer to the said partnership or hold for the benefit of said partnership the said acre of ground and its appurtenances and would divide the profits and losses of the entire partnership adventure; that the plaintiff accepted said offer, but that said offer was not in writing; that pursuant to the said agreement and on the same day, plaintiff paid defendant $80 in cash and plaintiff immediately secured a job as a day laborer for a lumber company and commenced work on July 10, 1919, and, with the exception of four months in 1920, he worked continuously for said lumber company until on or about March 22, 1922, the date said partnership was dissolved; that he received a salary of $30 per week; that during said period of time he paid to the defendant from his salary the sum of $20 per week and retained therefrom the sum of $10 per week, out of which plaintiff paid for approximately 90 per cent. of the groceries and foodstuffs used by the plaintiff and defendant; that during the existence of said partnership there had been accumulated as partnership property an additional one-half acre of ground, one water pipe line, a fence around the said one-half acre of ground, and approximately 800 chickens in addition to those owned by the defendant at the time of the formation of the partnership; that the value of the said one-half acre at the time of the termination of the partnership was $1,000; that the total value of the other additional property aggregated $2,335. The court further found that on the 22d day of March, 1922, the defendant, without advising with the plaintiff in any manner whatsoever, sold and disposed of the entire assets of said partnership for the sum of $10,000, all of which sum has been paid to the defendant; that after paying the debts of said partnership there remained in the hands of the defendant the sum of $8,500 partnership property. It is further found that the defendant failed, refused, and neglected to account to the above-named plaintiff for the proceeds of said sale except to the extent of $475 in cash and certain articles of furniture of the reasonable value of $200. The court further found that said plaintiff was entitled to receive one-half of the proceeds of the said sale less the sum of $675, paid him by the defendant as aforesaid, and that there is now due to said plaintiff from the defendant the sum of $3,575, together with interest.

The appellant contends that the evidence concerning the one acre of land owned by him before the formation of the partnership is so conflicting that the court erred in including it in the partnership affairs. He claims that the only evidence upon this subject is the oral testimony of the plaintiff and the defendant; that said testimony cannot be reconciled, and as the burden of proof is on the plaintiff and there is none except his own self-serving testimony to sustain the court's finding that it was in fact partnership property, such finding is therefore unsupported by the evidence.

[1] A careful reading of the entire testimony in the case does no more than disclose a sharp conflict in the evidence. It was the province of the court to make a finding thereon, and having accepted the testimony of the plaintiff as the correct version of the transaction and having found that the acre of land was a part of the partnership property, upon well-settled principles of law, this court may not disturb such finding.

[2, 3] It is further claimed that, to be valid, an agreement affecting an interest in real estate must be in writing. Civ. Code, § 1624. There are two answers to this claim. The agreement sued upon is one of partnership. The one acre of land was sold by the appellant and the complaint herein seeks an accounting of the partnership funds, which includes the money received from the sale of the land, and does not seek the enforcement of any contract affecting real property. Furthermore, the evidence discloses that from the beginning of the partnership, and for nearly four years thereafter, the partnership was in full operation. This is a sufficient performance to take the contract out of the statute of frauds, even if it were a contract affecting real property. Pearsall v. Henry, 153 Cal. 318, 95 P. 154, 159; Colon v. Tosetti, 14 Cal. App. 693, 113 P. 365, 366; Standing v. Morosco, 43 Cal. App. 244, 184 P. 954.

[4, 5] Another reason advanced for a reversal of the judgment is that the court did not enter a decree dissolving the partnership. The plaintiff prayed for a decree that the partnership was dissolved on or about March 22, 1922. In his answer the defendant alleges that the partnership was dissolved during the month of April, 1922. The evidence is uncontradicted that on March 22, 1922, defendant sold, without the consent of the plaintiff, all of the assets of the partnership, and told plaintiff to seek living quarters elsewhere. That since said date there have been no partnership dealings.

Section 2425 of the Civil Code provides that a dissolution of a partnership may be had "by decree of court under section 2426," and the latter section provides that: "On application by or for a partner the court shall decree a dissolution whenever: * * * (c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business." We think it is clear that the appellant's conduct justified a decree of dissolution and it should have been made.

One other claim deserves attention. It is that the court did not make a finding of what constituted partnership assets. An examination of the court's findings numbered 1, 5, and 6 set forth such assets and are sufficiently definite for that purpose.

In accordance with sections 956a and 957 of the Code of Civil Procedure, the judgment is modified by adding thereto before the words "Done in Open Court this 7th day of June, 1927," the following paragraph: "That said partnership was dissolved on or about the 22d day of March, 1922."

As so modified the judgment is affirmed, with costs to respondent.

We concur: NOURSE, P. J; STURTEVANT, J.

105 Cal. App. 519

PHILLIPS v. KINGHAM.

Civ. 4042.

District Court of Appeal, Third District. California.

May 7, 1930.

1. New trial ⟹71.

Trial court is not bound by conflicting evidence rule or jury's finding in passing on motion for new trial, if evidence warrants contrary finding.

2. Appeal and error ⟹1005(3).

Trial court's determination of fact, as to which evidence was conflicting, on motion for new trial, is conclusive on appeal.

Appeal from Superior Court, Nevada County; J. R. Hughes, Judge.

Action by Alfred Phillips against Alfred H. Kingham. Verdict for defendant, and, from an order granting a new trial, defendant appeals.

Affirmed.

Lynne Kelly and Nilon, Hennessy & Kelly, all of Grass Valley, for appellant.

E. H. Armstrong, of Grass Valley, for respondent.

FINCH, P. J.

The plaintiff sold and delivered to the defendant a new automobile at the price of $1,800, and agreed to accept a second-hand automobile as payment on the purchase price in the amount of $950; the remainder being paid in cash. The defendant was unable to transfer the old automobile to the plaintiff because a finance company held title thereto and the certificate of ownership thereof; it having held the title and certificate at the time the defendant purchased such automobile and at all times thereafter. Upon the defendant's failure to make the transfer, the plaintiff brought this action to recover $950, the sum for which the plaintiff had agreed to accept the old automobile in payment on the price of the new. The jury returned a verdict in favor of the defendant, and, on motion of the plaintiff, the court granted a new trial on the ground of insufficiency of the evidence to warrant the verdict. The defendant has appealed from the order granting a new trial.

[1] "The trial court is not bound by the rule of conflicting evidence as is the appellate tribunal; nor is it bound by the finding of the jury in passing upon a motion for a new trial on the ground of insufficiency of evidence to justify the verdict, if there is sufficient evidence to sustain a contrary finding." 20 Cal. Jur. 111.

[2] To review and comment at length on the evidence in this case might tend to prejudice the rights of the parties in the retrial thereof. It is deemed sufficient to say that the plaintiff testified that the defendant, at the time of the transaction in question, agreed to procure the certificate of ownership of the second-hand automobile and transfer it to the plaintiff. While it is true that the defendant denied this testimony and testified to facts tending to excuse him from delivering the certificate to the plaintiff, the trial court has resolved this conflict in favor of the plaintiff, and such determination is conclusive on appeal.

The order is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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105 Cal. App. 570

CARR v. ANDERSON.

Civ. 7307.

District Court of Appeal, First District, Division 1, California.

May 10, 1930.

1. Cancellation of instruments ⟹53.

Findings, in action to cancel deed, *held* to determine that grantee had not obtained manual possession of deed at time claimed.

2. Evidence ⟹69.

There is presumption of law that person takes ordinary care of his own concerns (Code Civ. Proc. § 1963).

3. Deeds ⟹194(2).

That deed was in possession of grantor and kept in drawer by her up to date grantee claimed deed was delivered, and after grantor's death deed was found in same drawer, *held* to raise presumption of nondelivery.

4. Deeds ⟹208(1).

Evidence, in action to cancel deed, *held* to support finding that deed was not delivered to grantee by grantor.

5. Appeal and error ⟹994(3).

Weight of evidence offered to impeach grantee and his witness, in action to cancel deed, *held* for trial court.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Alida B. Carr, as administratrix of the estate of Eva V. Anslyn, deceased, against Milton Anderson. Judgment for plaintiff, and defendant appeals.

Affirmed.

Edward S. Bell, of Oakland, for appellant.

Lovett K. Fraser, of San Francisco, and Sheridan Downey, of Sacramento (Morgan V. Spicer, of San Francisco, of counsel), for respondent.

McKENZIE, Justice pro tem.

The defendant, under the name of Mynard Anslyn, which he stated at the trial was his true name, in the year 1914 married Eva V. Anslyn, plaintiff's intestate. They lived together about ten years and then divorced. In 1926 defendant under the name of Milton Anderson married another woman. The defendant and his second wife separated at a time not disclosed by the record, but prior to his first wife's appearing again on the scene. This second marriage had not been dissolved at the time of the trial. On the 1st of January, 1928, the first wife (plaintiff's intestate), came to defendant's home in Berkeley, where he was living alone in a house which he owned. From the 1st of January, 1928, to March 6th of the same year, when the woman died, the defendant and his former wife lived together in this house without other occupants.

Some time between January 1 and February 27, 1928, plaintiff's intestate and defendant discussed the proposition of conveying the real property of each to the other and of his converting a bank deposit of his into a joint account. The amount of money in bank was $500, but there is no satisfactory evidence in the record which shows that this account was transferred to a joint account. There is no direct evidence as to the value of the respective real properties; however, the record shows that the intestate's real property involved in this action, which is situate in Merced, brings a monthly rental of $200 per month, but is incumbered with a trust deed to secure an undisclosed amount. It may be inferred that the property has a substantial value. It may also be inferred from the evidence that she had no other property of substantial value. In many respects the record is not comprehensive, but it may be inferred therefrom that the intestate's nearest relatives were nieces and nephews. It may likewise be inferred that defendant's Berkeley property was a modest residence, but of substantial value, and that the residence and bank deposit of $500 constituted all of defendant's property. The evidence does not disclose any relative of defendant, other than his second wife, who was not living with him, but from whom he had not been divorced.

On the 27th day of February, 1928, the intestate and defendant went to an abstract of-

fice and had prepared two ordinary grant deeds, one from the intestate to defendant of the Merced property and the other from defendant to the intestate of the Berkeley property. Both deeds described the defendant as an unmarried man. These deeds were signed and acknowledged by the respective parties; the defendant then going to his place of employment and the intestate returning to their home with the two deeds and placed them in a drawer where she had a number of her personal papers. Shortly after midnight on March 7, 1928, the defendant on returning to his home from work, found the intestate dead in a bathroom. The next day a woman friend of the deceased came to the residence, and while there examined the house to ascertain what papers could be found which had belonged to the deceased. In the drawer, where Mrs. Anslyn had placed them when she returned from the abstract office, she found the two deeds in question, together with a number of other papers belonging to the deceased.

The defendant was the only witness who testified concerning the negotiations and understanding concerning the making of the two deeds; and he testified that the agreement was that his deed was to have no effect unless he died before the intestate and the same understanding was had in regard to her deed, and that neither of said deeds was delivered at the time Mrs. Anslyn placed them in the drawer.

Up to this point both sides are agreed that the foregoing are the facts. The controversy centers around an incident that defendant claims occurred at defendant's home on the 2d day of March, 1928, when the intestate, the defendant, and W. F. Sergeant were present. At this time the defendant claims there was a complete delivery of Mrs. Anslyn's deed to him. To prove this fact he relies upon the testimony of himself and Mr. Sergeant, the only living witnesses to what occurred at this time.

At the trial Mr. Sergeant testified that he was manager of the insurance department of a real estate concern in Berkeley; that he called at defendant's home about 10 o'clock on the morning of March 2, 1928; that he did not know Anderson very well, but had met him in November; that he had never seen or heard of Mrs. Anslyn until this morning; that he went to the house to collect a premium that was due for insurance on Anderson's house; that he was in the house for an hour with Anderson and Mrs. Anslyn, and that they were in the kitchen all the time, he and Anderson standing and Mrs. Anslyn sitting on a chair; that they engaged in conversation, and from this conversation he learned that she owned an auto camp in Merced with which he was familiar, and that after some conversation about the auto camp Mrs. Anslyn got up from the chair she was sitting in when she was talking to Sergeant and went out of the room. "Coming back into the kitchen again where Mr. Anderson and I were talking, she said, 'Here is a deed to the property we were talking about at Merced,' and I cannot remember the exact words she said to Mr. Anderson, but she just handed me the deed and I gave it back to her, and she said something to the effect that she was giving this property to Mr. Anderson." At this point counsel for Anderson asked the witness: "Did she hand the deed to him?" Answer: "Yes, she handed him the deed." "And he put it in his pocket?" "Yes." "You actually saw her deliver that deed?" "I saw her." "And heard what she said about giving him the property?" "Yes." On cross-examination Mr. Sergeant testified that no mention was made of a deed from Anderson to Mrs. Anslyn and there was no mention of any other deed; that he did not know what prompted Mrs. Anslyn to spring out of her chair and get the deed or do what she did, and that the only reason he knew of was that they had been discussing the property.

In regard to Mr. Sergeant's testimony concerning the hour of the day he went to Anderson's house, he was asked on cross-examination if he had not told Mr. Fraser, one of counsel for plaintiff, that at the time in question he went to the Anderson house at about 8 o'clock in the evening, and he said he had not, that he had a conversation with Mr. Fraser, and that he told him about having met Anderson about 8 o'clock in the evening during the month of November. To impeach Sergeant, Mr. Fraser testified that on the 3d of April, 1928 (within a month after Mrs. Anslyn died), Mr. Sergeant told him that the meeting when the deed passed took place at 8 o'clock in the evening, that there was no talk between them about a meeting in November, and there was no occasion to talk about a meeting in November.

Concerning what happened at the house when the deed is alleged to have been delivered, the defendant testified: That he saw the deed in the drawer where Mrs. Anslyn had placed it and the next time he saw it was when she brought it in the kitchen, and "she brought it in there and told Mr. Sergeant she was going to deliver it to me, and he glanced at it and looked over it and handed it back to her, and she presented it to me. She gave it to me. I don't remember what was said. She said it was mine. I give it to you. I put it in my pocket. I think I put it back in the drawer next morning with her papers and my papers." That the deed remained in the drawer until after her death, and that Anderson took the deed out of the drawer the day following her death. "Q. Why did you draw these deeds? A. Because she said she wanted to do what was right. She said she wanted to give me that property, as she left me and treated me so mean. Q. What was said about you giving her your property? A. I told her

if she done that I am not ungrateful, and I would give her my own home. I owned no other property except about five hundred dollars in the bank." Before the trial Mr. Anderson had been examined under oath before a judge of the superior court concerning the property belonging to Mrs. Anslyn's estate, and on cross-examination he admitted having said at that time that he had known Sergeant about two years, and that "we both had known him"; that at said hearing counsel for plaintiff asked the following questions, and he made the following answers:

"Q. Now, was it (meaning the deed) removed from that place after she put it there (meaning the drawer where Mrs. Anslyn had placed the deed) until you removed it after her death, so far as you know? A. No, sir, I didn't meddle with it at all.

"Q. Had she passed it to you, or handed it to you (meaning the deed) before her death or not? A. Yes, before her death.

"Q. When did she hand it to you? A. It was somewhere around the 1st or 2d of March.

"Q. Now, you have testified that she put it in this drawer when she came home from signing it and that it remained there until after her death. Now, do you desire to change that statement? A. There was a man came there, a Mr. Sergeant, and she delivered it to him and gave it to me in front of him.

"Q. Did you believe that you were entitled to the rent from the Merced Auto Camp, after you got that deed, during Mrs. Anslyn's lifetime, supposing she had lived ten years? A. No, I would not, it wouldn't be mine then.

"Q. You didn't expect to have dominion and control of that property if she lived? A. No, sir.

"Q. You expected that she would continue to pay the taxes and pay the insurance, did you? Is that right? A. Yes, sir."

After Mrs. Anslyn's death, Anderson took the deed from the drawer in question and had the same recorded.

The foregoing somewhat lengthy statement is a fair summary of all the relevant and material facts.

This action is brought by the administratrix of the estate of Mrs. Anslyn to cancel said deed on the ground that it was never delivered.

[1] The trial court made findings and rendered judgment in favor of plaintiff, but did not make a strictly direct finding as to how the decision was arrived at. However, there is certainly nothing in the findings or in the record that tends to show that the trial court found to be true the facts testified to by defendant concerning the delivery on March 2d.

From the foregoing facts an action might be prosecuted on two theories: First, that the incident which defendant claims occurred on March 2d never took place, and, second, that even if it did take place, there was not a legal delivery. The allegations of plaintiff's complaint relating to delivery are as follows: Paragraph IV: "That on or about the 27th day of February, 1928, Eva V. Anslyn made and acknowledged a deed of the property described * * * to Milton Anderson, a single man. That at the same time and place the said Milton Anderson made and acknowledged a deed to said Eva V. Anslyn of his property, * * * and in said deed he set forth he was a single man, and he acknowledged said deed as a single man." Paragraph V: "That said deed from said Eva V. Anslyn to said Milton Anderson * * * was never delivered to said Milton Anderson or any other person with the intention of becoming absolute or vested." Paragraph VI: "That after the death of said Eva V. Anslyn on the 6th day of March, 1928, the said Milton Anderson obtained possession of said deed from the personal belongings of said Eva V. Anslyn and had the same recorded. * * *" The defendant answered these allegations by way of general denials, and made no allegation concerning how he got possession of the deed. The court found generally that all plaintiff's allegations were true, and made a special finding in the following words: "The court finds that the said deed described in Exhibit A of plaintiff's first cause of action in her complaint was never delivered during the lifetime of the grantor, Eva V. Anslyn, *or at all,* to said defendant or to any other person." In addition to the pleadings and findings, an examination of the record discloses that the principal issue of fact urged and contested at the trial centered around the fact as to whether or not defendant obtained the manual possession of the deed from Mrs. Anslyn on the 2d day of March. It will be noted that plaintiff's complaint contains two paragraphs relating to delivery: Paragraph 5 is applicable to both theories; paragraph 6, though indirect, raises the issue as to whether or not defendant obtained possession of the deed the day he got it from the drawer or on the 2d day of March, and this fact seems to have been determined by the findings. We therefore conclude that whether or not defendant obtained manual possession of the deed on March 2d was an issue of fact properly before the court, and that the findings determine this fact in favor of plaintiff.

From the foregoing it would seem that, before we can pass on the legal effect of the transactions alleged to have occurred on March 2d, we must first determine whether or not under the evidence we can say, as a matter of law, that the court was in error in finding that what defendant claims happened on March 2d did not occur, because, if the court's finding in this particular is sustained, it would be only of academic interest to try and reconcile the seemingly conflicting cases that counsel present in the case at bar. On one side counsel relies on a line of distinguished cases, of which Stone v. Daily, 181 Cal. 571, 185 P. 665, and Hotaling v. Hotaling, 193 Cal. 368,

224 P. 455, 56 A. L. R. 734, are quite conspicuous. On the other side is presented a number of eminent cases, of which Mowry v. Heney, 86 Cal. 471, 25 P. 17, and Blackledge v. McIntosh, 85 Cal. App. 475, 259 P. 770, are illustrative.

[2] Now coming to the question about determining as a matter of law that this court should say that the trial judge was not justified in finding that the deed was not even manually delivered on March 2d, it is proper to consider what effect would follow if defendant's contention were upheld: Mrs. Anslyn and Anderson had each made a deed to the other of substantially all their properties. Under the law neither would inherit from the other. Anderson claims his deed was not delivered, but hers was. If her deed was legally delivered and Anderson had died on the 3d of March, his heirs would have taken not only his property, but also the property formerly belonging to Mrs. Anslyn, and she would be left with nothing. If the situation was reversed and Anderson had died first, and Mrs. Anslyn set up the claim that Anderson's deed was delivered to her, but hers to him was not, the situation would be the same on the other side. If both deeds were delivered, it would amount to nothing but an exchange of properties. The defendant testified that Mrs. Anslyn promoted this deal, and that she was a smart business woman. She was presumed to know the law; and the court had a right to consider whether or not she would do what defendant claims she did on March 2d. There is a presumption of law "that a person takes ordinary care of his own concerns." Section 1963, Code Civ. Proc.

[3] According to the defendant's own testimony, the deed in question was in Mrs. Anslyn's possession and kept in a drawer by her up to the 2d day of March, and after her death it was found in the same drawer. This raises a presumption it was not delivered. Donahue v. Sweeney, 171 Cal. 388, 153 P. 708.

[4, 5] The foregoing summary of facts and other inferences that may be drawn from reading a transcript of the testimony might be well calculated to form in the court's mind an opinion that Anderson's story of what occurred on March 2d was a very strange and improbable one. Then, too, the plaintiff offered evidence tending to impeach both Anderson and Sergeant, and it was for the trial court to weigh this evidence. And, finally, the trial court saw, observed, and heard the witnesses, and we cannot say as a matter of law that he was not justified in finding that the story told by Anderson and his witness concerning what happened on March 2d was not true.

Defendant's notice of appeal states that the appeal is from the judgment and order denying a new trial. The only papers in the record concerning a new trial are the notice of motion and the order denying the motion. Furthermore, the defendant makes no point in regard to this order.

The judgment and order appealed from are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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105 Cal. App. 593

In re MINER'S ESTATE.

ROBERTS et al. v. KENNEALY et al.

Civ. 7038.

District Court of Appeal, Second District, Division 1, California.

May 12, 1930.

Rehearing Denied June 3, 1930. Hearing Denied by Supreme Court July 7, 1930.

Wills ⟹118.

Facts *held* to show testatrix acknowledged will in presence of two witnesses present at same time, where both were present during acknowledgment to second person witnessing will day after first witness did (Civ. Code, § 1276).

Civ. Code, § 1276, relates to the execution and attestation of a will. Evidence disclosed that testatrix signed and acknowledged the will in the presence of one of the witnesses thereto who, at the same time as such witness, affixed her signature thereto, and that on the day following testatrix showed the will to a second witness, who thereupon read it, and that at such time, and continuously thereafter, during the alleged acknowledgment, the first witness was either in the same room with, or in an adjoining room to that occupied by, testatrix and second witness.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Petition to revoke the probate of the will of Francis Nita Miner, deceased, by Charles A. Roberts and another against Emma Kennealy and others. From an order denying the revocation of the probate of the will, the contestants appeal.

Affirmed.

D. L. Di Vecchio, of Los Angeles, and Albert Picard, of San Francisco, for appellants.

Frank G. Tyrrell and MacDonald & Thompson, all of Los Angeles, for respondents.

HOUSER, J.

This is an appeal from an order by which a petition for the revocation of the probate of the will of Francis Nita Miner, deceased, was denied.

As stated by appellants, the sole question presented for consideration "is whether the

will was acknowledged by decedent in the presence of the two witnesses, present at the same time."

The evidence which related to the acknowledgment of the will which was adduced at the hearing of the contest showed that on a certain date the testatrix signed and acknowledged the will in the presence of one of the witnesses thereto, who at the same time, as such witness, affixed her signature thereto. On the day following, while the second witness and the testatrix were in a bedroom in an apartment occupied by the latter, the testatrix showed the will to the second witness, who thereupon read the same. At that time, and continuously thereafter during the alleged acknowledgment of the will by the testatrix, the first witness was either in the same room with, or in an adjoining room to that occupied by, the testatrix and the second witness. As testified by one of the witnesses, it was "only just a small apartment." The size of each of the rooms was approximately ten by thirteen feet. "It was very close quarters." The door between the two rooms was open, and, with the exception that the first witness did not actually see the second witness attach her signature to the will, the first witness saw all that took place, and heard all that was spoken between or among the persons then and there present. As stated by the first witness, she "had a good idea that she (the second witness) signed it."

In response to a question as to what she heard at the time the will was attested by the second witness, the first witness testified:

"Well, I believe after Mrs. Cotter (the second witness) had read the will, I believe Mrs. Miner said to her, 'What do you think of this,' or, 'What do you think about it?' or, 'What do you think of this will?' and Mrs. Cotter made some remark, that it was perfectly all right for her, it made no difference, if those were her wishes, something to that effect, and Mrs. Miner said, 'Those are my wishes, I want my two own sisters to have my property,' or words to that effect; I don't know, they may not be exactly just the same, but words to that effect that she said. * * * Well, I heard Mrs. Cotter ask her if she was going to leave anything to the half brothers, and she said, no."

In substance, the second witness gave identical testimony.

Primarily section 1276 of the Civil Code contains the rules which govern the execution and attestation of a will of the character of that here under consideration. As far as appears to be pertinent, the requirements are that there must be two attesting witnesses, each of whom must sign the same as a witness, at the end of the will, at the testator's request and in his presence, that the instrument purporting to be a will must be acknowledged by the testator to the attesting witnesses, "to have been made by him," and that at the time of subscribing or acknowledging the will the testator must declare to the attesting witnesses that the instrument is his will.

In Estate of Dow, 181 Cal. 106, 115, 183 P. 794, 798, it is held that, in the execution of an ordinary written will, it is unnecessary that the subscribing witnesses sign their names in the presence of each other. In that connection, in part, the court said: "To hold that the witnesses must sign in the presence of each other would be to write into the statute a requirement that is not there, and would be digging another pitfall for those unfamiliar with judicial decisions who rely upon what seems to be the plain letter of the Code."

No question is raised by appellants regarding the fulfillment of the statutory requirement to the effect that each of the witnesses to the will must subscribe his name thereto "at the testator's request"; in fact, it is conceded by appellants that in the execution of the will the testatrix complied with all statutory requirements, excepting only as to the acknowledgment by her to each of the attesting witnesses, "present at the same time," that the propounded instrument was her will.

In the Estate of Silva, 169 Cal. 116, 122, 145 P. 1015, and later, in the Estate of Cullberg, in the same volume, at pages 365, 368, 146 P. 888, where many authorities are cited in support of the doctrine there announced, it is ruled that in the execution of a will it is unnecessary that the testator in so many words declare the document to be his will, or that he expressly request the witnesses to sign it as such; but that, although such verbal declaration and request be lacking, they may be implied from the conduct of the testator and the attendant circumstances. To the same effect is decided in Estate of Johnson, 152 Cal. 778, 780, 93 P. 1015.

Supplementing the facts hereinbefore set forth, as well as repeating part of them, it appears that at the time in quest on the testatrix and the second witness to the will went into a bedroom, where the testatrix produced from "a pocket-book * * * in a little desk in the corner," the document here propounded as her will, and which theretofore, under the direction of the testatrix, had been prepared by the first witness, and which had been signed by the test trix and attested by such first witness. Thereupon the testatrix requested the second witness to read the "paper," and that the first witness bring pen and ink, with which request the first witness complied. The testatrix then inquired of the second witness if she thought it (the will) was "all right"; to which inquiry the witness responded, "Well, it is all right, Nita, *if that is your wishes*, but wasn't you going to leave Frank and Charley?" To such question the testatrix

replied, "No, 'she didn't want any of them to have any of her money, that she hardly knew them until a short time ago, that they were only half brothers and she wanted her two sisters to have her money.'" It also appears that at that time the testatrix stated that *"those are my wishes; I want my two own sisters to have my property."* The testatrix "said Mrs. Wilson (the first witness) had signed it while I (the second witness) was gone and they was waiting for me to come back to sign it." Thereupon the second witness attached her signature to the will. During all of such time, with the exception hereinbefore noted, the first witness saw or heard everything that was said or occurred as between the testatrix and the second witness. In such circumstances, it would seem impossible to place a construction upon the conduct of the testatrix other than as a declaration to the attesting witnesses, "present at the same time," that the instrument was her will.

The order is affirmed.

We concur: CONREY, P. J.; YORK, J.

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105 Cal. App. 797

In the Matter of the ESTATE of Francis Nita MINER, Deceased.

Emma KENNEALY and Jack Kennealy, Proponents and Respondents, v. Charles A. ROBERTS and Frank A. Roberts, Contestants and Appellants.

Civ. 7037.

District Court of Appeal, Second District, Division 1, California.

May 12, 1930.

Rehearing Denied June 3, 1930. Hearing Denied by Supreme Court July 7, 1930.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

D. L. Di Vecchio, of Los Angeles, and Albert Picard, of San Francisco, for appellants.

MacDonald & Thompson, of Los Angeles, for respondents.

HOUSER, J.

The appeal herein, which is from an order admitting to probate the will of Francis Nita Miner, deceased, is companion to that this day decided by this court under the same title as appears in this appeal. 288 P. 120. In substance, the facts presented by the record in the respective appeals are identical one with the other. Relying upon the decision in the former appeal as an authority, it is ordered that the order from which the appeal herein is taken be, and it is, affirmed.

We concur: CONREY, P. J.; YORK, J.

105 Cal. App. 578

In re BACIGALUPI'S ESTATE.

Civ. 7374.

District Court of Appeal, First District, Division 2, California.

May 10, 1930.

Rehearing Denied June 6, 1930. Hearing Denied by Supreme Court July 7, 1930.

1. Wills ⟹736.

Specific devises *held* exonerated from payment of expenses of administration, where residuum was sufficient (Civ. Code § 1359; Code Civ. Proc. § 1563).

Civ. Code, § 1359, prescribes order in which property of estate must be resorted to for payment of debts, and Code Civ. Proc. § 1563, provides that all estate given by will to legatees or devisees is liable for debts, costs of administration, and family expenses in proportion to value or amount of the several devises or legacies.

2. Wills ⟹736.

Devise of specific real property during life to named individuals with remainder to others showed intention administration expenses should be paid from residuum (Civ. Code, § 1359; Code Civ. Proc. § 1563).

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Angiola Bacigalupi, deceased. From a decree of distribution and settlement of final account, Charles Del Re and Teresa Del Re appeal, opposed by Antonio Nardini, executor of the last will and testament of Angiola Bacigalupi, deceased.

Reversed, with directions.

Ward G. Rush and Russell & Heid, all of Tulare, for appellants.

W. W. Sanderson, of San Francisco, for respondent.

NOURSE, P. J.

This is an appeal from a decree of distribution and settlement of final account. The appeal is taken on typewritten transcripts.

The appellants Charles Del Re and Teresa Del Re took a life estate in certain real property in the city of Tulare under the will of Angiola Bacigalupi, deceased. By the terms of this will, their interest in the property was to terminate upon the death of either one of the devisees, and the entire estate was then to go to their six children named in the will. The will contained numerous bequests to relatives of the deceased, and left the residue to a nephew and to a friend in equal shares. The total value of the estate for purposes of distribution was found to be over $76,000, of which amount over $31,-

000 made up the residue devised to these two individuals. In settling the account and decreeing distribution, the trial court determined that all legacies should bear a proportionate amount of the costs of administration, and for that purpose allotted the sum of $1,659.88 to these appellants, making that sum a charge upon the life estate devised to them.

[1] On this appeal the single question involved is whether the expenses of administration should thus be proportioned among the legacies or charged entirely to the residuum. Appellants rely upon the provisions of section 1359, Civil Code, which prescribes the order in which the property of the estate must be resorted to for the payment of debts. They read this section with section 1563, Code of Civil Procedure, which provides that all the estate given by will to legatees or devisees is liable for the debts, costs of administration, and family expenses in proportion to the value or amount of the several devises or legacies. They argue that section 1563, Code of Civil Procedure, begins to operate only when the conditions of subdivision 5 of section 1359, Civil Code, occur; that is to say, when all the property mentioned in the first four subdivisions of section 1359, Civil Code, is found insufficient to satisfy the debts and expenses of administration and when resort must therefore be had under subdivision 5 to "all other property ratably," then the method of resorting to the property ratably is that prescribed in section 1563, Code of Civil Procedure.

In order that we may better understand the point involved, we quote the two Code sections in full:

"1359. The property of a testator, except as otherwise specially provided in this code and the Code of Civil Procedure, must be resorted to for the payment of debts, in the following order: One. The property which is expressly appropriated by the will for the payment of the debts; Two. Property not disposed of by the will; Three. Property which is devised or bequeathed to a residuary legatee; Four. Property which is not specifically devised or bequeathed; and, Five. All other property ratably. Before any debts are paid, the expenses of the administration, and the allowance to the family, must be paid or provided for."

"1563. The estate, real and personal, given by will to legatees or devisees, is liable for the debts, expenses of administration, and family expenses, in proportion to the value or amount of the several devises or legacies, but specific devises or legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate."

In support of the decree, the respondent argues that there is an irreconcilable conflict between section 1359, Civil Code, and section 1563, Code of Civil Procedure, if the former is read as in any wise relating to the payment of expenses of administration. Their point is that the Civil Code section prescribing the method the property shall be resorted to relates solely to the payment of debts of the decedent and not to the payment of expenses of administration or of the allowance to the family, and that section 1563, Code of Civil Procedure, relating to the method of prorating legacies alone refers to the proration of the expense of administration and allowance to the family. By so interpreting the sections, the respondent has been able to create some inharmony between them, but there is no justification for such interpretation. Section 1563, Code of Civil Procedure, expressly relates to the payment of debts, expenses of administration, and family expenses. It provides for the prorating of these debts and expenses among the various legacies and for the exemption of specific legacies under certain conditions. Manifestly there is to be no prorating of *debts* of the estate if any of the properties mentioned in the first four subdivisions of section 1359, Civil Code, are available for that purpose, and, in so far as the payment of the debts of the estate are concerned, it is manifest that section 1563 does not begin to operate until we reach the property mentioned in subdivision 5 of section 1359, Civil Code. This is made the more clear by the provisions of subdivision 5 to the effect that the expenses of administration and the allowance for the family must be paid or provided for before any debts are paid. What possible reason could there be for holding that the debts should be paid out of any of the properties mentioned in subdivisions 1 to 4 of section 1359, but that before this is done the expenses of administration and the allowance to the family must be prorated under the provisions of section 1563? Thus section 1560, Code of Civil Procedure, corresponds with subdivision 1 of section 1359 of the Civil Code and section 1562 corresponds with subdivisions 2 and 4 of the Civil Code section except that in the Code of Civil Procedure the words "expenses of administration, and family expenses" are added. There is no section of the Code of Civil Procedure corresponding to subdivision 3, which relates to the devise to a residuary legatee. However, the practice has been uniform from the adoption of these various Code sections that specific devises or legacies shall be exonerated from the payment of debts of the deceased, funeral expenses, and expenses of administration if, in the absence of other provision in the will for that purpose, sufficient property is bequeathed to a residuary legatee; that is to say, the accepted rule is that the order in which the property of the estate is to be resorted to for the payment of debts of the deceased as pre-

scribed in section 1359 has been the accepted and approved order in reference to the payment of funeral expenses, allowance to the family, and expenses of administration. Recent authorities in harmony with this practice are Estate of Babb, 200 Cal. 252, 252 P. 1039, 1042, and Estate of Daly, 202 Cal. 284, 260 P. 296. In Estate of Babb, the Supreme Court, at page 260 of 200 Cal., 252 P. 1039, said: "Property bequeathed to a residuary legatee must be resorted to for the payment of the debts of the deceased, funeral expenses, and expenses of administration, prior to any resort being made to property specifically devised or bequeathed. Civ. Code, § 1359; Code Civ. Proc. § 1563." In that case, as here, the special devise of the life estate to appellants was specific, whereas the bequest to the residuary legatees was general within the definition of section 1357 of the Civil Code. In the Estate of Daly, at page 288 of 202 Cal., 260 P. 296, 298, the Supreme Court reaffirmed the rule that a specific legacy is exempt from the payment of expenses of administration "if there be other sufficient estate to satisfy them, and it was the intention of the testator that the specific legacy be not so charged."

[2] Respondent here earnestly contends that, because the probate court recited in the decree that it was not necessary to exempt this specific life estate in order to carry into effect the intention of the testatrix, therefore this court is bound to assume that the conditions were such that all these expenses should be prorated under the provisions of section 1563, Code Civ. Proc. Aside from the fact, as we have heretofore shown, that this section is applicable to the specific devises and legacies only when there is no other sufficient estate to satisfy them, it is apparent that the record fails to support the respondent in this respect. The best evidence of the intention of the testatrix is the will itself, and we could perceive of no other state of circumstances which would more imperatively call for a finding of necessity that the specific devise should remain intact than one where that devise was of specific real property carrying a life estate to named individuals with the remainder over to others likewise denominated in the will. But, as has been said in Estate of Daly, at page 288 of 202 Cal., 260 P. 296, 298, if it had been the intention of the testatrix to make this life estate subject to equalization for the payment of expenses of administration, it would have been an easy matter to have done so, and the fact that it was not done is persuasive that such was not her intention. No such intention appears from any provision of the will here involved, but, on the other hand, the contrary is evident from the fact that the cash in the estate was left to the residuary legatees sufficient to meet these expenses without resort to the real property covered by the specific legacies.

The order is reversed, with directions to modify the decree in accordance with the views herein expressed.

We concur: STURTEVANT, J.; SPENCE, J.

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105 Cal. App. 540

FINK v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 7312.

District Court of Appeal, Second District, Division 2, California.

May 8, 1930.

As Amended May 20, 1930.

Rehearing Denied June 7, 1930. Hearing Denied by Supreme Court July 7, 1930.

1. Statutes ⟹226.

Statute adopted from another state will be given same interpretation as is given to it by courts of state from which adopted.

2. New trial ⟹10.

Party moving for judgment notwithstanding verdict by failing expressly to reserve right to apply for new trial did not waive right to move for new trial (Code Civ. Proc. § 629).

Code Civ. Proc. § 629, provides in part that motion for judgment notwithstanding verdict may be made in alternative form, asking therefor, and reserving, if that be denied, the right to apply for a new trial.

3. Prohibition ⟹24.

Appellate court will quash alternative writ of prohibition to prevent expiration of period to move for new trial (Const. art. 6, § 4c).

An order denying the peremptory writ would not become conclusive on rights of parties for period of sixty days after decision under provisions of Const. art. 6, § 4c, and hence while this time was running jurisdiction of lower court to entertain motion for new trial might conceivably expire, which result should be avoided if possible.

Original application by Benjamin Fink for writ of prohibition prayed to be directed to the Superior Court of the State of California in and for the County of Los Angeles, and John L. Fleming, judge thereof, to prevent action on a motion for new trial.

Writ denied.

Henry E. Carter and Wheeler & Wackerbarth, all of Los Angeles, for petitioner.

Smith & Breslin and Freston & Files, all of Los Angeles, for respondents.

IRA F. THOMPSON, J.

This original proceeding seeks to prohibit the respondent court from entertaining or passing upon a motion for a new trial in the case of Benjamin Fink, Plaintiff, v. William Weisman et al., Defendants. The circumstances giving rise to this petition are as follows: The case mentioned was tried by the respondent court with a jury. The jury returned its verdict in favor of plaintiff on March 18, 1930, and immediately the defendants orally made motions for a judgment in their favor notwithstanding the verdict of the jury. The court continued the hearing until the following day at 2 o'clock p. m. Prior to the argument counsel for defendants filed with the court written motions for a judgment notwithstanding the verdict, which written motions were different from those orally made, in this: That the former were in the alternative, that is, reserving to themselves the right to apply for a new trial in the event of a denial of their motions for judgment, which motions were in fact denied by the court. It is now insisted that the defendants had no right to interpose the written motions after the oral motions were made and that by reason of their failure to word the oral motions in the alternative they waived their right to move for a new trial in the regular course of procedure. Motions therefor are now pending and the court is about to hear argument thereon.

The section of the Code of Civil Procedure pertinent to our problem is 629, reading as follows:

"When a motion for a directed verdict, which should have been granted, has been denied and a verdict rendered against the moving party, the court, at any time before the entry of judgment, either of its own motion or on motion of the aggrieved party, shall render judgment in favor of the aggrieved party notwithstanding the verdict.

"A motion for judgment notwithstanding such verdict may also be made in the alternative form, asking therefor and reserving, if that be denied, the right to apply for a new trial. If the motion for a directed verdict or for judgment notwithstanding the verdict be denied, the trial court on motion for new trial or the appellate court on appeal from the judgment may order judgment to be so entered when it appears from the whole evidence that a verdict should have been so directed at the trial; and when the motion is made in the alternative form, the court may also so order on appeal from the other denying such motion for judgment notwithstanding the verdict, whether a new trial was granted or denied."

[1] We do not need to concern ourselves with any question except the one of waiver by failure to put the motions in the alternative, assuming solely for the purposes hereof that the oral motions precluded the filing of other and altered motions, because the view we now entertain is that the defendants did not waive their rights to apply for a new trial in the regular course of procedure. The section of the Code which we have quoted is, we learn, taken from similar legislation in Minnesota and North Dakota. See Cushman v. Cliff House, 79 Cal. App. 572, 250 P. 575. In accordance with a well-known rule of construction the act is to receive the interpretation given to it by the courts of the states from which the statute is adopted. Cushman v. Cliff House, supra; Estate of Potter, 188 Cal. 55, 204 P. 826. We have found the authorities of Minnesota to be definitely opposed to the contention of petitioner. In Smith v. Minneapolis St. Ry. Co., 132 Minn, 51, 155 N. W. 1046, 1047, the defendant appealed from a judgment against it, it having moved for a judgment notwithstanding the verdict, without asking for a new trial. The court affirmed the judgment, taking occasion to say that, "A new trial was not asked for, so that on this appeal we can only consider whether the evidence is sufficient to support the verdict." On a subsequent appeal of the same case from an order denying defendant's motion for a new trial (Smith v. Minneapolis St. Ry. Co., 134 Minn. 292, 157 N. W. 499, 159 N. W. 623), the court announced the following: "A motion for judgment notwithstanding the verdict does not bar a subsequent motion for a new trial. Sallden v. City of Little Falls, 102 Minn. 358, 113 N. W. 884, 13 L. R. A. (N. S.) 790, 120 Am. St. Rep. 635. The trial court may entertain a motion for a new trial after the decision upon an appeal from a judgment; there having been a motion for judgment notwithstanding the verdict, but no motion for a new trial. This is definitely decided in Daily v. St. Anthony Falls Water Power Co., 129 Minn. 432, 152 N. W. 840. In that case there was a motion for judgment notwithstanding the verdict, which was denied, and an appeal from the judgment afterwards entered, which was affirmed. An application for a rehearing was made; and there was a request that the case be remanded without prejudice to the right of the defendant to move for a new trial. This court, in denying the motion for a rehearing said: 'The request that the order of this court be so amended as to remand the cause without prejudice to the right of defendant to move for a new trial is also denied. An application for leave to make such motion, if grounds exist therefor, must be addressed to the trial court, and the affirmance here ordered in no way interferes therewith.' The trial court was not without jurisdiction to entertain a motion for a new trial. It entertained the motion and denied it. This court has jurisdiction of an appeal from the order denying it."

In an earlier case from that state (Sallden v. City of Little Falls, 102 Minn. 358, 113 N. W. 884, 885, 13 L. R. A. [N. S.] 790, 120 Am. St. Rep. 635), the reason for the inter-

pretation is made manifest in the following language: "Counsel for plaintiff contends that the order appealed from should be affirmed, for the reason, as he urges, that defendant waived the right to move for a new trial. This contention is based upon the fact that, after the verdict had been returned, defendant moved the court for judgment notwithstanding the same, which motion was denied. Thereafter, upon a settled case, the motion for a new trial was made, heard by the court without objection, and denied. We discover no waiver in this state of the facts. The motion for a new trial was, so far as the record discloses, made within the time prescribed by the statute, and the right to make it was not barred by the previous *separate* motion for judgment. The cases cited by counsel in support of this contention (Bragg v. Railway Co., 81 Minn. 130, 83 N. W. 511; Wright et al. v. Robinson, 79 Minn. 272, 82 N. W. 632) are not in point. In those cases a motion for judgment was made, and upon that the moving party rested. No motion for a new trial was made at any time, and the court held that the party could not obtain a new trial on an appeal from an order denying a motion for judgment notwithstanding the verdict; that by limiting and resting upon the motion for judgment he waived the right to ask for a new trial. In this case the defendant did not rest upon his motion for judgment, but subsequently made his motion for a new trial, which was denied. This is proper practice." (Italics ours.) So, too, the North Dakota authority of Nelson v. Grondahl, 12 N. D. 130, 96 N. W. 299, 301, although the opinion was written prior to the amendment of their statute, throws some light upon the proper interpretation of the legislation. Therein we read: "The respondent contends that the appellant is not entitled to a new trial for the reason that he did not ask for one in connection with his motion for judgment notwithstanding the verdict, made when the verdict was returned into court, and, in consequence of his failure to do so, has waived his right thereafter to move for a new trial based on a settled statement of the case. We do not think that chapter 63, p. 74, Laws 1901, is subject to such a construction. That law permits a motion for judgment notwithstanding the verdict to be made either separately or in connection with a motion for a new trial. Nothing in the law indicates that they must be joined, nor that the right to move for a new trial in the usual way is waived if a new trial was not asked in connection with the motion for judgment notwithstanding the verdict. It is true, as repeatedly held in the Minnesota cases, under a law the same as the one under consideration, that a new trial will not be granted by the Supreme Court on review of an order granting or denying a motion for judgment notwithstanding the verdict, unless such motion includes within it a motion for a new trial. It is held in such cases that, by failing to unite a motion for a new trial with the motion for judgment notwithstanding the verdict, the right to a new trial is waived. This is all that Bragg v. Ry. Co. [81 Minn. 130], 83 N. W. 511, relied on by counsel, decides, as we understand it. In that case no motion for a new trial was made at all in the district court, and for that reason it was held that the right thereto had been waived. This is the extent of the Minnesota decision. In no case is it held that the failure of the moving party to unite a motion for a new trial with his motion for judgment deprives him of his statutory right to move thereafter for a new trial in the usual way."

[2] The conclusion which follows logically and irresistibly is that by the adoption of the section from the laws of the states mentioned there is an entire lack of legislative intent to put the losing party to a waiver of his right to apply in the trial court for a new trial as distinguished from appellate tribunals by his failure to word his motion for a judgment notwithstanding the verdict in the alternative, and even though our procedure for taking appeals seems to materially vary from that provided in those states we ought not, for that reason only, to so construe the act as to be in opposition to the legislative will.

[3] The petition for the writ in this case made it appear that the law of the states of Minnesota and North Dakota required the motion in arrest of judgment to be worded in the alternative at the peril of waiving the right to make a motion for a new trial. A further perusal of the authorities from those jurisdictions have convinced us that the law is to the contrary and is as we have already expressed it. It is manifest that an order of this court denying the peremptory writ would not become conclusive upon the rights of the parties for a period of 60 days after decision under the provisions of section 4c of article 6 of the Constitution, and hence while this time was running the jurisdiction of the respondent court to entertain the motion for a new trial might conceivably expire. Such a result should be avoided if it be possible. We entertain no doubt concerning our right to undo what we have done and leave the parties to this proceeding in the same position as though the alternative writ had never been issued. This can be accomplished by setting aside and vacating the order that the alternative writ issue, or, in other words, by quashing the writ.

The alternative writ is quashed and the permanent writ denied.

I concur: CRAIG, Acting P. J.

Owing to the absence of Presiding Justice WORKS, he does not participate in this opinion.

105 Cal. App. 587

VICKICH v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

Civ. 7044.

District Court of Appeal, Second District, Division 1, California.

May 12, 1930.

Rehearing Denied June 4, 1930. Hearing Denied by Supreme Court July 7, 1930.

1. Execution ⟹158(1).

Superior court has power to stay execution on ordinary judgment of that court.

2. Master and servant ⟹416½.

Superior court is without jurisdiction to suspend execution of judgment entered in its records on award of Industrial Accident Commission (Workmen's Compensation Insurance and Safety Act of 1917, §§ 20(d), 21, 67(d), Const. art. 20, § 21).

Under Workmen's Compensation Insurance and Safety Act § 67(d), St. 1917, p. 876, Deering's Gen. Laws 1923, Act 4749, no court, except the Supreme Court and District Courts of Appeal, has jurisdiction to review, reverse, correct, or annul any order or award of Industrial Accident Commission.

3. Master and servant ⟹416½.

That Accident Commission reduced amount of original award did not justify superior court in attempting to recall execution on judgment entered in accordance with original award (Workmen's Compensation Insurance and Safety Act of 1917, §§ 21, 67(d).

Workmen's Compensation Insurance and Safety Act, § 21 (St. 1917, p. 850, Deering's Gen. Laws 1923, art. 4749), provides that the Industrial Accident Commission may stay execution of any judgment entered on award of commission on good cause appearing therefor.

Original application by Kris Vickich for writ of prohibition to be directed to the Superior Court of Los Angeles County and Samuel R. Blake, judge thereof, to prevent further proceedings in the matter of a motion to recall and quash execution issued on judgment entered in accordance with an award of the Industrial Accident Commission.

Writ granted.

Kelly, Stuart & Hendrick, of Los Angeles, for petitioner.

Everett W. Mattoon, County Counsel, Fred M. Cross, Deputy County Counsel, and Sherer & Howard, all of Los Angeles, for respondents.

CONREY, P. J.

Petition for writ of prohibition. Petitioner applied to this court for writ of prohibition to prevent respondent court from proceeding further in the matter of a motion to recall and quash an execution upon a judgment entered in accordance with an award made by the Industrial Accident Commission.

The proceedings by which an award of said commission may be filed in a Superior Court, and judgment entered thereon and the judgment enforced, are outlined in section 21 of the Workmen's Compensation, Insurance and Safety Act of 1917. St. 1917, p. 831; Deering's Gen. Laws, 1923 Ed., Act 4749. When a certified copy of the findings and award of the commission has been filed with the clerk of the Superior Court, judgment must be entered by the clerk in conformity therewith. The certified copy of the findings and award and a copy of the judgment constitute the judgment roll.

[1, 2] In the case of an ordinary judgment of the Superior Court, the power of that court to stay or recall an execution is included in the general authority of the court to control its own proceedings. In said section 21, however, it is provided that "the commission, or any member thereof, may stay the execution of any judgment entered upon an award of the commission, upon good cause appearing therefor and upon such terms and conditions as may be imposed. A certified copy of such order shall be filed with the clerk entering judgment." It would seem to follow that, when a stay has been ordered by the commission or by one of its members, no judge of a Superior Court would have authority to interfere with the operation of the order so made. But the question arises whether the judgment when entered upon an award of the commission becomes a judgment of the Superior Court, of such a nature that, in the absence of any stay order made by the commission or one of its members, the Superior Court acting through one of its judges may stay, or recall, or quash an execution. In section 20 (d) of the Compensation Act, it is provided that the commission shall have continuing jurisdiction over its awards, and may at any time, upon notice, etc., rescind, alter, or amend any award made by it upon good cause appearing therefor, at any time within 245 weeks from the date of the injury. Article 20, section 21, of the Constitution of California, which authorizes the Legislature, by appropriate legislation, to create a system of workmen's compensation, gives to the Legislature plenary power in relation to the manner of review of decisions of the compensation tribunal; "Provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this state."

Section 67 of the Compensation Act, in subdivision (d) thereof, reads as follows: "The provisions of the Code of Civil Procedure of this state relating to writs of review shall, so far as applicable and not in conflict with this act, apply to proceedings in the courts under the provisions of this section. No court of this state, except the supreme court and the district courts of appeal to the extent herein specified, shall have jurisdiction to review, reverse, correct or annul any order, rule, regulation, decision or award of the commission, or to suspend or delay the operation or execution thereof, or to restrain, enjoin or interfere with the commission in the performance of its duties; provided, that a writ of mandamus shall lie from the supreme court or the district courts of appeal in all proper cases." From the foregoing quotation it appears that the Superior Court is deprived of jurisdiction to suspend or delay the execution of a judgment entered in the records of such court following upon, and in accordance with, an award of the commission. In the case at bar the real question presented is whether or not, in threatening to proceed to the hearing and determination of the motion to recall and quash the execution upon such a judgment, the court is exceeding its jurisdiction, in that it is assuming authority to suspend the operation or execution of the judgment or of the award.

[3] In the proceeding before us, it appears that in accordance with an award made by the commission in favor of petitioner, Kris Vickich, and against one Tony Pleik, judgment was entered on September 15, 1928, in the sum of $1,742.79; that on September 30, 1929, execution was issued and a levy made upon certain real property of the defendant, and the property advertised for sale, to be sold by the sheriff on November 4, 1929. On November 2, 1929, the defendant gave notice of motion to be made in the Superior court on November 12th for an order to recall and quash the execution "on the ground that the execution exceeds the present amount of the award and/or judgment."

With the notice of motion an affidavit was filed, which, among other things, stated that, pursuant to an application made to the commission, the commission on October 29, 1929, modified and reduced the original award, and among other things ordered that indemnity payments under the award be terminated as of August 26, 1928; that, pursuant to the execution and levy made prior to said modification of the award, the property levied upon (unless proceedings under the execution be restrained by order of the court) would be sold under the execution issued on the original judgment rather than on the award and judgment as now modified. Upon said notice of said motion and affidavit, respondent court made an order restraining petitioner and the sheriff from making sale under said execution and levy during the pendency of said motion. The sheriff refused to sell the property, and continued the sale to November 18, 1929. On November 12, 1929, when the motion to recall and quash the execution came before the Superior Court for hearing, the petitioner objected to the hearing upon the ground that said court did not have jurisdiction of said proceeding. The court overruled that objection and indicated its intention to further proceed, and announced that, upon the proper amount of the award being ascertained, an order would be made reducing the amount to conform therewith, and continued the matter to November 15th for further hearing. On November 14, 1929, the petition for writ of prohibition was filed in this court, and an alternative writ issued, wherein and whereby further proceedings in the matter of said motion in the Superior Court are stayed until the further order of this court.

The question at issue here apparently has not been the subject of decision in any other case. In Gamble v. Superior Court, 39 Cal. App. 661, 179 P. 717, it was held that a Superior Court as a court of equity has jurisdiction to enjoin the enforcement by execution of an award of the Industrial Accident Commission upon the ground that the same was obtained by fraud. But the plaintiff in the action there under consideration had not been a party to any proceeding before the commission, and was not a person who would have been entitled to appear before the commission in the proceeding before it. The provisions of the Compensation Act which authorize the entry of judgment upon an award and the issuance of execution thereon in the Superior Court are merely a method adopted for the enforcement of such awards, in lieu of machinery of enforcement which might have been provided for and given to the commission itself, to exercise through executive officers appointed for that purpose. Subject only to review by the Supreme Court or a Court of Appeal, the judicial authority in relation to such awards appears to have been retained entirely within the Industrial Accident Commission. If the facts relied upon by the employer, Pleik, are such as to justify or require the recall or quashing of the execution, the authority to make such order is in direct terms vested in the commission or some one of its members. Section 21 of the Compensation Act so provides. In vesting such authority in one tribunal, it seems clear that the Legislature intended to withhold that authority from any other tribunal. The execution on a judgment entered upon an award of the Industrial Accident Commission, although in the form of an execution upon a judgment of the Superior Court, is in reality an execution upon the award of the commission. The

clerk in issuing the execution and the sheriff in making his levy and sale under the writ are for the purposes of the proceeding instrumentalities of the commission in the enforcement of its award. That those officers are respectively the clerk of the county (ex officio clerk of the Superior Court) and sheriff of the county, are simply and only facts which under the statute qualify them to perform these duties. Our conclusion is that respondent court is without jurisdiction over the subject-matter of the motion to recall or quash the execution.

Let the peremptory writ issue.

We concur: HOUSER, J.; YORK, J.

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105 Cal. App. 535

PACIFIC INDEMNITY CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 7385.

District Court of Appeal, First District, Division 2, California.

May 8, 1930.

Rehearing Denied June 6, 1930. Hearing Denied by Supreme Court July 7, 1930.

1. Master and servant ⟹417(7).

In proceedings to review award of Industrial Accident Commission to employee, conflicting evidence must be resolved in favor of employee.

2. Master and servant ⟹375(1).

Services of automobile distributor's city salesman injured while driving automobile dealer to home town *held* within scope of employment for automobile distributor, under evidence (Workmen's Compensation Act, § 6 (a), subd. 2).

The evidence disclosed that the automobile distributor sold a local dealer an automobile, but that dealer was not in a condition to drive automobile, and that the city salesman, while driving dealer to his home town at implied, if not express, request of distributor's sales manager was injured. The city salesman was to receive no compensation from the dealer, but was merely to be reimbursed for his expenses.

3. Master and servant ⟹361.

Automobile distributor's city salesman, injured while driving dealer to home town, *held* not employee of dealer, under evidence, within Workmen's Compensation Act.

Proceedings under the Workmen's Compensation Act by John C. Murphy, employee, opposed by Butler-Veitch, employer, the Pacific Indemnity Company, insurer, and others. To review and annul an order awarding compensation for injury, the insurer brings certiorari.

Affirmed.

Bronson, Bronson & Slaven, of San Francisco, for petitioners.

Edward O. Allen, Redman, Alexander & Bacon, and R. P. Wisecarver, all of San Francisco, for respondents Burke and Georgia Casualty Co.

Carroll S. Bucher and Andrew F. Burke, both of San Francisco, for respondent Murphy.

SPENCE, J.

The petitioners seek to annul the award of the Industrial Accident Commission in favor of the respondent Murphy and against petitioner Pacific Indemnity Company, the insurance carrier of Butler-Veitch. It is contended that the finding that Murphy, while employed as a salesman of Butler-Veitch, sustained injury "occurring in the course and arising out of his employment," is not supported by the evidence.

Murphy was an employee of Butler-Veitch acting as a city salesman of automobiles on a commission basis. Murphy had certain freedom of action, as is customary with such salesmen, but Butler-Veitch generally directed and controlled his activities by requiring definite hours of floor duty and reports on his time spent on work other than floor duty. Murphy worked every third Sunday and was on call at all times. Admittedly Murphy was an employee and would have been entitled to compensation for injuries received in the performance of his customary duties as city salesman. However, he met with the accident here involved under somewhat unusual circumstances.

Butler-Veitch, as Northern California distributors of Marmon and Roosevelt automobiles, sold cars to H. F. Burke, the local retail dealer in Merced. Burke purchased a certain Roosevelt car in May, 1929, and on July 26, 1929, drove the car from Merced to San Francisco and into the mechanical department of Butler-Veitch to have certain adjustments made. That evening Burke returned to Butler-Veitch's store in an intoxicated condition. Mr. Veitch was leaving town, and left orders not to allow Burke to take his car while intoxicated. The following day, Saturday, July 27, neither Mr. Veitch nor Mr. Butler was present. The sales department of the establishment was in charge of Mr. Crogan, and the mechanical department, was in charge of Mr. Reimus. Mr.

Crogan was the sales manager supervising the work of the salesmen. Burke again returned to the store on Saturday morning in an intoxicated condition. Murphy was on floor duty at the salesroom, and, seeing Burke's condition, took him to a barber shop and later to a nearby hotel in an effort to straighten him up. Before Murphy left the hotel, Burke told him that he had to get back to Merced, and asked Murphy to drive him there if he could not make it himself. Murphy told Burke that he would, but testified that he had no intention at that time of doing so, believing that Burke would go to sleep and not awake in time to leave that day. Murphy returned to the store and talked to Mr. Crogan about Burke's condition. Mr. Crogan stated that Burke's wife had been ringing up from Merced and that he had been telling her that Burke was all right. Crogan further told Murphy that, if Burke could not get down, he would like to see Murphy take him down or get him down there. Murphy worked on floor duty until 1 o'clock that afternoon. He then called on certain prospects, returning to the salesroom a couple of times. When he returned about 4 o'clock that afternoon, Burke was there waiting for him. Burke was still in an intoxicated condition, and, pursuant to Mr. Veitch's instructions, Mr. Reimus had refused to let him take his car. Burke told Murphy that they would not allow him to drive his car, and renewed his request that Murphy drive him to Merced. Murphy told Burke that, if he had to get to Merced, he would take him. Murphy again spoke to Mr. Crogan and told him that he would have to take Burke to Merced. Crogan said, "Someone will have to get him down there." Murphy took Burke's car with the knowledge and consent of Mr. Crogan and Mr. Reimus and started on the trip with Burke. About two hours later, while Murphy was driving the car towards Merced on the highway near Dublin, an accident occurred in which Murphy sustained his injuries.

Thereafter a question arose as to whether Murphy was entitled to compensation for his injuries from Butler-Veitch or Burke or from both. He filed an application with the commission, joining Butler-Veitch and Burke, together with their respective insurance carriers, as defendants. At the conclusion of the hearing, the commission made its award in favor of respondent Murphy and against petitioner Pacific Indemnity Company, the insurance carrier of Butler-Veitch, and dismissed the action as to the remaining defendants. In effect, the conclusion reached was that Murphy was at the time of the injury an employee of Butler-Veitch and was performing services growing out of and incidental to his employment and acting within the course of his employment as contemplated by section 6 (a), subd. 2, of the Workmen's Compensation Act (St. 1917, p. 834) and that he was not an employee of Burke. The evidence was sufficient to justify these conclusions and to support the findings made by the commission.

[1] There was some conflict in the evidence, but on this proceeding such conflict must be resolved in favor of the respondent. In addition to the evidence above referred to, it appeared that Murphy had only a slight acquaintance with Burke through seeing Burke at Butler-Veitch's store; that Burke was a customer of Butler-Veitch, but not a prospect for Murphy, as Murphy could not sell to the local dealers; that Murphy did not desire to make the long trip involved, but felt that he "was elected to take him down"; that he undertook the driving of Burke's car merely as a courtesy on the part of his employers; that various courtesies of a similar nature were customarily performed by distributors for their customers; that Murphy was to receive no compensation from Burke, but merely reimbursement for the expenses incurred; that Mr. Veitch testified that to a certain degree Murphy was performing a service for Butler-Veitch in driving Burke to Merced; that, while normally some one regularly assigned to driving would have been assigned to such work, Mr. Veitch stated that under the circumstances he might have told Murphy to "go ahead" if he had been personally present.

[2, 3] The services performed by Murphy in driving Burke to Merced were exceptional and were not within the usual scope of his employment as a city salesman. Nevertheless, it may properly be inferred from the evidence that these services were connected with his employers' business, were of benefit to the employers and not personal to the employee, and were performed on behalf of the employers at the implied, if not express, request of their sales manager, Mr. Crogan. Under these circumstances the services were within the actual scope of Murphy's employment, and the fact that they were outside of the usual scope of his employment is immaterial. Engels Copper Mining Co. v. Industrial Accident Commission, 183 Cal. 714, 192 P. 845, 11 A. L. R. 785; Payne v. Industrial Accident Commission, 84 Cal. App. 657, 258 P. 620. The evidence failed to show any hiring of Murphy by Burke so as to establish the relationship of employer and employee between them within the meaning of the act. The evidence justified the findings made, and the commission did not exceed its jurisdiction.

The award is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

DOLMAN CO., Inc., v. RUBBER CORPORATION OF AMERICA.★

Civ. 6840.

District Court of Appeal, First District, Division 2, California.

May 8, 1930.

Rehearing Granted June 6, 1930.

1. Principal and agent ⟹89(7).

Evidence of payments made by advertising agent, suing principal for moneys due, *held* admissible as against contention that he acted as volunteer.

Plaintiff corporation's letter, confirming its president's conversation with defendant corporation's general manager regarding plaintiff's employment as advertising agent, stated that defendant was to remit to plaintiff for all monthly bills within certain time and receive cash discounts when paid in full.

2. Principal and agent ⟹89(7).

Evidence of covenants of standard contracts between advertising agents and newspapers *held* admissible in agent's action against principal for moneys due.

3. Evidence ⟹271(19).

Letters of parties to contract of employment as advertising agent after featured week *held* not inadmissible as self-serving declarations.

Agent's letter, confirming conversation regarding employment, stated that agency was contingent on confirmation by principal's permanent board of directors, but neither confirmation nor objection by such board was forwarded before agent fully performed its part of contract, at least as to some parts thereof.

4. Principal and agent ⟹89(7).

Estimate of quantity and cost of advertising items and letter confirming conversation regarding employment as advertising agent *held* admissible in action against principal for money due.

5. Appeal and error ⟹1064(4).

Instruction, inadvertently repeating date of letter listing amounts due newspapers for advertising in referring to previous letter specifying times for payments to advertising agent, *held* not reversible error.

The agent sued for and recovered judgment against principal for money due under oral contract of employment.

6. Principal and agent ⟹85.

Agent ordinarily is entitled to reimbursement by principal for all proper advances and expenditures in accomplishing purposes of agency, in absence of inconsistent contract stipulations.

7. Principal and agent ⟹89(10).

Instruction as to advertising agent's authority to pay newspapers and thereafter collect from principal *held* properly refused in agent's action against principal for money due (Civ. Code, § 2343).

Civ. Code, § 2343, which instruction purported to follow, states the law as to an agent's obligation to a third person.

8. Principal and agent ⟹89(10).

Instruction withdrawing from jury's consideration advertising agent's letter, confirming conversation respecting employment, as not evidence of contract, *held* properly refused.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by the Dolman Company, Incorporated, against the Rubber Corporation of America. Judgment for plaintiff, and defendant appeals.

Modified, and affirmed as modified.

Glensor, Clewe & Van Dine, of San Francisco, for appellant.

Boyd Oliver, of San Francisco, for respondent.

STURTEVANT, J.

The plaintiff commenced an action against the defendant to recover moneys alleged to be due under an oral contract. The defendant answered and the trial was had in the lower court before the court sitting with a jury. The jury returned a verdict in favor of the plaintiff, and from the judgment entered thereon the defendant has appealed and has brought up a typewritten record.

Mr. M. T. Dolman, president of the plaintiff corporation, met Mr. W. Flanders Setchel, the general manager of the defendant corporation, and a conversation was had regarding the employment of the plaintiff by the defendant as its advertising agent. Thereafter, on August 10, 1927, the two met again, and at that time Mr. Dolman delivered to Mr. Setchel a written plan, which is set forth in the transcript. It included the use of advertisements in newspapers, window cards, window streamers, and "throw away cards." Newspaper advertising was to be done in the metropolitan daily newspapers of San Francisco and Oakland. The advertisement in

*Rehearing granted 293 P. 129.

each newspaper was estimated as to size and the cost per week. Each other item of the plan was estimated as to quantity and the cost of each item. After that conversation, on August 12, 1927, the plaintiff wrote the defendant a letter confirming the conversation. Omitting irrelevant parts, and for our convenience numbering the paragraphs, the letter stated:

"1. We wish to thank you for placing your advertising account with this agency, and to confirm our understanding of the basis upon which it is to be handled.

"For the present all that is required is for us to prepare a booklet, illustrating Keaton Tires and describing their various points of superiority.

"And to plan and prepare and place a campaign of advertising to appear in San Francisco and Oakland newspapers (to be selected later) featuring Keaton Week, August 21.

"To supervise the preparation of publicity matter under the direction of Mr. A. S. Peterson, to be furnished the newspapers.

"To plan and prepare such window streamers and window cards and display advertising material as may be deemed necessary and compatible with good judgment.

"2. It is understood further that these arrangements, tentatively entered into by Mr. Setchel and this agency are contingent also upon confirmation by your permanent board of directors.

"3. It is agreed further that the Dolman Company, Inc., is to be assured, during the life of any agreement of a minimum remuneration of $50.00 per month, regular agency commissions to apply against this fee.

"4. It is agreed by you that the Dolman Company, Inc., is to retain any and all customary agency commissions from publications, etc., that you will remit to us for all monthly bills on or before the tenth of the month following date of invoice, and you will receive, for this a 2 per cent cash discount for such payments, but only when the monthly invoices have been paid in full."

The advertising was to take place during "Keaton Week," which was to commence on the 21st day of August, 1927. That letter was not answered by a letter written by the defendant. However, after the letter was written the plaintiff proceeded to prepare the advertising matter including the wording, size, etc., of the newspaper advertisement. Having done so, it caused its secretary to take the proofs and submit them to the defendant. When she returned and made her report, on August 19, 1927, the plaintiff wrote the defendant a letter confirming the conversation between the plaintiff's secretary and the defendant and stating that the plaintiff would make certain corrections which had been suggested. In that letter the plaintiff stated the cost of each newspaper advertisement and also the total thereof. After that letter was sent the advertisements were inserted in the newspapers. No claim is made that said advertisements did not in form, in size, and in all other respects conform with the terms of the oral agreements. During the oral negotiations the defendant discussed its desire to pay for some of the advertising in trade. Mr. M. T. Dolman testified that he stated to the defendant that agreements to pay in trade must be negotiated by the agents of the defendant and not by the agents of the plaintiff, but that otherwise such arrangements would be satisfactory to the plaintiff. Mr. William A. Dolman testified that prior to the placing of the advertisements he had a conversation with Mr. Setchel in which he stated to Mr. Setchel the necessity of bills being paid to the plaintiff promptly to the end that the plaintiff in turn could make its payments promptly to the newspapers and thus obtain the benefit of certain liberal discounts which were made to the plaintiff by the newspapers and which enabled the plaintiff to give to its patrons more liberal terms. Before "Keaton Week" had ended no further communications, oral or written, were had between the witnesses above named.

The plaintiff pleaded its claim in five separate counts. The defendant denied many of the allegations, but as to the newspapers, it admitted that it employed the plaintiff to place the advertising, but contended that the advertising was limited to $1,200 and that it was to be paid for in trade and that each application for advertisements should have indorsed thereon a stipulation to that effect.

After the "Keaton Week" had taken place, the plaintiff paid the bills which it had incurred and asked the defendant to pay it. The defendant did not do so and this action was commenced. The defendant does not claim that it did not authorize everything done which the plaintiff did, nor does it claim any defect in the performance by the plaintiff, except as we shall note.

[1-4] Using the language of defendant: "The issues were (1) Whether the agency was authorized to place advertising to the extent of $1,200 and no more; (2) whether such advertising was to be placed only upon condition that the newspapers would take payment therefor in tires and (3) whether in any event the defendant's liability to pay therefor was to the newspapers or to the agency." The defendant does not follow this order in briefing, but the gravamen of its complaint is that the issues so enumerated were not properly presented by reason of certain errors committed at the trial. In assignments 1, 3, 4, 6, and 9 the defendant complains of the admission of evidence showing payments made by the plaintiff. It asserts the plaintiff in making the payment acted as a volunteer. We think

it did not do so. Paragraph 4 of the letter written August 12, 1927, shows that defendant was to pay the plaintiff and that the plaintiff was to pay the newspapers, receive the discount, and retain the discount to its own use. There was other evidence which clearly authorized, at least by implication, plaintiff to pay the other expenses which it was expressly authorized to incur. The defendant complains because evidence of usage was introduced. It was in the nature of a description of the business in hand which is somewhat out of the ordinary. Among other things, it showed the following: As to a newspaper, an advertising agency undertakes to solicit and finally prepare for insertion advertising matter and to collect therefor and then to pay the newspaper. In turn the newspaper gives to the agency liberal discounts on the payments which are made promptly. As to the advertiser, the agency undertakes to inform itself of his wants and needs and express them in the most effective form for insertion in a newspaper, to select the place in the newspaper where the advertisement is to be inserted, to obtain the most efficient and economical space, and make all arrangements therefor. On all of these matters it undertakes to be informed as fully as the proprietors of newspapers. Both as to the newspaper and as to the advertiser it undertakes to do perfect work. In the interest of the newspaper and also in the interest of the advertiser it undertakes to make payments promptly, obtain discounts for the prompt payments, and give the advertiser the benefit of the cheapest service possible. Mr. Dolman testified that he stated these matters to Mr. Setchel. Continuing, he testified that said facts were the general usage. Evidence of the covenants of standard forms of contracts used by agencies and newspapers was admitted. We think the trial court did not err in admitting it. It was but a method of showing what the nature of one of these transactions is in the absence of express covenants to the contrary. As the contract, if any, between the plaintiff and defendant rested in parol the evidence just referred to was not improper. Letters written by the parties after the end of "Keaton Week" were introduced. The defendant asserts that they were improperly received and were in the nature of self-serving declarations. The point is not sustained by the record. As recited in paragraph 2 of the letter dated August 12, 1927, Mr. Setchel endeavored to hold the contract open until it was confirmed by the defendant's "permanent board of directors." As neither a confirmation nor objection of defendant's "permanent board of directors" was sent forward before the plaintiff had fully performed everything by it to be done and performed, at least as to some parts of the agreement, the terms were not agreed to. Until all communications, written or oral, made before the trial were received and considered, the jury under the circumstances was not in a position to ascertain exactly what had been agreed to and what had not been agreed to. From what has been said above it is patent that defendant's motion to strike out the written estimate dated August 10, 1927, was properly denied, and the same comment applies to the motion to strike the letter dated August 12, 1927.

[5] The defendant makes several attacks on the giving or refusing to give instructions. We do not find any merit in any one of the attacks. It objects to instruction No. VI. It says that the instruction submitted to the jury whether the letters constituted a contract; that it is in conflict with instruction No. VII; and that it withdrew from the jury the question of authority. A bare reading of it shows that it did nothing of the kind. It was not addressed to authority. That subject was fully discussed in other instructions. It complains of instruction No. VII. That objection is hypercritical and rests on a typographical error. The letter dated August 12th contained statements regarding the times within which payment should be made. The letter dated August 19th contained a list of the amounts that would be due each paper. Instruction No. VII clearly refers to both letters, but inadvertently repeats 19th instead of using 12th when referring to the letter which specified the times of payments.

[6, 7] The trial court refused to give defendant's proposed instruction No. II. That instruction purported to state the law as to the authority of this plaintiff to pay the newspapers and thereafter collect from the defendant. It purports to follow Civil Code, § 2343. That section states the law as to an agent's obligation to a third person. In this case we are considering the rights and obligations between principal and agent. In 2 C. J., 793, the rule is stated as follows: "Except where the contract of agency contains stipulations contrary to or inconsistent with any right of the agent to * * * reimbursement for liabilities or expenditures incurred in the furtherance of the agency, an agent ordinarily is entitled * * * to reimbursement from his principal for all advances and expenditures properly made in carrying into effect the purposes of the agency." The text cites, among other authorities, Thompson-Houston Electric Co. v. Central R. Co., 6 Cal. Unrep. 202, 55 P. 777. Applying that rule to the instant case, there was nothing precluding the plaintiff from making the payments. There was no covenant in the contract limiting its right so to do.

[8] Complaint is also made because the trial court refused to give defendant's requested instruction No. IV. The court did not err. The instruction was an improper

statement of the law. Among other things it purported to withdraw the letter dated August 12, 1927, as being no part of the evidence of the contract between the parties. To have so held would have been to commit reversible error.

The plaintiff asserts that the judgment was excessive in the sum of $50. The plaintiff admits the fact and asks that the judgment be modified accordingly. Therefore the words "the sum of two thousand three hundred and eighty-nine and two one hundredths ($2,389.-02)" contained in the judgment are changed to read as follows: "the sum of two thousand three hundred and thirty-nine and two one hundredths ($2,339.02)."

As so modified the judgment is affirmed, and the plaintiff will recover its costs on this appeal.

We concur: NOURSE, P. J.; SPENCE, J.

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105 Cal. App. 513

GUITRON et al. v. RODRIGUEZ et al.

Civ. 7158.

District Court of Appeal, First District, Division 2, California.

May 7, 1930.

Rehearing Denied June 5, 1930. Hearing Denied by Supreme Court July 3, 1930.

1. Contracts ⟹313(1).

When repudiation of executory contract results in violation of contract "in omnibus," injured party may sue for breach.

2. Sales ⟹379.

In sellers' action for repudiation of contract, allegation balance was due, whereas evidence showed balance was to be paid in installments, *held* not variance.

There was no variance, since evidence as to amount due was merely evidence of sellers' damages for breach, and was in no sense variance from pleadings in so far as recovery was sought for breach of contract by repudiation.

3. Appeal and error ⟹1033(9).

Where contract price due sellers was $2,700, buyer could not object to verdict for $1,000 on ground contract price was measure of detriment caused by breach (Civ. Code, § 3310).

4. Appeal and error ⟹883.

Where remarks of court which could have been prejudicial were agreed to by defendants' counsel, defendants could not claim prejudice on appeal.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Frances Guitron and others against Jose M. Rodriguez and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

A. V. Dalrymple and John R. Tyrrell, both of San Francisco, for appellants.

Charles E. Gould and C. D. Dudley, both of San Francisco, for respondents.

NOURSE, P. J.

Plaintiffs sued for breach of contract for a sale of personal property. The cause was tried before a jury and resulted in a verdict for plaintiffs in the sum of $1,000. Defendants appeal upon typewritten transcripts.

The contract was oral and called for the sale to defendants of a grocery store for the full purchase price of $3,700, $1,000 of which was to be paid at the time of transfer, the balance in monthly installments of $150 each. Defendants made the first payment, plaintiffs transferred the property to them, and they took possession, which they retained until after this action was filed. While still in possession, defendants repudiated the contract in toto. Plaintiffs' complaint is framed in two causes of action; the first on the contract itself, and the second for the recovery of damages for the breach.

[1] On this appeal the appellants insist that the action was premature because the contract called for monthly payments and these payments were not due at the time the suit was filed. In answer, the respondents rely upon the well-settled rule that, when the repudiation of an executory contract results in a violation of the contract "in omnibus," the injured party may treat the entire contract as at an end and sue for damages for the breach. 6 R. C. L. pp. 1024, 1025; 6 Cal. Jur. pp. 464, 465.

[2] It is argued that there is a fatal variance between the evidence and pleadings, because the plaintiffs alleged that the full balance of $2,700 was due, whereas the evidence showed that this amount was agreed to be paid in monthly installments of $150 each. If plaintiffs were suing to enforce the contract there might be some merit in the point, but, where they rely upon the repudiation as a breach of the entire contract, the evidence as to the amount due was merely evidence of plaintiffs' damages for the breach, and was in no sense a variance from the pleadings in so far as the second cause of action was concerned.

[3] It is also argued that the verdict cannot be justified because under the provisions of section 3310, Civil Code, the full contract

price is the measure of the detriment caused by the breach of a buyer's agreement to accept and pay for personal property, whereas in this action the jury awarded the plaintiffs no more than $1,000. If the point were raised by the plaintiffs, we might be constrained to give it some consideration, but we cannot perceive how the defendants can possibly be prejudiced through a verdict of $1,000 instead of $2,700.

[4] Finally it is argued that the trial judge was guilty of prejudicial misconduct in the matter of instructions to the jury. The point is this: It was stipulated that the property had been sold under attachment proceedings and that the sheriff held in his possession the sum of $533.66, as the proceeds of such sale. After the jury had retired under instructions to which no objections have been made, it returned to the courtroom, and one of the jurors stated to the trial judge that they wished to know whether they were to determine the amount of money in possession of the sheriff and what was to be done with it. The trial judge instructed the jury that it had nothing to do with that matter, but that, if the plaintiffs were to prevail, the amount in the hands of the sheriff would be credited to them. To this statement both counsel agreed in the presence of the jury. The further discussion between court and counsel along the same lines was nothing more than an amplification of this statement. As all that was said in the presence of the jury which could possibly be deemed prejudicial to the defendants was expressly agreed to by their counsel, they may not at this time make the claim of prejudice.

We find no error in the record.

Judgment affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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105 Cal. App. 611

BOTELER v. ROBINSON et al.

Civ. 4090.

District Court of Appeal, Third District, California.

May 13, 1930.

Rehearing Denied June 12, 1930. Hearing Denied by Supreme Court July 11, 1930.

1. Assignments for benefit of creditors ⟹3.

Assignment of store stock, fixtures, etc., to creditor *held* not composition agreement, but assignment for creditors' benefit, though not statutory assignment (Civ. Code, §§ 3449–3473).

The agreement recited that it was made between assignor, assignee, and "creditors of the assignor signing this agreement, consenting hereto in writing or whose claims may be filed with and allowed by the assignee," and witnessed that assignor, in consideration of assignee's and such creditors' covenants and $1 paid by assignee, assigned all of assignor's stock of merchandise, store fixtures, etc., that assignee might conduct business and sell property and should pay net proceeds to such creditors pro rata, and that they agreed to accept their pro rata portion of net recoveries.

2. Assignments for benefit of creditors ⟹322.

Ordinarily, assignment for creditors' benefit and payment of dividends do not discharge debtor except to extent that creditors' claims are actually paid.

3. Evidence ⟹441(3).

Proof of assignee's verbal agreement to give assignor's note to assignee preference *held* inadmissible as contrary to written assignment for all creditors' benefit (Code Civ. Proc. § 1856; Civ. Code § 1625).

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by L. Boteler against C. A. Robinson and others. Judgment for defendants, and plaintiff appeals.

Reversed.

Craig & Weller, of Los Angeles (Merrill L. Granger, of Los Angeles, of counsel), for appellant.

Kennith H. Burns, of Santa Ana (A. P. Nelson, of Santa Ana, of counsel), for respondents.

FINCH, P. J.

This is an action to recover the balance alleged to be due on a promissory note. The answer alleges and the court found that the note had been paid in full prior to the commencement of the action, and judgment was entered in favor of the defendants. The plaintiff has appealed from the judgment. The only question to be determined is whether the note has been paid.

At all times during the transactions mentioned herein, the plaintiff was the assistant secretary of the Los Angeles Wholesalers' Board of Trade and acted in that capacity in connection with such transactions. Prior to April 8, 1925, Mayme Crew was operating as a retail merchant. She became indebted to a number of creditors and was unable to pay them. On the day mentioned, she entered into an agreement with the defendant C. A. Robinson and the plaintiff, by the terms of which she agreed to sell her business and stock of merchandise to Robinson for the

sum of $7,000, to be evidenced by a promissory note for that sum payable to the plaintiff and executed by Robinson and J. H. McGehee. The defendants gave the plaintiff their promissory note in accordance with the terms of the contract, and Robinson and his wife, the defendant Myrtle Robinson, took charge of the business. The business did not prove profitable, and on November 13, 1925, the following agreement was executed by the persons named therein:

"This Agreement, Made this 13 day of November, 1925, between C. A. and Myrtle Robinson, * * * parties of the first part, hereinafter referred to as assignor, L. Boteler, * * * party of the second part, hereinafter referred to as assignee, and the creditors of the assignor signing this agreement, consenting hereto in writing or whose claims may be filed with and allowed by the assignee, parties of the third part,

"Witnesseth: That said assignor, for and in consideration of the covenants and agreements to be performed by the parties of the second and third parts, as hereinafter contained, and the sum of $1 to assignor in hand paid by the assignee, receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, assign and transfer unto said assignee, his heirs and assigns forever, all of the property of the assignor of every kind and nature and wheresoever situated, both real and personal, not exempt from execution, including all that certain stock of merchandise, store furniture and fixtures, book accounts, books, bills receivable, cash on hand, choses in action, insurance policies, and all other personal property of every kind and nature situated in or pertaining to that store * * * now owned and conducted by said assignor, * * * except real estate leases and leasehold interests in real estate. Said assignee to receive the said property, conduct the said business, should he deem it proper, and is hereby authorized at any time after the signing hereof by said assignor to sell and dispose of the said property upon such time and terms as he may see fit, and is to pay said parties of the third part, pro rata, according to the several indebtedness due to them from the said assignor, the net proceeds arising from the conducting of said business and sale and disposal of said property after deducting all moneys which said assignee may at his option pay for the discharge of any lien on any of said property and any preferred indebtedness, and all charges (subject to the Constitution, By-Laws and Rules of the Los Angeles Wholesalers' Board of Trade, which are hereby made a part hereof).

"In consideration of the premises the parties of the third part do hereby agree to accept their pro rata portion of the net recoveries from this estate as paid to them by said assignee."

The Robinsons made payments on their promissory note to the plaintiff in the aggregate sum of about $3,500. The assets of the assignors were sold by the plaintiff and the net proceeds applied pro rata in accordance with the terms of the assignment, each creditor receiving about 40 per cent. of the amount of his claim. Out of such proceeds the plaintiff received and credited on the note the sum of $1,982.57, leaving a large balance due thereon. A. B. Fately was an adjuster of the Los Angeles Wholesalers' Board of Trade. In that capacity he procured the assignment involved herein. In relation to the execution of the assignment, the following testimony was given by the defendant C. A. Robinson over the plaintiff's objection that "it is incompetent, irrelevant and immaterial and wholly outside the issues in this case; * * * and for the further reason that it is an attempt to alter, vary or contradict the terms of a written contract."

"I told the fellow (Fately) I was going to put the matter in the hands of the bankruptcy court. He told me not to do that, that the Board of Trade's way of handling business would be that they would take and leave him there until the store had paid itself out and give her [Mrs. Robinson] a position to support herself, turn the stock back to her when the stock was clear of any indebtedness. * * * That was the reason I turned it over to the Board of Trade. * * * He showed me in the assignment where it was a preferred note, * * * told me plainly that that note would be paid first before anything else was paid. * * * He told me that that note would be taken care of, that if such a thing happened that the stock was sold, that the note would be paid first before anything else was paid. * * * He told me I would be clear of all I owed on that note, the note would be paid. * * * Out of the stock, if the stock was sold; otherwise payments would be kept up. * * *

"Q. Did Mr. Fately tell you that if you would make that assignment it would be in full payment of that note? A. Full payment, not only the note, but would release me, the Board of Trade would give me a release, give me clearance, * * * clearance of my indebtedness."

Mrs. Robinson testified to the same effect as the foregoing, and Fately testified to the contrary.

[1] The assignment is not a composition agreement. As said in Reynolds v. Pennsylvania Oil Co., 150 Cal. 629, 634, 89 P. 610, 612: "There is no covenant on the part of the creditors to discharge their claims against the debtor on the payment of less than the full amount of their claims." It is not a statutory assignment for the benefit of creditors as authorized by sections 3449 to 3473 of the Civil Code. There was no at-

tempt to comply with the provisions of those sections. The agreement, however, while not a statutory assignment, may properly be termed an assignment for the benefit of creditors. Jarvis v. Webber, 196 Cal. 86, 98, 236 P. 138.

[2, 3] "Ordinarily an assignment for the benefit of creditors and the payment of dividends thereunder do not act as a discharge of the debtor, except to the extent that the claims of creditors are thereby reduced by actual payment." 2 R. C. L. 667. Such assignments often contain a condition that the debtors shall be released from further liability, and that condition in an assignment is binding upon creditors who accept the benefits of the assignment. Equitable Life Assur. Soc. v. Jacobson, 68 Cal. App. 717, 230 P. 200. It appears that the assignment considered in the case last cited was substantially to the same effect as the one involved herein, except that it was expressly provided in that assignment that the creditors consenting thereto should "accept in full payment of their several indebtedness said pro rata payments to be made to them by said second party hereunder." It would not be contended that parol evidence would be admissible to add a similar provision, relating to the creditors generally, to the assignment in this case; no "mistake or imperfection of the writing" being put in issue by the pleadings and the "validity of the agreement" not being in dispute. Code Civ. Proc. § 1856; Civ. Code, § 1625. If such parol proof is inadmissible to show a discharge of the debtor by all the creditors, it certainly is inadmissible to prove a discharge by one or more of them. The verbal agreement to give the promissory note preference is in direct conflict with the express provision of the written assignment to the effect that all the creditors were to be paid "pro rata, according to the several indebtednesses due to them from the said assignor," and the admission of proof of such agreement was error.

The judgment is reversed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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105 Cal. App. 552

BORTON v. WEEGER et al.
Civ. 7262.

District Court of Appeal, First District, Division 2, California.

May 9, 1930.

Bills and notes ⚷129(1).

Under terms of note due two years after date, due date *held* accelerated by maker's sale of designated hotel building and furniture.

Note payable two years after date contained provision that, when designated building is sold, half of note shall be paid at close of sale, and, when furnishings and lease in building are sold, other half shall be paid at close of such sale, and that, if both are sold, full amount of note, with secured interest, shall be paid from proceeds of sale.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Walter Borton, against P. A. Weeger and another, wherein defendants filed cross-complaint. Judgment for plaintiff, and defendants appeal.

Affirmed.

A. G. Ritter and Benno M. Brink, both of Los Angeles, for appellants.

John J. Craig, of Los Angeles, for respondent.

BURROUGHS, Justice pro tem.

This is an action upon a promissory note. Plaintiff was awarded judgment, and the defendants appeal.

The complaint alleges that on July 25, 1924, the defendants executed and delivered to plaintiff the following promissory note:

"$17,993.67 Los Angeles, Cal., July 25, 1924.

"Two years after date and for value received, we promise to pay to Walter Borton or order at Los Angeles, California, the sum of Seventeen Thousand nine hundred ninety three 67/100 Dollars, with interest from date until paid, at the rate of six (6%) per cent. per annum, payable semiannually. Should the interest not be so paid, it shall become a part of the principal, and thereafter bear like interest as the principal. When the building located at 420 South Westlake avenue is sold half of this note shall be paid at the close of such sale, and when the furnishings and lease in said building are sold, the other half shall be paid at the close of such sale. If both are sold the full amount of this note, with secured interest, shall be paid from the proceeds of such sale."

The answer admits the making of the note, but alleges that it was given without consideration. By a cross-complaint defendants seek to recover the sum of $3,920.98, alleged to be a balance of rent unpaid. By answer to the cross-complaint the plaintiff denied the indebtedness.

The court found that the promissory note was made and executed as alleged in the complaint; that the plaintiff is the owner and holder thereof; that the building mentioned in the promissory note, and the furnishings

mentioned therein, have been sold; that the only sum paid on said note was $1,079.62 interest; that the amount due and unpaid at the date of the judgment was $20,392.41; that defendants on or about February 11, 1924, were the owners of the building and premises known as the Regina Hotel, situated at 420 South Westlake avenue, Los Angeles city; that defendants have sold said premises, together with the furniture and fixtures contained therein; that on February 11, 1924, plaintiff and defendants entered into a lease of the premises described, but that on July 25, 1924, said lease was canceled by mutual consent of the parties, and since said date has been of no binding force or effect; that it is not true that there is any rental due the defendants from the plaintiff. Judgment was therefore entered in favor of the plaintiff in accordance with the terms of said promissory note.

Appellants' first point of error is that there was no sufficient showing that the building or the lease and furniture were sold or the price for which they were sold. It is alleged in the cross-complaint that on or about April 1, 1925, "defendants were by the creditors compelled to sell said premises." Defendant P. A. Weeger testified at the trial that he had disposed of the furniture on approximately April 20, 1927. The testimony of the plaintiff was that the lease had been canceled by the mutual consent of the parties on or about July 25, 1924. While our attention has not been called to any price received by the defendants for the property sold, it is immaterial. In so far as the lease is concerned, it appears that defendants have sold both the premises and furniture and furnishings, and there is, therefore, even under defendants' claim, no lease to be sold before the note would be due.

It is further advanced as a reason for a reversal of the judgment that the note sued upon was to be paid out of the proceeds of the sale of the building, the lease, and the furniture. The note fell due two years after date, but, if the property were sold before that date, in our opinion, such sale accelerated the due date of the note; if the building were sold, one-half was due immediately after the sale, the same condition prevailed if the furniture were sold, in that event the other half became due; if it were all sold at one sale, then the full amount became due, and was payable from the proceeds of the sale. Furthermore, the evidence of the plaintiff is to the effect that, after the lease was made, he refused to proceed further with it, and threatened to commence an action to cancel the lease because of certain changes in the construction of the building, after the lease was made; that it was then agreed the lease should be canceled, the defendants were to take over the building, also an assignment of the furniture contract that the plaintiff had made for the furnishings to go into the building; that $10,000 already paid to the defendants by plaintiff as security for the performance of the lease, and the first payment of $10,243.67, on the furniture contract, was to be repaid to the plaintiff, less $2,250, which he was to sacrifice.

On March 16, 1925, the defendant P. A. Weeger wrote a letter to plaintiff inclosing interest on the note. Again on July 24, 1926, said defendant wrote another letter to the plaintiff in which he acknowledged the note, and stated that, if he closed a certain deal he had on hand, he would be able to take care of the note and would appreciate an indulgence for a few days.

This evidence is sufficient to uphold the findings of the court, and satisfies us that they are correct.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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105 Cal. App. 525

ALEXANDER v. WALLING et ux.

Civ. 7026.

District Court of Appeal, First District, Division 1, California.

May 8, 1930.

1. Appeal and error ⟹1011(1).

Findings on conflicting evidence are conclusive, unless supporting evidence is inherently improbable or of insufficient probative value as matter of law.

2. Corporations ⟹121(5).

In buyer's action alleging breach of sales contract by sellers' refusing to allow resale, sellers' testimony buyer never secured prospective purchaser *held* to support judgment for seller.

The evidence showed that the parties entered into a written contract whereby the sale of certain stock was agreed upon, the price to be paid by installments. The buyer, to secure performance of his agreement, pledged other stock to the sellers, with the privilege of withdrawing it "for the purpose of sale at a price to be agreed upon by the parties hereto." It was contended upon the one side that although the buyer had found a prospective purchaser, the sellers refused to resell the stock or allow it to be sold, whereas it was claimed upon the other side, and the sellers so testified, that the prospec-

tive purchaser had never actually agreed to buy the stock.

3. Corporations ⟹119.

Installment contract to sell stock *held* not to obligate sellers to permit resale to another.

Pursuant to their agreement, the buyer had pledged certain stock to the sellers, and the contract then provided for the buyer's "privilege to withdraw any and all of said stock pledged as security for the performance of this contract, for the purpose of sale, at a price to be agreed upon by the parties hereto"; it being further agreed that the sellers should have a similar "privilege of selling * * * said stock * * * so pledged as security * * * at the price of $210 per share." It was contended that under this contract, the sellers were obligated to allow the buyer to resell, not only the pledged stock, but also the stock agreed to be sold to the buyer whenever a prospective purchaser should be found willing to pay a price sufficient to yield the sellers $210 a share.

4. Corporations ⟹119.

That installment contract to sell stock required defaulting buyer to pay entire price was not inconsistent with sellers' retaining title, notwithstanding statutory vendors' lien (Civ. Code, §§ 3049, 3311).

Civ. Code, § 3049, gives the seller of personal property a special lien, dependent on possession when price becomes payable. Section 3311 specifies the seller's detriment caused by breach of executory contract of sale on part of buyer who has not been vested with title.

5. Sales ⟹300.

Under executory sales contract where title remains in seller, no lien exists, since seller cannot have lien upon personalty owned by him (Civ. Code, §§ 3049, 3311).

6. Corporations ⟹123(1).

Stock contracted to be sold on installments, remaining in sellers' possession, could not be deemed "pledge" thereof by buyer, as regards sellers' obligation to permit resale of "pledged" stock (Civ. Code, §§ 2986, 2987).

Civ. Code, § 2986, defines "pledge" as deposit of personalty to secure performance of another act, and section 2987 declares that every contract whereby possession of personalty is transferred, as security only, is to be deemed a pledge.

[Ed. Note.—For other definitions of "Pledge," see Words and Phrases.]

7. Contracts ⟹170(1).

If contract be ambiguous, court will look to acts done thereunder as clue to intention of parties.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by C. H. Alexander against J. C. Walling and wife. From a judgment for defendants, plaintiff appeals.

Affirmed.

Gallaher & Jertberg, of Fresno, for appellant.

Everts, Ewing, Wild & Everts, Dan Conway, and C. M. Ozias, all of Fresno, for respondents.

CAMPBELL, Justice pro tem.

On October 18, 1923, respondents J. C. Walling and Anita I. Walling, his wife, were the owners of 1,263⅓ shares of the capital stock of the Valley Transit Company, and on that date entered into an agreement in writing with appellant whereby they agreed to sell to appellant and appellant agreed to buy the 1,263⅓ shares of stock for $266,710.25. The authorized stock of the Valley Transit Company consisted of 2,500 shares, of which at the date of the contract 1,263⅓ shares were owned by respondents Walling and wife, 1,083⅓ shares by appellant Alexander, 113⅓ shares by others, and the remaining 40 shares were in the treasury of the corporation. Of the 1,263⅓ shares owned by respondents, 613⅓ shares were owned by respondent J. C. Walling and 650 shares were owned by his wife, Anita I. Walling. The purchase price of the stock agreed to be paid was "$35,000 upon the execution of the agreement, the receipt whereof is acknowledged by the first parties (Wallings) and the balance of $231,140.25 payable as follows: $25,000.00 including interest at the rate herein mentioned on the 18th day of April, 1924, and $25,000.00 including interest semiannually thereafter until nine installments have been made, and the balance then remaining shall be paid in full with interest at the rate herein mentioned, six months thereafter."

After providing that deferred payments shall bear interest at 6½ per cent. per annum and that the installment payments shall be paid from the dividends of the stock agreed to be sold, including that pledged as security, the agreement provides: "It is further understood and agreed that second party (appellant) has concurrently with the execution of this agreement by proper assignment, transferred to first parties Six Hundred Thirteen and one-third (613⅓) shares of stock held by second party in Valley Transit Company, which shall be held by first parties as additional security for the full performance of each and all of

the terms of this contract. It is understood and agreed that second party shall have the right and privilege to withdraw any and all of said stock pledged as security for the performance of this contract, for the purpose of sale, at a price to be agreed upon by the parties hereto, except said eighty-three and one-third (83⅓) shares hereinafter mentioned, provided the proceeds of the sale be paid to first parties to be applied to the unpaid principal, and first parties shall have the like privilege of selling and disposing of said stock of second party so pledged as security for the performance of this contract at the price of $210.00 per share and applying the proceeds of said sale as herein specified."

In the month of February, 1924, subsequent to the date of the contract, appellant endeavored to sell and dispose of the stock in the Valley Transit Company, which then consisted of his interest in the 1,263⅓ shares acquired under the contract of purchase with the respondents Walling and wife, and also of the 1,083⅓ shares which he owned in his own right, subject, of course, to the pledge of 613⅓ shares thereof under the contract. With the aid of his agent Willett appellant ascertained that one O. R. Fuller of Los Angeles was a prospective buyer for the stock, whereupon in contemplation of such a sale he had several interviews with the respondent J. C. Walling prior to the time that Fuller came to Fresno from Los Angeles to negotiate for the stock.

Appellant contends—and his complaint is based upon such assumption—that at such interviews the respondents orally agreed with him that the 1,263⅓ shares of stock owned by respondents might be sold to Fuller at $210 per share, and that the respondents would thereupon accept in full the entire balance due them under the contract. But the immediate payment of the entire balance under the contract would have subjected the respondents to the payment of approximately $40,000 to $45,000 in federal income taxes in addition to the income taxes they would be required to pay if they received the deferred installment payments at the times and in the manner prescribed by the contract.

On February 23, 1924, O. R. Fuller, in company with his agent Franklin D. Howell, came to Fresno for the ostensible purpose of negotiating with Alexander and Walling for the purchase of their stock in the Valley Transit Company, which included that covered by the contract and the 1,083⅓ shares owned by the appellant in his own right subject to the pledge of 613⅓ shares thereof. A conference was held in the law office of Everts, Ewing, Wild & Everts in Fresno on that date, at which Mr. Fuller and his agent, Mr. Howell, Mr. Alexander, and his agent, Mr. Willett, and Mr. Walling and his attorney, Mr. Wild, were present. The result of the conference was that no sale of the stock to Fuller was consummated.

On December 1, 1924, and prior to the commencement of the action, appellant assigned, transferred, and set over to W. E. Travis all of his right, title, and interest in and to the Walling-Alexander contract; the consideration of such transfer being $179,291.66, payable in certain installments. Appellant claims that being able to secure but $165.50 per share for 2,346⅔ shares by this transaction, when the stock could have been sold on February 23, 1924, to O. R. Fuller, pursuant to the arrangement of appellant and respondent J. C. Walling for $210 per share, he has suffered as damages the difference between $210 per share and the price for which the stock was finally sold. The court entered judgment for defendants—respondents herein—and from such judgment appellant has prosecuted this appeal. The objections urged have to do with the findings, appellant urging that certain findings are not supported by the evidence.

The court found that plaintiff did not find a purchaser for 1,180 shares of the stock or any other number of such shares for the price of $210 per share or any other price; that plaintiff and defendants never agreed upon a price for which plaintiff should sell the stock; that the stock was by defendants contracted to be sold by plaintiff upon conditional sales contract with the title to the same reserved in defendants until the stock should be paid for in accordance with the terms of the contract and should remain in the possession of the defendants as sellers until such payments be made; that plaintiff did not lose an opportunity to sell any of the stock by reason of any refusal of defendants; that on or about December 1, 1924, plaintiff sold, assigned, and transferred all of his right, title, and interest in the contract to W. E. Travis, and that the contract was thereafter by mutual agreement between W. E. Travis and defendants canceled and terminated; that at no time did defendants refuse to comply with the terms of the contract between plaintiff and defendants.

Even if appellant is correct in his contention that respondents were obligated to accept $210 per share for the stock agreed to be sold, if he produced a purchaser able, ready, and willing to buy the stock at that figure, if the evidence supports the court's finding that appellant did not find a purchaser for the stock at $210 per share and appellant did not lose an opportunity to sell the stock by reason of any refusal of respondents, the judgment must be affirmed, irrespective of whether the other findings complained of find support in the evidence.

On the question as to whether O. R. Fuller, who came from Los Angeles for the purpose of negotiating for the purchase of the stock, agreed, as appellant contends, to purchase

the same respondent J. C. Walling testified: "My talking with Alexander was occasioned by a question that was asked by Mr. Fuller after some other discussion: 'Well, what is your proposition this time, John? Are you assuming the position that you will or you won't take this money, the balance due—or the balance owing under your contract?' But I told him that the contract I had with Mr. Alexander was perfectly satisfactory, that if I took all my money, all in cash, it would entail a very heavy burden on income tax, and relying on my contract, which I believe was clear and good, that I would not be required to take it all at one time. * * * Mr. Fuller asked me how much additional income I thought that would amount to. I asked Mr. Wild if he could give me an idea. * * * He said 'it will run between forty and forty-five thousand if you should take your money all at one time.' * * * I told him * * * if you will pay $15,000 and Fuller would pay $15,000 in addition to the amount mentioned in the contract for the sale of the stock, I would probably deal with them and take the money and assume the rest of the loss myself * * * that was satisfactory to all with the exception that Mr. Alexander finally said he would stand ten thousand, but didn't feel like standing fifteen, and Mr. Willett appeared on the scene about that time and said that he thought that Fuller would stand ten also; if I would make it ten he thought he would put the deal over, and I told him all right go ahead and shoot on that basis. * * * I remember rather distinctly the position of Mr. Fuller that he made a statement that he was interested in the deal, and he would like to see it go over. He could pay for the stock with the Motor Transit Company, Motor Terminal stock and White Motor stock and finished up with the statement to the effect 'If you don't want all cash, write your ticket. * * * He said he would pay it in three different items, three different stocks that I have mentioned, if they were acceptable to me. I told Mr. Fuller I didn't know anything about his stocks and wouldn't be interested in them. * * * He mentioned three securities, Mr. Gallaher, that I just mentioned to you, or told you about; that he could pay me in cash. He did not say that he would. He said that he could pay me in cash or that he could pay me part cash and give me these securities in addition, that he mentioned. * * * Mr. Fuller stated just before he left the office 'Well, that is a lot of money to talk about anyway. I am going back to Los Angeles to see my attorneys. I don't know just where I stand on this thing yet.'" Following this interview the record is silent as to any further offer by Mr. Fuller or negotiations with him.

[1, 2] While the testimony introduced by appellant is at variance with that given by respondent J. C. Walling and raises a conflict, the trial court's findings being against appellant are therefore conclusive unless we are prepared to say, which we are not, that respondent J. C. Walling's testimony is to be marked as inherently improbable or is such as to justify us in holding as a matter of law that it is not of sufficient probative force as to support the findings. Milwaukee Bldg. Co. v. Wetzel, 93 Cal. App. 775, 789, 270 P. 382. The same may be said with respect to the finding that plaintiff and defendants never agreed upon a price for which plaintiff should sell the stock. On this subject respondent J. C. Walling testified that appellant never told him the price for which he was offering to sell the stock; that appellant did not say he thought he could make a deal with Fuller for the stock at $210 a share, as claimed by appellant.

[3] Appellant argues that it was evidently the intention of both parties that all of the stock should be sold when a price satisfactory to the plaintiff and sufficient to procure the defendant J. C. Walling $210 per share could be procured; that by the terms of the contract the title to the entire 1,263⅓ shares of stock agreed to be sold actually passed to appellant upon the execution of the contract and that such stock was by the terms of the contract pledged to respondents as security for the performance of the obligation, and that therefore the provisions of the contract relating to the sale of the pledged stock applies to the 1,263⅓ shares as well as to the 613⅓ shares. The court found against appellant's contention, and we are in accord with the construction placed upon the contract by the trial court.

The contract provides that the dividends accruing on the stock "agreed to be sold" and the dividends accruing on the stock "pledged as security" are to be applied by respondents upon the purchase price. It will therefore be seen that there are two classes of stock in the contract, viz.: Stock "agreed to be sold," the dividends of which are to be applied upon the purchase price; and "stock pledged as security," the dividends of which are likewise to be applied upon such purchase price. It thus appears that the parties to the contract clearly had in mind these two classes of stock.

The contract further specifies that 613⅓ shares are transferred to respondents to be held as "additional security" for the full performance of the terms of the contract. Appellant argues that there could be no "additional security" unless there was other security, apparently asserting that there could be no other security unless the 1,263⅓ shares were pledged. However, there was other security, which was the retention of title by respondents to the 1,263⅓ shares of their stock until the purchase price therefor was

fully paid. "'Security' is a word of broad import." Renton v. Gibson, 148 Cal. 650, 655, 84 P. 186, 188. "A security is something which makes the enjoyment or enforcement of a right more secure or certain. * * * A security on property is where a right over property exists, by virtue of which the enforcement of a liability or promise is facilitated, or made more certain." First National Bank of Stewart v. Hollinsworth, 78 Iowa, 575, 43 N. W. 536, 538, 6 L. R. A. 92.

By the succeeding clause of the contract appellant is authorized to withdraw and sell any of "said stock pledged as security" except 83⅓ shares thereof at a price to be agreed upon by the parties. The word "said" in this clause of the contract necessarily refers to the pledged 613⅓ shares referred to in the immediately preceding clause. It is again demonstrated in the following paragraph of the contract that the pledged stock consisted of but the 613⅓ shares: "It is agreed that upon each payment of $25,000.00 upon the principal, first parties (respondents) will release to second party (appellant) 125 shares of second parties stock in Valley Transit Company which has been assigned to first parties to be held by them as security as herein mentioned until first parties have released Five hundred thirty (530) shares, the balance of second party's stock amounting to eighty-three and one-third (83⅓) shares shall be retained by first parties as security until the total balance is paid." The 530 shares and the 83⅓ shares total the 613⅓ shares pledged as security.

[4-6] We do not agree with appellant's contention that the clause of the contract providing in default of payment of installments the appellant in default was to pay the respondents all of the money, is irreconcilable with the continued ownership of the stock by them and is strong proof that the 1,236⅓ shares were pledged. The contract seems to have been carefully drafted to provide that in default on the part of appellant the total unpaid balance "shall immediately become due and payable at the option of first parties, or they may take such other and further steps as they may deem advisable." Section 3049 of the Civil Code, which provides, "One who sells personal property has a special lien thereon, dependent on possession, for its price, if it is in his possession when the price becomes payable, and may enforce his lien in like manner as if the property was pledged to him for the price," is simply declaratory of the seller's lien at common law, but limits its enforcement by requiring him to follow the procedure required of one enforcing a pledge. Since section 3049 relates to vendors' liens it obviously relates only to sales in which title has passed and not to executory sales where the title is still in the seller. In the latter situation no lien exists for the reason that the vendor cannot have a lien upon personal property of which he is the owner. Katzenbach & Bullock Co. v. Breslauer, 51 Cal. App. 756, 197 P. 967; Standard Auto Sales Co. v. Lehman, 43 Cal. App. 763, 186 P. 178. There being no statutory requirement as to the manner of resale when the buyer repudiates an executory contract of sale, the seller may resell at private sale, and his right to recover the difference between the market value of the goods and the contract price will not be defeated. Civ. Code, § 3311, subd. 2; Gibbs v. Ranard, 86 Cal. 531, 25 P. 63. However, the executory seller may, if he chooses, resell according to section 3049 of the Civil Code, and the resale price is conclusive of the market value against the executory contract buyer. A pledge is a deposit of personal property by way of security for the performance of another act Civ. Code, § 2986. Every contract by which the possession of personal property is transferred, as security only, is to be deemed a pledge. Civ. Code, § 2987. The 1,263⅓ shares of stock of respondents contracted to be sold upon certain payments being made remaining at all times in their possession cannot be construed to have been pledged.

[7] As to appellant's claim that it was the intention of the parties that all of the stock might be sold at $210 per share, it may be said that by the terms of the contract the only stock that could be sold at $210 per share was the 613⅓ shares actually pledged and not the 1,236⅓ shares owned by respondents. Furthermore, the privilege of selling and disposing of the stock at $210 per share was by the terms of the contract conferred upon respondents and not upon appellant. That appellant recognized that any sale he made other than of the 613⅓ shares pledged as security required the sanction of respondents, is evidenced by the fact that he was willing to contribute to the increased income tax respondents would be required to pay, if they sold all of the stock at $210 per share. The meaning of the language of the contract here seems clear, but if it can be considered doubtful, the court will call in the aid of the acts done under it as a clue to the intention of the parties. Retsloff v. Smith, 79 Cal. App. 443, 452, 249 P. 886.

We have discussed this latter question not so much because we deemed it necessary to a decision of the case, but because of the seriousness with which appellant has urged it.

What we have said renders decision of the remaining objections to findings urged by appellant unnecessary as well also of considering the point made by respondents that appellant, having assigned all his right, title, and interest in the contract to W. E. Travis prior to the filing of his complaint, he could not maintain the action.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

105 Cal. App. 616

LEVIN v. TRAEGER, Sheriff.

Civ. 4094.

District Court of Appeal, Third District, California.

May 13, 1930.

Appeal and error ⟹916(1).

Claim and demand alleged in answer and demand referred to in stipulation in action for conversion are presumed sufficient on defendant's appeal (Code Civ. Proc. § 519).

While the evidence did not show the character and claim of demand made by plaintiff in action for conversion at trial when plaintiff was proceeding to make proof thereof, counsel for defendant stipulated that demand was made, whereupon plaintiff dropped the subject, and made no further proof of claim and demand.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Sam Levin against William I. Traeger, Sheriff. Judgment for plaintiff, and defendant appeals.

Affirmed.

Everett W. Mattoon and Rupert B. Turnbull, both of Los Angeles, for appellant.

E. P. Peers and Alfred Kehde, both of Los Angeles, for respondent.

FINCH, P. J.

The plaintiff brought this action to recover the value of 1,030 hens alleged to have been converted by the defendant and disposed of to his own use. The answer denies the allegations of the complaint, and alleges, among other things, that, while the defendant held possession of 2,000 hens as sheriff, "the plaintiff herein claimed to be the owner of a portion only thereof, and at that time demanded of and from this defendant, the portion thereof claimed by the plaintiff; that thereupon this defendant offered to release and deliver to the plaintiff the portion thereof claimed by the plaintiff, to-wit: 1,030 white leghorn hens." Judgment was entered in favor of the plaintiff, and the defendant has appealed therefrom.

At the time referred to in the answer, the defendant had seized and was holding possession of the property in an action in claim and delivery.

The only ground urged for a reversal of the judgment is that the plaintiff's claim of ownership of the property and his demand for possession thereof did not comply with the provisions of section 519 of the Code of Civil Procedure. The evidence does not show the character of the claim and demand made by the plaintiff, but at the trial, when the plaintiff was proceeding to make proof thereof, counsel for the defendant said: "I stipulate that he made demand on the Sheriff for the property prior to the 14th day of June, 1926." The plaintiff thereupon dropped the subject, and made no further effort to prove the making of a claim and demand. It must be presumed on appeal that the claim and demand alleged in the answer and the demand referred to in the stipulation complied with the provisions of section 519 of the Code of Civil Procedure, and were sufficient. Either the defendant intended the stipulation to mean that a legal demand was made or he was trifling with the trial court, and it is not to be presumed that he made the stipulation in bad faith.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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105 Cal. App. 546

CARRICK et al. v. SHERMAN et al., Board of Fire Com'rs.

Civ. 6921.

District Court of Appeal, First District, Division 1, California.

May 9, 1930.

1. Municipal corporations ⟹197.

Successive renewals of temporary appointments of firemen without regard to civil service law requirements would be void (San Francisco Charter 1899, art. 13, § 11).

2. Municipal corporations ⟹217(1).

Word "void," as used in civil service law providing that appointment not made in conformity therewith shall be void, receives its natural full force and effect (San Francisco Charter 1899, art. 13, § 11).

[Ed. Note.—For other definitions of "Void," see Words and Phrases.]

3. Municipal corporations ⟹200.

Engineers and pilots of fireboats acting as temporary appointees on amendment to firemen's pension law *held* not entitled to benefits of pension fund (San Francisco Charter 1899, art. 9, c. 7; c. 2, § 1; c. 1, § 6, as amended by St. 1911, p. 1692).

Under San Francisco Charter (St. 1899, p. 336) art. 9, c. 7, provision is made for firemen's pension fund, but by article 9, c. 1, § 6, as amended by St. 1911, p. 1692, engineers of fireboats, pilots, and certain

others, cannot derive benefits of firemen's pension fund.

4. Evidence ⚷83(1).

Presumption that person acting in public office was regularly appointed is inapplicable to one seeking to recover salary.

5. Evidence ⚷83(1).

Presumption that person acting in public office was regularly appointed *held* inapplicable to one seeking benefits of pension system.

6. Municipal corporations ⚷200.

Burden was on persons claiming benefits of firemen's pension system to establish right (San Francisco Charter 1899, art. 9, c. 7; c. 2, § 1; c. 1, § 6, as amended by St. 1911, p. 1692).

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Suit by Thomas Carrick and others against W. A. Sherman and others, as Board of Fire Commissioners of San Francisco. From a judgment granting writ of mandate to prevent deduction from wages of petitioners for maintenance of Employees' Retirement System, defendants appeal.

Reversed.

John J. O'Toole, City Atty., and Thomas P. Slevin, Asst. City Atty., both of San Francisco, for appellants.

Melvin & Sullivan, William J. De Martini, and Gregory, Hunt & Melvin, all of San Francisco, for respondents.

McKENZIE, Justice pro tem.

This is an appeal from a judgment of mandate ordering the defendants to desist from deducting from the pay roll furnished the city auditor any portion of petitioners' wages, which deductions are retained by the city for the purpose of maintaining San Francisco City Employees' Retirement System, which was established by ordinance in 1922. The ordinance provides that all employees of the city, with certain exceptions, must belong to this protective system. Included within one of the exceptions are firemen who are entitled to the benefits of firemen's relief and pension fund, and petitioners claim to belong to this class. Beside the retirement system created by the ordinance, there are pension systems applicable to the police department, the fire department, etc. These pension systems were established long prior to the enactment of the ordinance in question. The retirement system is financially supported by deducting a certain percentage from each member's salary, and the pension system is supported by public revenue and also the benefits are probably greater. Consequently it is more advantageous for a city employee or officer to be included within the pension system, and this is what petitioners are endeavoring to do in this action. They belong to the fire department and have been members thereof for many years. There is just one question involved in this case, and that is: Were the petitioners entitled to the benefits of the Firemen's Pension System under the provisions of the San Francisco charter of 1899 (St. 1899, p. 241) before said charter was amended in 1911 (St. 1911, p. 1661). Said amendments became operative on February 23, 1911, the day they were filed with the secretary of state.

Article 9 of the 1899 charter makes full provision for the organization of the fire department of the city; the management and control is vested in a board of fire commissioners. Section 1, c. 2, of this article provides: "The board of fire commissioners shall immediately after their appointment and qualification proceed to reorganize the fire department in conformity with the provisions of this charter. In so doing the board shall make its appointments of officers and members from the persons constituting the force in the service of the fire department at the time this charter goes into effect. Such officers and members shall not be required to pass any civil service examination. All future appointments and promotions shall be made subject to the provisions of Article XIII of this charter."

Article 13 provides that all appointments to the fire department must be made through and by the methods provided by the civil service commission. Section 11 of this article provides: "All officers, courts, boards, and heads of departments vested in this charter with the power to appoint deputies, clerks, stenographers or employees in any of the offices or departments of the city and county mentioned in this section shall make such appointments in conformity with the rules and provisions prescribed by this article, and any appointment not so made shall be *void*."

Chapter 7 of article 9 makes provision for a firemen's relief and pension fund. Throughout this chapter the beneficiaries are referred to as firemen and nothing is stated about permanent or temporary employees.

Section 6, chapter 1, article 9, by amendment effective February 23, 1911 (St. 1911, p. 1692), provided that engineers and pilots of fireboats, engineers, mechanics, and employees of the auxiliary fire system or of the corporation yard, and clerks in the office of the commission shall not be subject to nor derive any benefits from the firemen's relief and pension fund as provided for in chapter 7 of article 9.

The board of fire commissioners appointed the petitioners to their respective positions at the times and for duties as follows: Carrick, engineer of fireboat, November 4, 1909; Ward, engineer of fireboat, January 6, 1910; Trapp, pilot of fireboat, December 23, 1910; and Daly, engineer of fireboat, January 30, 1911. As shown by the minutes of the board of fire commissioners, the appointments were all designated as temporary, and those temporary appointments to the same respective duties were renewed as temporary appointments at intervals until January 24, 1913, when the civil service commission having certified the petitioners as eligible, they were permanently appointed to their respective positions, which they now and ever since have held.

If the status of petitioners as firemen is to be determined as of date of their permanent appointment, they are not entitled to the relief they seek because the charter amendment of 1911 specifically excludes them from deriving any benefits from the firemen's relief and pension fund. If they are to have the relief sought, it must be on one of two theories: First, that a temporary employee, before the amendment to the charter, was entitled to this benefit; or second, that the original appointments, although designated temporary, were in fact permanent.

Before discussing these two propositions, we will consider a principle of law which respondent stresses, and this is that relief and pension systems for firemen are to be liberally construed for the benefit of firemen. For firemen and policemen, who in the course of their duties are constantly exposed to injury and death, it is no advantage to have included within the pension system a number of men who are not exposed to danger. In fact, it is a disadvantage, because the funds to support the system come from the public treasury, and if only the deserving reap the benefits, the public can be more generous with its appropriations. An engineer on a fireboat in San Francisco Bay is no more exposed to hazard than hundreds of other ordinary city employees. By the foregoing we are not decrying the highly technical and honorable pursuits of petitioners; we only have in mind that the equities are not all on one side.

Article 13 of the charter, which provides that all permanent positions must be filled through civil service and in the manner prescribed in article 13, § 10, contains this qualifying proviso: "To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with the approval of the commissioners, make temporary appointments, to remain in force not exceeding sixty days, and only until regular appointments, under the provisions of this article, can be made."

[1, 2] At the time petitioners Carrick and Ward were temporarily appointed the fire commissioners were creating a new department which required permanent employees to fill permanent positions newly created, and why those positions were temporarily filled by the same men month after month is not revealed. In fact, the action of the fire commission in renewing these temporary appointments would seem to indicate, so far as the record shows, that the civil service law was being ignored. However, if this be so, it will avail the petitioners nothing because such appointments would be void. San Francisco Charter 1899, p. 352, art. 13, § 11. "When the word void is used in a statute that has some object of public policy in view which requires the strict construction the word receives its natural full force and effect." Maxw., Interp. St. (2d Ed.) 256; Reams v. Cooley, 171 Cal. 150, 152 P. 293, Ann. Cas. 1917A, 1260.

Under the ruling in Hurley v. Sykes, 69 Cal. App. 310, 231 P. 748, 751, petitioners before the amendment of the charter in 1911 would have been entitled to the benefits of the firemen's pension and relief fund if they had been lawful and permanent employees. But being only temporary employees, were they so entitled? The decision in this case must rest on the answer to this question. In determining this question we must differentiate between a temporary appointment and the six months' probationary period that civil service appointees must serve before the appointment becomes final. Counsel have not directed our attention to any authority where this precise question has been determined, nor have we found any in our limited research. However, in Hurley v. Sykes, supra, this statement is made: "The terms employed would not, of course, embrace persons hired for a transient or temporary task. The term 'member' embraces the idea of tenure, duration, emoluments, and duties." On this statement appellant relies for a reversal. In State etc. v. Trustees Firemen's Pension Fund, 18 Ohio Cir. Ct. R. 887, it was held that a substitute fireman who was injured while on duty as such substitute was not entitled to the benefits of the relief and pension fund.

[3-6] Having in mind that the board of fire commissioners, outside of civil service appointments, had only power to make temporary appointments, we are compelled to hold that petitioners were not such members of the fire department as were entitled to the benefits of the relief and pension fund prior to the amendment of the charter in 1911. It thus follows that the trial court, on the evidence adduced at the trial, was not justified in finding that petitioners were, prior to the charter amendment of 1911, members of the fire department and entitled to the advantages of the firemen's relief fund. The presumption "that a person acting in a public office was regularly appointed to it" is not applicable to one seeking to recover the sal-

ary attached to the office. Burke v. Edgar, 67 Cal. 182, 7 P. 488. The same rule should apply when the benefits of a pension system are being sought. The burden was upon petitioners to establish their claim. This they did not do. However, on a new trial they may be able to show some further action by the civil service commissioners that would change the situation, and, likewise, there might be some rule established by the pension commissioners relating to temporary appointments, which was overlooked at the trial, that would bring comfort to petitioners.

The judgment is reversed.

We concur: TYLER, P. J.; CASHIN, J.

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105 Cal. App. 562

E. E. McCALLA CO. v. SLEEPER, County Assessor, et al.

Civ. 4057.

District Court of Appeal, Third District, California.

May 9, 1930.

1. Taxation ⟹421(1).

Assessor's copy of map supplied by property owner and containing sufficient description to permit accurate determination of land assessed *held* sufficient (Pol. Code, §§ 3629, 3658a).

2. Taxation ⟹421(1).

Realty is described sufficiently for tax assessment purposes when owner can identify it without being misled by description (Pol. Code, § 3650).

3. Taxation ⟹335.

Landowner, providing map containing only description furnished assessor, *held* estopped to challenge sufficiency thereof and question fact that property was assessed by reference to subdivision numbers thereon (Pol. Code, §§ 3629, 3650, 3658a).

Pol. Code, § 3629, requires assessor to exact from each person a verified written statement of all property owned by him, section 3650 requires that land, which is not a congressional division or subdivision, be listed in assessment book by metes and bounds "or other description sufficient to identify it," and section 3658a provides for preparation of official maps of cities, towns, and subdivisions by city engineer or county surveyor under council's or board of supervisors' direction.

4. Appeal and error ⟹907(3).

Statutory requirements as to description of land in assessment book must be assumed to have been fulfilled on appeal from judgment roll (Pol. Code, § 3650).

5. Appeal and error ⟹907(3).

Court of Appeal must assume on appeal from judgment roll that every necessary element not refuted thereby was adequately proved.

6. Taxation ⟹319(2).

It will be presumed, in absence of contrary evidence, that assessor regularly and correctly assessed property for taxation (Code Civ. Proc. § 1963, subd. 15).

7. Evidence ⟹460(4).

Parol evidence is competent to aid description of realty by locating monument referred to or applying description to surface.

8. Taxation ⟹421(1).

Assessor's map, drawn to scale, marking northern boundary of tract "East" and "West," showing subdivisions, separately numbered, with boundary distances, and accurately describing point of commencement in such line, *held* sufficient (Pol. Code, §§ 3629, 3650).

9. Boundaries ⟹6.

Terms "east" and "west," used in description of boundary courses without modification or variation, mean due east and due west.

[Ed. Note.—For other definitions of "East" and "West," see Words and Phrases.]

Appeal from Superior Court, Orange County; E. J. Marks, Judge.

Action by the E. E. McCalla Company against James Sleeper, Assessor of Orange County, and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

C. E. McDowell, of Los Angeles, for appellant.

Z. B. West, Jr., and Sam L. Collins, both of Santa Ana, for respondents.

R. L. THOMPSON, J.

This is an appeal from a judgment in favor of the defendants in an action to declare invalid an assessment of taxes levied against certain lots belonging to the plaintiff which are situated in Orange county.

The complaint alleges that during the fiscal year from July 1, 1923, to July 1, 1924, the plaintiff was the owner of a five-acre tract of land in Orange county, Cal., which is

described by metes and bounds; that the defendant Sleeper was the assessor of that county, and as such officer procured from the plaintiff an outline map or diagram of said five-acre tract included within a larger parcel of land consisting in the aggregate of 41.7 acres of land, which was subdivided into uniform parts or lots numbered from 1 to 427; that the assessor obtained a copy of this map which was filed in his official book of maps; that with reference to this copy of an unofficial map he proceeded to assess said five-acre tract at the rate of $50 per lot or subdivision; that for the purpose of assessing said property the officer failed to comply with the provisions of chapter 3, part 3, title 9, of the Political Code of California (section 3627 et seq.); that said map, to which reference was made in assessing the property, was not procured or filed pursuant to the requirements of section 3658a of the Political Code, and that said property was illegally assessed in subdivisions by reference to the numbers thereof as they appeared upon said unofficial map and not in one plot described by metes and bounds or so defined that the owner was able to identify the parcels of land which were assessed.

The complaint was demurred to on the ground that it failed to state facts sufficient to constitute a cause of action. The demurrer was overruled. The answer admitted many of the allegations of the complaint, except that it denied that the map in question was unofficial or that the description of the property by reference to the map and the numbers of the lots designated thereon was uncertain, indefinite, or inadequate to enable the owner to identify the land which was assessed. Upon the contrary, the answer affirmatively alleged that the map in question was a facsimile of the map of plaintiff's property furnished by him to the assessor under the provisions of section 3629 of the Political Code, and which copy was duly filed in the official Assessor's Book of Maps, and contained descriptive data from which the owner would be enabled to accurately locate the various portions of land which were assessed to the plaintiff. A blueprint copy of this map was attached as an exhibit to the answer. This blueprint map describes the 41.7-acre tract of land, which includes the five acres involved in this suit, in a triangular form subdivided into uniform sections or lots which are numbered consecutively upon the map from 1 to 427. The map appears upon its face to have been drawn upon a scale of 50 feet to the inch. It also contains the following reference to its identity: "Assessor's Map No. 10." The points of compass are also indicated, and a definite point in the northern line of the triangular parcel of land is specifically designated as "2190.14 [feet] S. of ¼ cor. bet. Sec. 20 & Sec. 29, T. 3 S.—R. 9 W." The course of the northern line of the tract is also indicated by the use of the words "East" and "West."

The court found that the plaintiff owned the property which is involved in this appeal; that the map hereinbefore mentioned was furnished to the assessor at his request covering a tract of 41.7 acres of land within which plaintiff's said five-acre tract was included; that a facsimile copy of that map as hereinbefore described was made and filed as "Assessor's Map No. 10" in the Assessor's Official Book of Maps in his office, and that the said officer thereupon assessed the plaintiff's said property for the fiscal year beginning with July 1, 1923, and in so doing "described the aforementioned and described property by numbers as delineated on said Assessor's map No. 10"; that said map "is a true and correct description of the property reported to be shown thereon and is a sufficient description to identify each and every lot or parcel of land therein shown."

Upon these findings judgment was rendered in favor of the defendants. From this judgment an appeal was perfected upon the judgment roll alone. The evidence which was adduced at the trial is not before this court.

The appellant contends that the assessment was void, for the reason that, (1) the description of the property was insufficient upon which to enable the owner to identify the particular property assessed, (2) the description is inadequate because reference was made only to an unofficial map, and (3) since the property had not been legally subdivided, the assessor was authorized to describe it only by metes and bounds.

[1] Since the map to which reference was made by the officer in assessing the property was supplied by the owner of the property and contained a description of the land and an identification of the various subdivisions thereof sufficient to enable one to accurately determine and define the particular land which was assessed to the plaintiff, and that a facsimile copy of this map was made and filed in the official Assessor's Tax Book of Maps, designated as "Assessor's Map No. 10," and specifically referred to, it became a part of the description of the property, and was therefore sufficient for the purpose of assessment, under the circumstances of this case.

[2] For the purpose of assessment, real property is described with sufficient particularity when the owner is enabled to identify the land which is assessed without being misled by the description. Corson v. Crocker, 31 Cal. App. 626, 161 P. 287; Numitor Gold Min. Co. v. Katzer, 83 Cal. App. 161, 165, 256 P. 464; 3 Cooley on Taxation, p. 2365, § 1175. In the case of Best v. Wohlford, 144 Cal. 733, 78 P. 293, 294, the language used by the court in San. Gabriel Co. v. Witmer Co., 96 Cal. 635, 29 P. 500, 31 P. 588, 18 L. R. A. 465, 470, was quoted with approval as follows:

"The designation of the land will be sufficient if it afford the owner the means of identification and do not positively mislead him, or is not calculated to mislead him."

[3-5] While it is true that the map to which reference is made in the present case was not prepared in the manner provided by section 3658a of the Political Code, it was provided by the plaintiff himself, and contained the only description of the property which was furnished to the officer. The owner was therefore estopped from challenging the sufficiency of the description which he himself had given to the assessor. Dear v. Varnum, 80 Cal. 86, 22 P. 76; Jacoby v. Wolff, 198 Cal. 667, 674, 247 P. 195; 24 Cal. Jur. 192, § 178. For the same reason the owner may not question the fact that the property was assessed by reference to the numbers of the subdivisions contained upon the map instead of describing the land by metes and bounds. The requirements of section 3650 of the Political Code, in the absence of evidence to the contrary, must be assumed to have been fulfilled in the present case. This appeal is from the judgment roll. The evidence which was adduced at the trial is not before this court. We must therefore assume, in support of the judgment, that every necessary element of the case, which is not refuted by the judgment roll, was adequately proved. Section 3650 of the Political Code requires only that:

"The assessor must prepare an assessment-book, with appropriate headings, * * * in which must be listed all property within the county, and which shall show under the appropriate head: * * * 2. Land, by township, range, section, or fractional section; and when such land is not a congressional division or subdivision, by metes and bounds, *or other description sufficient to identify it.* * * *" (Italics ours.)

[6, 7] In the absence of evidence to the contrary, it will be presumed that an assessor has regularly and correctly assessed property. Section 1963, subd. 15, Code Civ. Proc.; Utah Const. Co. v. Richardson, 187 Cal. 649, 203 P. 401. The property was adequately described in the map to which reference was made in the present case. Parol evidence is competent to aid the description of real property in order to locate a monument which is referred to, or to identify the land by applying the description to the surface of the ground. Fox v. Townsend, 152 Cal. 51, 58, 91 P. 1004, 1007; Best v. Wohlford, 144 Cal. 733, 78 P. 293.

[8, 9] Pursuant to the foregoing rule, in the absence of the transcript of testimony of the trial, we may assume that a surveyor was called and definitely located the one monument or fixed point in the description which appears on the map, and from that point of commencement traced out, scaled, accurately described, and located the outline and dimensions of the triangular tract of land containing the 41.7 acres of land, together with the several subdivisions and the area and descriptions thereof which were assessed to the plaintiff by numbers. This information required the supplying of no course or direction of boundary or subdivision lines or the distances thereof, as all of these essential elements of the description adequately appear upon the diagram furnished by the plaintiff. It will be observed that the map to which reference is made is drawn to a definite scale of 50 feet to the inch; the customary dart is used to indicate the relation of the map to the points of compass; the northerly boundary line of the triangular tract is distinctly marked "East" and "West"; with a few exceptions this triangular tract is divided into uniform square subdivisions, each of which is separately numbered; the angles and distances of the boundaries of the irregular subdivisions are accurately given in feet and inches, and these lots or sections are also separately numbered. At a point in the northerly boundary line of the entire tract the following definite monument or point of commencement appears, to wit: "2190.14 [feet] S. of ¼ Cor. bet Sec. 20 & Sec. 29—T. 3 S.—R. 9 W." The abbreviations which are used in the description of this point of commencement are well understood and sufficiently accurate. When the terms "east" and "west" are used in the description of the courses of the boundary of land, without modification or variation, they must be deemed to mean *due* east and *due* west. 1 Jones on Real Property, p. 329, § 397; Currier v. Nelson, 96 Cal. 505, 31 P. 531, 746, 31 Am. St. Rep. 239; Fratt v. Woodward, 32 Cal. 219, 91 Am. Dec. 573. It must therefore be assumed the northern boundary of the 41.7-acre tract of land extends due east and west. With the definite point of commencement accurately located in this northern line, as it appears to be, it is a simple matter for a surveyor to accurately define and describe, not only the entire triangular tract of land, but each separate subdivision thereof which was assessed to the plaintiff by reference to its designated number. The plaintiff was therefore not misled by the description, and was able to identify and locate each separate tract which was assessed to him.

There is nothing in the language employed in the case of Best v. Wohlford, 144 Cal. 733, 78 P. 293, which is relied upon by the appellant in this case, that is in conflict with the foregoing application of the law.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

105 Cal. App. 606

DEE v. J. C. FORKNER FIG GARDENS, Inc.

Civ. 293.

District Court of Appeal, Fourth District, California.

May 12, 1930.

1. Appeal and error ⟹205.

Defendant, claiming unambiguous memorandum introduced by plaintiff was incomplete, should have explicitly offered explaining parol evidence or obtained ruling presenting question on appeal (Civ. Code, §§ 3399, 3402).

The instrument in question, although contended by defendant to be a mere receipt, had all of the elements of a complete contract for the sale of certain lots, and contained a "refund guarantee" within three years of moneys paid thereunder by plaintiff, who sought to recover his payments. Although plaintiff claimed that memorandum did not fully express intention of parties and defendant claimed it was incorrect, neither party sought a reformation thereof in equity under Civ. Code, §§ 3399, 3402.

2. Appeal and error ⟹179(1).

Defendant's allegation of plaintiff's nonperformance of certain covenants of contract, admittedly never executed, insufficiently raised such question on appeal.

Plaintiff relied upon a "refund guarantee" to recover back money paid under an agreement to buy certain lots from defendant, who attempted to prove that a more complete contract had been subsequently executed which obligated plaintiff to pay interest. Plaintiff contended, and the court found, that such contract had never been executed, which was also shown by testimony of defendant's witnesses. On appeal, defendant urged that court erred in finding that plaintiff was not obligated to pay interest.

3. Trial ⟹396(7).

In action for money had and received where plaintiff admitted obligation to pay interest, contrary finding was not error, testimony indicating waiver.

4. Appeal and error ⟹843(2).

In action for money had and received, after allowing plaintiff return of interest, finding denying plaintiff's obligation for interest was not error; question being moot.

The plaintiff sought to recover certain moneys paid to the defendant under a contract entitling plaintiff to a refund thereof at his option within three years. It was contended by defendant that plaintiff was obligated under the contract to pay interest; but conceding that to be true, plaintiff was entitled to a refund by the terms of the contract.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Rollins L. Dee against the J. C. Forkner Fig Gardens, Incorporated. From a judgment for plaintiff, defendant appeals. Affirmed.

Cosgrave & Barstow, of Fresno, for appellant.

Thomas F. Lopez, of Fresno, for respondent.

OWEN, Justice pro tem.

The plaintiff and the defendant executed the following instrument:

"Original No. 4182.

"$20,000.00 Date May 26, 1923.

"Received of Rollins L. Dee, Five Hundred and No/100 Dollars to apply on purchase price of lots 141-142-143-144- Sec. 5, Bullards Lands Irrigated, Fresno County, Calif., price $20,000.00; Terms $500 cash—$1500 fifteen days—balance 7 equal annual installments beginning in 3 years from Nov. 1st, 1923—7% semi-ann. int.—Refund guarantee in 3 years at 7% all moneys paid in less moneys taken out subject to prior sale.

"The J. C. Forkner Fig Gardens, Inc.
"By J. C. Forkner.

"I agree to the above.
"Rollins L. Dee.

"Address 2126 Highland Ave., Los Angeles, Cal.

"(If not approved this money to be immediately refunded to purchaser.)"

The plaintiff paid the $2,000 as provided in the instrument. On April 1, 1926, he notified the defendant in writing that at the expiration of three years from the date of the agreement he would make formal demand for the return of the $2,000, together with interest at the rate of 7 per cent. from May 26, 1923. On November 22, 1926, he made the demand.

Within proper time after the demand was made the plaintiff instituted this action, his complaint containing three counts: First, for money had and received; second, the failure of negotiations between the parties leading up to the execution of a written contract for the sale and purchase of the premises involved, and a demand for the return of the money paid in under the terms of the written memorandum heretofore set forth; and third, for a refund of the $2,000 and interest thereon under the option contained in the memorandum.

The answer contains a general denial of the allegations of the first cause of action; second, that the instrument set forth is an incomplete writing, and expresses only a part of a complete agreement between the parties as to the terms and conditions of the sale, which said complete agreement was never executed by the plaintiff; third, that the instrument set forth was merely a receipt and did not contain the terms and conditions of the contract; that the plaintiff had agreed to execute a form agreement in use by defendant which fully and in detail set forth all of the matters under consideration.

During the time elapsed between the making of the agreement herein set forth and the date plaintiff gave his notice of intention to claim the money paid in, the defendant tendered to plaintiff, for execution, two extended form agreements, essentially different from the one executed and from each other. After several interviews between the parties and the exchange of some correspondence, the plaintiff declined to sign either of the two contracts. In fact, there is no proof that he ever agreed to the terms and conditions of either, but did make specific objection, by letter, that the contracts so tendered did not comply with his original contract.

The trial court gave the plaintiff judgment in the sum of $2,853.14, being the $2,000 paid in, with interest.

The defendant appeals and relies upon the following three propositions for a reversal of the judgment:

(1) That the receipt admitted in evidence was an incomplete agreement and was subject to explanation and variation by parol evidence:

(2) That the finding of the untruth of the denial in defendant's answer as to plaintiff's obligation to pay interest is contrary to the uncontradicted evidence;

(3) That plaintiff was required to pay interest and there is no pleading or finding that defendant excused payment thereof.

It may be remarked in passing that while the plaintiff claims that the memorandum set forth does not fully, and the defendant claims that it does not correctly, express their intentions, neither party is seeking a reformation of the contract in equity under the provisions of sections 3399 and 3402 of the Civil Code.

[1] I. The memorandum heretofore set out fully is treated by the defense as only a receipt. It cannot be gainsaid, however, that the document, although abbreviated, has all of the elements of a complete contract, and is neither ambiguous nor uncertain. A careful search of the record does not show that the plaintiff ever agreed to the two contracts submitted to him by the defendant and marked Exhibits 2 and 3. These contracts were apparently printed forms used by defendant, containing a multiplicity of covenants and agreements. No testimony was adduced by either party showing the execution of both or either of them; but as a matter of fact the testimony of both Dee and Forkner shows that the plaintiff Dee made specific objection to their terms. These exhibits were admitted in evidence and Exhibit 2 contains the terms, covenants, and agreements which defendant claims were omitted from exhibit 1 heretofore set forth. While the plaintiff in the beginning of the trial attempted to introduce the conversation leading up to the execution of Exhibit 1, the so-called receipt, and the trial court of his own volition held that the memorandum could not be evaded unless there was an allegation of mistake or inadvertence, the fact remains from a close reading of the transcript that no other attempt was made to change or vary the terms of the memorandum by parol evidence. The defendant at no time made an offer to introduce such parol evidence. If the document were subject to explanation and variation, he should have preserved his rights by a full and explicit offer to the court, or at least asked his chief witness such a question as would have called from the court such a ruling as would have permitted him to take advantage of it on appeal. The trial judge had Exhibit 2 before him, and it is presumed that he decided that its terms had never been assented to by plaintiff orally or otherwise. We find no fault with the trial court's decision as set forth in point No. 1 in defendant's brief.

[2] II. The second and third points raised by defendant as cause for reversal are that the finding of untruth of defendant's answer that plaintiff was obligated to pay interest was contrary to the evidence, and that there was no pleading or finding that defendant excused such payment.

Defendant strenuously urges that the court erred in finding generally the allegations of the answer to be untrue, especially plaintiff's obligation to pay interest. It must be admitted that the testimony shows plaintiff Dee's obligation to pay interest, and that the memorandum executed by the parties so provides. However, counsel for defendant sets up the question of interest, and plaintiff's failure to pay it, in that count of his answer wherein he seeks to establish Exhibit 2 as the contract between the parties; and the promise to pay interest relied on by him is provided under the terms and obligations of that contract which the court found, and rightly so, had never been executed or agreed to by the parties. The allegation of failure to pay interest provided in the agreement, as well as allegations of failure to meet other covenants of the agreement, when the agreement was never executed according to the testimony of defendant's own witnesses,

may hardly be used in a technical discussion of the court's failure to pass upon the question not otherwise alleged or denied.

[3] However, Exhibit 1 shows, and plaintiff admits, he was obligated to pay interest. But both the plaintiff and the president of the defendant corporation testified explicitly that the interest requirements had been waived; nor was there any testimony or showing that the defendant had ever made a demand for interest, or furnished any statement of the amount of interest due.

[4] In any event, under the terms of the memorandum (Exhibit 1), if the plaintiff had paid interest during the three years he would have been entitled to its return after giving his notice. It therefore became more or less of a moot question when the court had decided that Exhibit 1 was a valid contract.

The judgment is affirmed.

We concur: BARNARD, Acting P. J.; MARKS, J.

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105 Cal. App. 559

REA et ux. v. SOUTHERN PAC. CO. et al.

Civ. 7044.

District Court of Appeal, First District, Division 2, California.

May 9, 1930.

1. Ferries ⟹33.

In railroad passenger's action for allegedly slipping on oily deck of defendant's ferry carrying train, conflicting evidence of negligence *held* for jury.

The evidence showed that the passenger, after descending to the deck of the ferry, had walked around the railroad tracks in rear of the train, and, on recrossing the tracks, which were eight and seven-eighths inches above the surface of the deck, she had stepped into a pool of grease and oil on the deck and slipped, causing the injuries complained of. The evidence was conflicting as to whether the accident was caused by her tripping over the rail, or slipping in the pool of grease and oil.

2. Ferries ⟹33.

In railroad passenger's action for allegedly slipping on oily deck of defendant's ferry carrying train, contributory negligence on conflicting evidence *held* for jury.

3. Damages ⟹130(1).

$1,500 *held* not excessive for pregnant woman passenger, in bed seven weeks, and sustaining possible thyroid disturbance allegedly caused by slipping on oily deck of ferry.

The complaint by the injured passenger and her husband prayed total damages in the sum of $10,661.35, including expenses incurred for medical treatment. Although the plaintiff's normal weight before the accident had been 145 pounds, she had increased in weight by 85 pounds during four months following the accident, and at the time of trial she was still 80 pounds in excess of normal weight, this abnormality, in the opinion of the attending physician, being due to injury to the thyroid and pituitary glands.

4. Appeal and error ⟹1073(3).

After stipulation for dismissal as to certain defendant, judgment inadvertently entered against him was erroneous, requiring reversal.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Action by Harvey Rea and wife against the Southern Pacific Company and Charles F. Heath. From a judgment for plaintiffs, defendants appeal.

Reversed as to the last-named defendant, and affirmed as to the first-named defendant.

Dozier & Kimball, of San Francisco, for appellants.

Vincent W. Hallinan, of San Francisco, for respondents.

SPENCE, J.

The Southern Pacific Company and Charles F. Heath appeal from a judgment in favor of the respondents Harvey Rea and Elsie Rea, his wife, in the sum of $1,500 awarded as damages arising out of injuries sustained by Mrs. Rea on the Solano, a Southern Pacific ferry, while the train on which she was a passenger was being ferried across Carquinez straits.

[1, 2] It is contended that the evidence is insufficient to justify the verdict, that Mrs. Rea was guilty of contributory negligence as a matter of law, and that the verdict is against law. We find no merit in these contentions. Mrs. Rea was a passenger in the car immediately ahead of the observation car. While on the boat going from Benicia to Port Costa she left the car and walked on the deck to a point to the rear of the observation car and there crossed the tracks to the right side of the boat. Later, upon recrossing these tracks, she stepped into a pool of grease and oil on the far side of one of the rails and slipped and fell. These tracks were eight and seven-eighth inches above the sur-

face of the deck. The pool of grease and oil was about a foot wide and two feet long. She did not notice this pool until after she fell. The evidence was conflicting as to whether the fall was caused by slipping in the pool of grease and oil or by tripping on the rail, but there was ample evidence to the effect that the accident was caused by slipping in the manner described. We find nothing inherently improbable in this testimony as claimed by appellants. Under the circumstances revealed by the evidence, both the issues of negligence and of contributory negligence were properly submitted to the jury for their determination. Williamson v. Hardy, 47 Cal. App. 377, 190 P. 646; Brinkworth v. Sam Seelig Co., 51 Cal. App. 668, 197 P. 427.

[3] It is further contended that the damages are excessive. The complaint prayed for damages in the sum of $10,661.35, it being claimed that Mrs. Rea had suffered damages in the sum of $10,000, that her husband had suffered damage in the sum of $500 by reason of the loss of services of his wife, and that both had suffered special damage in the sum of $166.35 for expenses incurred in the treatment of the injuries. At the time of the accident, Mrs. Rea was pregnant; her child being born four months later. In the accident she suffered bruises and contusions about her body and particularly about the knees and elbow, a wrenching of the neck and a badly wrenched ankle, which continued to trouble her at the time of trial. Following the accident, she was under the treatment of a physician and in bed most of the time for about seven weeks, thereafter limping and getting around with difficulty. For many years prior to the accident her normal weight was 145 pounds. Her weight increased by 85 pounds during the four months following the accident, and at the time of trial she weighed 225 pounds. The attending physician was of the opinion that this abnormal increase in weight was due to injury to the thyroid and pituitary glands. There was other evidence concerning the injuries and their resultant effect, but, considering the foregoing testimony, it is at once apparent that we cannot say that a verdict of $1,500 covering the damage to both plaintiffs was excessive.

[4] During the trial of the case it was stipulated that the action be dismissed as to the defendant Charles F. Heath. The verdict was rendered "against defendants." The clerk thereupon entered a judgment upon the verdict against both the Southern Pacific Company, a corporation, and Charles F. Heath. The entry of a judgment against appellant Charles F. Heath following the dismissal was erroneous. Respondents did not claim upon the trial nor upon this appeal that they were entitled to a judgment against said appellant. The judgment against said appellant was entered by reason of the inadvertent use of the word "defendants" rather than "defendant" in the verdict of the jury.

The judgment against appellant Charles F. Heath is reversed and the judgment against appellant Southern Pacific Company, a corporation, is affirmed, respondents to recover their costs on appeal.

We concur: NOURSE, P. J.; STURTEVANT, J.

106 Cal. App. (Supp.) 777

PEOPLE v. CALE.

SAME v. LYTTLE et al.

Cr. 67, 59.

Appellate Department, Superior Court, Los Angeles County, California.

Jan. 3, 1930.

1. False pretenses ⚷4.

Essential elements of "obtaining money under false pretenses" are intent to defraud and actual fraud accomplished by false pretenses used for such purpose (Pen. Code, § 484, as amended by St. 1927, p. 1046, § 1).

Pen. Code, § 484, as amended by St. 1927, p. 1046, § 1, declares every person who knowingly and designedly, by any false or fraudulent representation or pretense, defrauds any other person of money, labor, or property, guilty of theft.

[Ed. Note.—For other definitions of "False Pretense," see Words and Phrases.]

2. False pretenses ⚷9.

False pretense must be relied on to constitute offense (Pen. Code, § 484, as amended by St. 1927, p. 1046, § 1).

3. False pretenses ⚷7(5).

False pretense must be as to past or present fact to constitute offense (Pen. Code, § 484, as amended by St. 1927, p. 1046, § 1).

4. False pretenses ⚷7(5).

Evidence of representation that purchasers of memberships in society could sell them to new member at profit *held* not to establish offense of obtaining money under false pretenses.

5. False pretenses ⚷7(5).

Evidence of payment for membership in society because of representation that another was ready to buy it, and testimony that defendant said he had new member waiting, *held* not to establish offense of obtaining money under false pretenses.

Prosecuting witness testified that defendant made no representation before he paid for his membership except that amount was for dues and application, which was admittedly true.

6. False pretenses ⚷7(5).

Agreement to sell diploma never called for *held* not to constitute offense of obtaining money under false pretenses.

7. False pretenses ⚷7(5).

Evidence of representation that purchaser of chiropractor's diploma could make liv-

ing therewith *held* not to establish offense of obtaining money under false pretenses.

8. False pretenses ⚷49(5).

Evidence of seller's statement that diploma purchased was as good as any *held* not to establish offense of obtaining money under false pretenses.

There was no showing that prosecuting witness paid money for diploma in reliance on such statement.

Appeal from Municipal Court of Los Angeles; Caryl M. Sheldon, Judge.

Appeal from Municipal Court of Los Angeles; Walter B. Thompson, Judge.

Proceedings by the People of the State of California against Dr. Charles A. Cale, and against Frederick W. Lyttle, John L. Snyder, and Bernard Byrn. Judgments for plaintiff, and defendants appeal.

Reversed and remanded.

Griffith Jones, of Los Angeles, for appellant Cale.

S. S. Hahn, of Los Angeles, and James E. Bates, for appellants Lyttle, Snyder, and Byrn.

Lloyd S. Nix, City Pros., and F. W. Fellows and Joe W. Matherly, Deputy City Prosecutors, all of Los Angeles, for the People.

BISHOP, J.

The two cases above entitled are considered together because they present problems depending upon the same legal principles for solution. In each the defendants were charged with petty theft. In each the offense within the category of "theft" which the evidence most nearly indicates is that of obtaining money under false pretenses. In each the evidence fails utterly to establish such an offense.

[1] The crime of obtaining money by false pretenses is not new to this state, and the indispensable elements were early catalogued and have been frequently illustrated.

In the Penal Code we find two sections of interest.

Section 532, as enacted in 1872, read in part: "Every person who knowingly and designedly, by false or fraudulent representation or pretenses, defrauds any other person of money or property, * * * is punishable by imprisonment in the County Jail." In 1889 (St. 1889, p. 14) the section was amended so as to make the punishment the same as that for larceny of money or property so obtained, and in 1905 (St. 1905, p. 685, § 4) the section was further amended in a particular not of interest to us.

Section 484, as amended in 1927 (St. 1927, p. 1046, § 1), includes this offense under the definition of theft, by the following language: "Every person who shall * * * knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor, or real or personal property, * * * is guilty of theft."

In the early cases of People v. Jordan (1884) 66 Cal. 10, 4 P. 773, 56 Am. Rep. 73, and People v. Wasservogle (1888) 77 Cal. 173, 19 P. 270, 271, we find this statement concerning obtaining money under false pretenses:

"It is true, as claimed for appellant, that to constitute the offense charged four things must concur, and four distinct averments must be proved:

" '(1) There must be an intent to defraud;

" '(2) There must be actual fraud committed;

" '(3) *False pretenses* must be used for the purpose of perpetrating the fraud; and

" '(4) The fraud must be accomplished by means of the false pretenses made use of for the purpose, viz., they must be the cause which induced the owner to part with his property.' Commonwealth v. Drew [19 Pick. (Mass.) 179], supra."

This specification of the constituent parts of the offense was approved in People v. Cadot (1903) 138 Cal. 527, 71 P. 649; People v. Rose (1919) 42 Cal. App. 540, 183 P. 874; and People v. Neetens (1919) 42 Cal. App. 596, 184 P. 27.

Another expression of the rule is found in People v. Ward (1905) 145 Cal. 736, 79 P. 448, 449: "The charge was obtaining money by false pretenses. The elements of this crime necessary to the establishment of the corpus delicti are false statements adapted to the fraudulent purpose, and money parted with upon the faith of such statements."

By way of illustrating the second element, we have such cases as People v. Tufts (1914) 167 Cal. 266, 139 P. 78, 80, where it is said: "Where the prosecutor gets out of the transaction just what he bargained for, no offense is committed." People v. Bliss (1920) 47 Cal. App. 503, 190 P. 1046, comes to the same conclusion, relying upon the Tufts Case.

[2] Then, too, the pretense must be relied upon, or there is no offense. To this effect, see People v. Daniels (1923) 64 Cal. App. 514, 222 P. 387, and People v. Wilkins (1924) 67 Cal. App. 758, 228 P. 367.

[3] A further principle imbedded in the authorities is that the pretense must be as to a past or present fact. It is not an offense if it is a matter of opinion or a statement of a future happening. In People v. Wasservogle, supra, the following definition is quoted from Bishop: "A false pretense is such a fraudu-

lent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value."

The following quotation from People v. Walker (1926) 76 Cal. App. 192, 244 P. 94, 100, correctly states the rule governing in these cases: "It is well settled that to be indictable the representation must be of a past event or of an existing fact. No representation of a future event, whether in the form of a promise or of an opinion, can be a criminal pretense."

To the same effect, see People v. Gibbs (1893) 98 Cal. 661, 33 P. 630; People v. Green (1913) 22 Cal. App. 45, 133 P. 334; People v. Kahler (1915) 26 Cal. App. 449, 147 P. 228; People v. Mace (1925) 71 Cal. App. 10, 234 P. 841; People v. Moore (1927) 82 Cal. App. 739, 256 P. 266; People v. White (1927) 85 Cal. App. 241, 259 P. 76.

[4] Applying the measure of these principles to the evidence in the cases before us, we find it far short of that required to prove petty theft.

Defendants Lyttle, Snyder, and Byrn were charged with unlawfully taking $2.50 from one Lessey A. Frame on or about May 16, 1929. In addition to Frame, the prosecution called some ten witnesses to prove a course of dealing to illustrate or complete that claimed to have been followed on the occasion charged. From examining the testimony of these witnesses, a fair understanding of the theory of the prosecution may be obtained. It is that the defendants, as directors of the Society of the New School of Applied Christian Psychology, secured many members at $2.50 each on the representation that shortly, thirty to sixty days, each $2.50 member would be able to sell out his membership for $95 net to a new member who was to come in on a reorganization of the school.

[5] Plainly this is not a representation of a past or present fact, and therefore does not constitute an offense. In only two places in the whole record is there any suggestion of a statement as to an existing fact. The prosecuting attorney, during the cross-examination of Mrs. Shreeve by the defendant's counsel, asked her this question: "Would you have paid this $2.50 but for the representation that some one was ready to take over your membership?" To which the reply was: "No. I would have had no reason to go in there." Who made the representation was not shown, nor was it shown not to be true.

In cross-examination Mrs. Middleton stated that Mr. Lyttle told them that he already had the new member, "waiting for our paper." This was not shown to be false.

But if these two representations had been shown to be false, and had been shown to have been made by the defendants, and if a statement that $95 would be realized in a month or so out of an investment of $2.50 could be a false pretense constituting a public offense, still we would have no evidence warranting a verdict against the defendants in this case. This is so because the prosecuting witness testified that none of the defendants ever made any representation to him prior to his paying his $2.50 except that Mr. Lyttle said that the $2.50 was for three months' dues and application, a representation admittedly true and not material. A man, name not inquired for, who worked at the same place the prosecuting witness did, had told him what he was to get for his $2.50, and his first approach to defendant Lyttle was, "I have come to pay my dues."

This evidence lacks every one of the elements held necessary to prove the offense of obtaining money under false pretenses. The judgment against defendants Lyttle, Snyder, and Byrn must be reversed, and the cause remanded for a new trial.

[6] In the first complaint issued against Dr. Cale, he is charged with having unlawfully taken $14 of Jacqueline De Courcy. She, it appears from her testimony, as an investigator for the chief inspector of the State Chiropractic Board, visited the defendant and expressed a desire to purchase a diploma (Doctor of Chiropractic) without attending school, that she might practice in Wyoming. He agreed to get her one for $250 as soon as he secured certain signatures. A few days later, on request, she made a payment on account of $14, promising to pay the balance when the diploma was delivered. She never returned for the diploma nor her $14.

No representation, false or otherwise, is here shown, except merely a promise as to what he would do but was never called on to do. Indeed, we may reasonably infer that the reason the prosecuting witness was sent to him was the belief that he would do what he promised her he would do, i. e., sell her a diploma. The judgment based on the first complaint is reversed, cause remanded for new trial.

[7, 8] In the second complaint against the defendant Cale, he is charged with taking two sums of money from Anna Carlson who had been referred to the defendant by a friend to learn to become a masseuse. His representations appear as follows: (1) After a three months' course she would be able to go out with his diploma and make an independent living. (2) He handed her a diploma after ten or twelve lessons, stating it to be as good as any in town. (She was charged $125 for the diploma, and made payment in two sums which appear in the two counts of the complaint.)

The first representation was obviously but an expression of opinion as to a future event.

Just what is meant by the second statement it is hard to say. It may be an expression of opinion or a statement of fact, depending on the circumstances under which uttered. But in any event, there was no showing that the prosecuting witness paid the money in reliance upon the statement. An offense has not been proven.

It may well be that the lessons were not worth the sum asked or any considerable portion of it, and the diploma was worthless as the prosecution contended. With that problem we are not here concerned. The question here is: Did the defendant obtain money under false pretenses? He has not been shown to have done so. The judgments in the second action are reversed, the cause remanded for a new trial.

We concur: McLUCAS, P. J.; SHAW, J.

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209 Cal. 476

BAILEY v. STATE BAR OF CALIFORNIA.

L. A. 11392.

Supreme Court of California.

May 28, 1930.

Attorney and client ⚷53(2).

Evidence *held* to show board of governors of the state bar correctly recommended disbarment of attorney.

The record showed that the attorney had been disbarred in other states, and that, after admission to practice in California, he had accepted fee from client for purpose of appealing action, though, at time he accepted such fee, time for appeal had elapsed.

In Bank.

Application by Weldon J. Bailey to review an order of the Board of Governors of the State Bar of California recommending disbarment.

Order affirmed.

John W. Ray, of Phœnix, Ariz., for petitioner.

Julius V. Patrosso, of Los Angeles, for respondent.

PER CURIAM.

This proceeding was instituted for the purpose of reviewing the action of the board of governors of the state bar of California in recommending the disbarment of petitioner as an attorney and counsellor at law in this state. The record of the entire proceedings before the board of governors and the local administrative committee, to whom the accusations against petitioner were referred, is before us, and we have carefully read and examined the same. We are satisfied that the findings of the local administrative committee upon which the board of governors based its recommendation of disbarment not only finds ample support in the evidence presented before said committee, but that no other conclusion could be reasonably drawn from said evidence than that set forth in the findings of said committee.

This record shows that petitioner under the name of Wendell Bailey was fined for contempt of court for practicing law without a license by the Supreme Court of the state of Montana on the 1st day of March, 1915 (In re Bailey, 50 Mont. 365, 146 P. 1101, Ann. Cas. 1917B, 1198); that petitioner under the name of Gordon W. Bailey was disbarred from the practice of law by a judgment of the Supreme Court of the state of Nevada on the 15th day of December, 1916 (In re Bailey, 40 Nev. 139, 161 P. 512); that he was also disbarred from the practice of law in the state of Arizona by the Supreme Court of that state on the 14th day of November, 1927 (In re Bailey, 31 Ariz. 407, 254 P. 481). Each of said judgments of disbarment was based upon charges of unprofessional and unethical conduct.

The record further shows that petitioner made application to practice before the courts of this state in September, 1916, upon a certificate to practice law issued by the Supreme Court of the state of Alabama; that he failed to inform the court before whom said application was filed of the action of the Supreme Court of Montana finding him guilty of contempt of court for practicing law in said state without a license; that he also failed to inform said court of the proceedings then pending against him before the Supreme Court of Nevada, which proceedings finally resulted in his disbarment by said Supreme Court as recited above.

Said record further shows that petitioner, after his admission to practice before the courts of this state, accepted a fee from V. H. Tisdale for the purpose of appealing an action to which said Tisdale was a party, and that at the time he accepted said fee the time in which said action could be appealed had elapsed, and that petitioner knew at the time of accepting said fee that the time within which said action could be appealed had fully expired. It is also shown by the record that, after Tisdale discovered that no appeal could be taken in said action and demanded a refund of said fee, the petitioner refused to re-

fund the money paid to him as a fee by the said Tisdale.

Petitioner appeared before said local administrative committee as a witness and attempted to explain the transactions out of which grew said contempt proceedings and the two disbarment actions, as well as his dealings with Tisdale, and to excuse himself from all culpability in each and every one of said transactions, but the explanation and excuses on the part of the petitioner are so weak and unsatisfactory, and in many instances directly contrary to the facts found and recited in the opinions of the various courts rendering the adverse judgments above mentioned, that they are entitled to very slight, if any, weight. Surely we cannot be expected to accept petitioner's bare statements as to his conduct when they appear unreasonable and inaccurate in the light of other proven facts and circumstances in the case, and when in many instances they are directly contradicted by the statements of facts set forth in the reported cases wherein the conduct of petitioner was the chief subject under consideration. It would serve no useful purpose to review the evidence in detail as the same is set forth in the record before us. It would simply make public another chapter in the story of petitioner's shortcomings and delinquencies as the same have been written into the reports of the highest courts of the states of Montana, Nevada, and Arizona. The report of the local administrative committee to the board of governors of the state bar presents a complete and sufficiently exhaustive review of the evidence upon which said committee based its findings in this matter. We are in entire accord with the reasoning and conclusions set forth in this report, and, should any of the parties interested in this proceeding desire any further enlightenment as to the views of this court regarding the evidence in this proceeding, we would most respectfully refer them to said report now on file in this court.

Petitioner has raised certain questions relative to the constitutionality of the State Bar Act (St. 1927, p. 38). All of these questions have been previously before this court and have been passed upon adversely to the contention of the petitioner. Matter of Shattuck (Cal. Sup.) 279 P. 998; Matter of Petersen (Cal. Sup.) 280 P. 124; Matter of Winne (Cal. Sup.) 280 P. 113.

We therefore, for the reasons above stated, approve the recommendation of the board of governors of the state bar, and upon said recommendation it is hereby ordered that Weldon Jefferson Bailey be and he is hereby disbarred from the further practice of law in the state as an attorney and counsellor at law, and that his name be, and it is hereby, stricken from the roll of attorneys and counsellors at law of the state of California.

MESSICK et al. v. HOUX BROS., Inc.

Civ. 3866.

District Court of Appeal, Third District, California.

May 14, 1930.

Rehearing Denied June 13, 1930. Hearing Denied by Supreme Court July 7, 1930.

1. Partnership ⟹64.

Copartners with surnames M. and K., doing business under name "M. & K." need not file statutory certificate for fictitious name (Civ. Code, §§ 2466, 2468).

Civ. Code, §§ 2466, 2468, provide in general that every person or partnership transacting business under a fictitious name, or under a designation not showing the names of the persons interested as partners, must file and publish a certain certificate of detailed information, as a condition precedent to suit upon any claim or account.

2. Pleading ⟹129(2).

Allegation in complaint that plaintiffs were partners doing business under certain name, not denied by answer, was admitted.

3. Partnership ⟹64.

Whether plaintiffs, admittedly copartners, had theretofore done business under fictitious name requiring filing of statutory certificate *held* defensive matter, waived because not pleaded (Civ. Code, §§ 2466, 2468).

4. Partnership ⟹64.

Defendant had burden of proving plaintiffs, suing as partners under name not requiring statutory certificate, made contract sued on under fictitious name requiring certificate (Civ. Code, §§ 2466, 2468).

5. Partnership ⟹64.

That copartners formerly incorporated had used corporate stationery and neglected to change name in telephone directory insufficiently showed they had done business under fictitious name so as to require statutory certificate (Civ. Code, §§ 2466, 2468).

The evidence showed that the corporation had been dissolved a year or more before the transactions involved in the present action, and that at no time since the dissolution of the corporation had plaintiffs done business under any name other than the partnership name. Defendant offered no proof that plaintiffs had ever transacted any business with it under the name of the dissolved corporation.

6. Partnership ⟹64.

Butcher transacting business under his own name, although calling shop "Princeton

Meat Market," need not file statutory certificate for using fictitious name (Civ. Code, §§ 2466, 2468).

The evidence showed that there was a sign on the market indicating it was called the "Princeton Meat Market," and that the billheads and stationery of the owner bore the name "Princeton Meat Market, G. D., Proprietor."

7. Assignments ⚷134.

Alleged assignee without proof of assignment cannot recover against obligor by whom assignment is denied.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by George L. Messick and another, copartners doing business under the firm name and style of Messick & Kirkpatrick, against Houx Brothers, Incorporated. From a judgment for plaintiffs, defendant appeals.

Affirmed in part, and reversed and remanded in part, with directions.

S. J. Hankins, of San Francisco, for appellant.

U. W. Brown, of Colusa, for respondents.

PARKER, Justice pro tem.

This is an action to recover a balance alleged due for goods sold and delivered. The complaint is in two counts. The first count alleges a balance due plaintiffs on their own account and the second count is upon an assigned claim. Judgment went for plaintiffs on both counts and defendant appeals from the said judgment and the whole thereof.

Three points are raised by appellants, as follows: (1) That plaintiffs have no right to maintain the action by reason of their noncompliance with sections 2466 and 2468 of the Civil Code; (2) that the assignor of plaintiffs in the second cause of action likewise failed to comply with the same sections; (3) that there is no evidence to show an assignment of the claim sued upon in the second cause of action.

A consideration of these points requires some statement of the facts upon which the contentions of appellant predicate.

[1] The complaint alleges that plaintiffs were at all times therein mentioned, and at the time of the commencement of the action, copartners doing business under the firm name of Messick & Kirkpatrick. The answer of defendant alleges that plaintiffs have not legal capacity to sue or maintain the action, in this, that said plaintiffs have not filed or published the certificate as required by sections 2466 and 2468 of the Civil Code. It will be noted, incidentally, that there is no denial of the allegation of the complaint that the plaintiffs were doing business under the firm name of Messick & Kirkpatrick. Sections 2466 and 2468 of the Civil Code are the sections regulating the use of fictitious names. Generally, the sections provide that every partnership transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business must file with the county clerk a certain certificate of detailed information and publish the same. A failure to so file and publish bars any suit upon a claim or account or transaction had until compliance with the statutory requirements. It has been held upon numerous occasions that a name such as "Messick & Kirkpatrick" is neither fictitious nor one failing to designate the partners. In the case of Andrews v. Glick, 205 Cal. 699, 272 P. 587, 588, it is said:

"It is definitely settled in this state that the usual form of partnership name, consisting merely of the surnames of the partners, joined by '&' or 'and,' is not an assumed or fictitious name, or a designation not showing the names of the persons interested as partners."

Therefore, it was not necessary that the parties herein named doing business as partners under the name of "Messick & Kirkpatrick" file any certificate pursuant to section 2466 of the Civil Code. However, appellant, conceding this, goes further and urges that the evidence discloses that the plaintiffs were doing business under the firm name of "Messick & Kirkpatrick Co.," a designation which, under the cited case, brings them clearly within the statute. On the threshold of our discussion on this contention we meet a question of pleading. In the case of Bryant v. Wellbanks, 88 Cal. App. 144, 263 P. 332, it is held that an objection to plaintiff's legal capacity to sue on the ground that he is doing business under a fictitious name and has not complied with sections 2466 and 2468 of the Civil Code must be taken by demurrer if the grounds for it appear on the face of the complaint or by answer if they do not; otherwise it is waived. Many authorities are cited and reviewed in the case of Bryant v. Wellbanks, supra. In Cook v. Fowler, 101 Cal. 89, 35 P. 431, 432, we find the language:

"There is but a single point made by appellant. It is that the complaint shows that plaintiffs were copartners under a designation not showing the names of the persons interested as partners, and that they have failed to aver or prove a compliance with the provisions of sections 2466 and 2468 of the Civil Code. * * * The point is not well taken. The failure to make, file, and publish the certificate in question is matter of defense, to be set up by defendants, and, not having been so taken, is waived."

In Paff v. Ottinger, 32 Cal. App. 439, 163 P. 230, and in a Dakota case, Drake v. Great Northern Ry. Co., 24 S. D. 19, 123 N. W. 82, 84, we have further authority that a plea setting up the lack of plaintiff's capacity to sue by reason of a noncompliance with the Civil Code sections, here under discussion, is a dilatory plea and waived by a failure to plead it. With these authorities before us and mindful of the rule that pleas of this sort tend rather to obstruct than promote justice, let us examine the issues here.

[2-5] As before stated, the plaintiffs alleged that they were partners doing business under the firm name of Messick and Kirkpatrick. Defendant in its answer did not deny this, and therefore this allegation stood admitted. Defendant then set up by way of defense the plea that plaintiffs had failed to comply with the statute. Defendant in its answer did not allege that plaintiffs were doing business under any other name than Messick and Kirkpatrick. The issues, therefore, were confined to that one question, namely, whether or not plaintiffs had filed any certificate of the fact that they were doing business under that name. The trial court found and it was admitted that plaintiffs had filed no such certificate. Under the authorities hereinbefore cited such filing was not required. Whether or not plaintiffs had done business under some other name that was fictitious or which did not disclose the names of all the partners was a matter of defense that should have been pleaded and not being so pleaded was waived and therefore was without the issues. The trial court's finding was in full response to the issues and the conclusion of law that plaintiffs did not lack capacity to sue was correct. However, we may go further and meet the claim of appellant squarely without regard to pleading. It appears that some few years prior to the transactions sued upon the plaintiffs had incorporated their business under the name of "Messick & Kirkpatrick Co." A year or more prior to the transactions out of which this suit arose this corporation was dissolved in the manner provided by statute for the dissolution of private corporations. It was shown that after such dissolution and during the time in question here the plaintiffs did not change the business name in the local telephone directory, nor did they change the advertisement carried in such directory. It was further shown that after the dissolution the plaintiffs for some time used the stationery of the corporation in correspondence and in sending out bills, and that in some instances letters were signed in the corporate name by one of the clerical employees of the firm. Plaintiffs offered evidence showing that at no time since the dissolution of the corporation had they done business under any name other than Messick and Kirkpatrick. The explanation of plaintiffs was that a large supply of stationery had been on hand when the corporation was dissolved and it was used only through reasons of economy and that the matter of the telephone directory was just a neglect. There is not the slightest showing of any business ever having been done with defendant under the company name. As the entire burden rested upon the defendant, it was incumbent on it to show that the contract sued upon was made by plaintiffs under the fictitious name or under a name not disclosing the names of all parties interested as partners, and we concede that the use of the suffix "Co." would bring plaintiffs within the statute. From the record before us we conclude that defendant has not sustained this burden. Kohler v. Stephenson, 39 Cal. App. 374, 178 P. 970.

[6] We come now to the second cause of action. This rests upon a claim of one George Denny alleged to have been assigned to plaintiffs. Here, again, appellant urges the provisions of sections 2466 and 2468 of the Civil Code in that it claims that Denny, the assignor, has failed to comply with the provisions thereof, and that therefore no suit can be maintained by the assignee. The facts are that George Denny conducted a meat market in a place called Princeton, located in Colusa county. He called his market "Princeton Meat Market." He had a sign on the shop indicating that name. All of his business, as disclosed by the record, was done under the name of George Denny. His billheads and stationery read as follows: "Princeton Meat Market, George Denny, Proprietor." Thus it will be seen that he comes clearly within the rule as announced in Spreckels v. Grace Darling Hospital Association, 28 Cal. App. 646, 153 P. 718. In that case the court, speaking through Mr. Justice Richards, says:

"The complaint affirmatively shows that the business in which the plaintiff is engaged is that of publisher of a newspaper known as 'The San Francisco Call.' The name of this newspaper is not fictitious, but is as real as the name of a hotel or a building or a steamship, or any other medium of business or article of commerce, which, for convenience or of necessity, should have a particular designation."

Paraphrasing the further language of the same case, the most that can be said here is that Denny is the owner of a meat market and is engaged in carrying on the business thereof, choosing for convenience to call his market "Princeton Meat Market." See Kohler v. Stephenson, supra.

On the authority of the cited cases, we hold that there is nothing in the statutes requiring that Denny, the assignor of plaintiffs, file any certificate as required by the sections of the Civil Code hereinbefore referred to.

[7] The last point urged by appellant is that there is no proof of any assignment from

Denny to the plaintiffs. It seems to be conceded by all parties that there was no formal proof offered as to the assignment. In other words, there is no evidence of any written or oral assignment which evidence goes expressly and directly to the assignment. Plaintiffs alleged the assignment. Defendant denied the assignment and denied that plaintiffs were the holders of the claim. The court finds the allegation of assignment to be true. The absence of direct evidence leaves the record in an unfortunate condition. There can be no question but that proof of the assignment is essential to a recovery by the alleged assignee where the fact of assignment is put in issue by the pleadings. In 3 Cal. Jur. p. 305 et seq., many of the authorities are collected and a reference thereto will suffice.

It might appear that where the alleged assignor appeared to urge his claim on behalf of another that in itself would be prima facie evidence of the assignment. It might be expedient and relatively just to so hold. But such a holding would to some extent be speculative. When courts of appeal resort to psychological legerdemain to force a fact into a barren record, it breaks down the law itself and can result in naught but disaster. In Brown v. Curtis, 128 Cal. 193, 60 P. 773, 774, we find this language:

"Respondent is correct in stating that the reason for requiring proof of the assignment is to protect the defendant from any claim of the assignor; but it is not true, as claimed, that 'when the assignor takes the stand for the plaintiff, and * * * the defendant admits a demand from the assignee, and notice from the assignor that he has assigned the claim to plaintiff, certainly the proof is sufficient to show an assignment.' Brown may not have had any assignment when he made the demand. Linville [the alleged assignor] may not have in fact assigned his claim when he wrote he had done so. It was incumbent upon Brown to establish his right to sue, and this necessitated proof of the assignment by which alone he had any such right. It was as necessary for Brown to prove this fact as it was to prove the indebtedness."

The judgment in the case at bar provides that plaintiff have and recover of and from the defendant the sum of $2,591.85 (with interest) upon the first cause of action. This portion of the judgment is affirmed.

The judgment further provides that plaintiff have and recover of and from defendant upon the second cause of action the sum of $670.95. This portion of the judgment is reversed, and the cause, to this extent, remanded, with directions to the trial court to reopen this phase of the case upon the sole issue of the assignment of the claim of Denny to plaintiffs, and if such proof is made, enter judgment in favor of the plaintiffs upon the second cause of action.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

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105 Cal. App. 679

BALLSUN et ux. v. STAR PETROLEUM CO.

Civ. 4091.

District Court of Appeal, Third District, California.

May 16, 1930.

1. Mines and minerals ⚷73.

Lessee *held* not required to replace buildings upon discontinuing work, under oil lease requiring lessee to restore "premises" to original condition.

The lease specifically stated that the subject of the lease was land, and therefore the word "premises" referred to land only, especially since lease was for twenty years with possible term of fifty years, so that parties evidently did not intend that buildings should be restored to original condition for dairy purposes at expiration of such period. Prior to the execution of the lease, the lessee paid plaintiffs $10,000, and it was disputed as to whether such payment covered expense of moving buildings.

[Ed. Note.—For other definitions of "Premises," see Words and Phrases.]

2. Appeal and error ⚷842(8).

Trial court's construction of oil lease is not binding on reviewing court.

3. Trial ⚷47(2).

Where court sustaining objections to testimony stated, in substance, that no similar testimony would be admitted, appellant need not offer further testimony on such subject.

4. Customs and usages ⚷15(2).

Where ambiguity exists respecting meaning of word "premises" in oil lease, testimony respecting usage and custom in interpreting such leases is admissible (Code Civ. Proc. § 1870, subd. 12).

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Sam Ballsun and wife against the Star Petroleum Company. Judgment for plaintiffs, and defendant appeals.

Reversed and remanded.

Neil S. McCarthy, George J. Stoneman, and Earl L. Banta, all of Los Angeles, for appellant.

Carl B. Sturzenacker, of Los Angeles, for respondents.

PLUMMER, J.

The plaintiffs had judgment against the defendant for the sum of $1,210 for and on account of damages alleged to have been suffered by reason of the failure of the defendant to replace certain buildings upon a tract of land theretofore leased by the plaintiffs to the defendant for the purpose of exploring the same for oil. From this judgment the defendant appeals.

The record shows that on or about the 22d day of June, 1925, the plaintiffs and the defendant entered into a certain indenture of lease for the purpose of having wells sunk on the lands described, to determine their oil-producing qualities. The salient portions of the lease involved in this action are as follows:

"Witnesseth:

"That for and in consideration of Ten Dollars ($10.00) by the lessee in hand paid to the Lessor, receipt of which is hereby acknowledged, and in consideration of the performance by the lessee of the covenants and agreements hereinafter contained, the lessor has leased, let and demised, and by these presents does lease, let and demise unto the lessee, the lands hereinafter described, with the sole and exclusive right to the lessee to drill for, produce, extract and take oil, gas, asphaltum, and other hydro-carbon substances, and water from, and store the same upon said land during the term hereinafter specified, with the right to enter upon said land at all times for said purposes, and from time to time to construct, use, maintain, erect, repair, replace, and remove thereon and therefrom, all buildings, tanks, machinery, telephone and telegraph wires, and other structures, including all pipe lines which the lessee may desire in carrying on its business and mining operations on said premises, with the rights of way for passage over, upon and across, and ingress and egress to and from said premises. The possession of the lessee of said land held by it under this lease shall be sole and exclusive, excepting only that the lessor reserve the right to occupy and use said land or to lease the same, or any part thereof, for agricultural or grazing purposes, which shall be carried on subject to and with no interference with the rights or operations of the lessee hereunder. The said land which is the subject of this lease is situated in the County of Los Angeles, State of California, and is described as follows, to wit: The south half of Lot twenty-three (23) of the Gardena Heights Tract, as per map recorded in Book 11, page 164 of Maps, in the office of the County Recorder of said County. The lessee shall hold said land with the appurtenances, for the period of twenty (20) years from the date hereof, and so long thereafter, not exceeding fifty (50) years in the aggregate, as oil, gas, asphaltum or other hydro-carbon substances are produced thereon and therefrom in quantities deemed paying quantities by the lessee, and the lessee hereby leases from the lessor the above described lands for the purposes and term aforesaid, and upon the conditions and considerations hereinafter set forth:

"1. The lessee, in consideration of the premises, does hereby covenant and agree as follows:

"a. That it will commence the drilling of a well for oil on said leased premises, within one month from the date hereof, and thereafter prosecute said work with reasonable diligence, continuously and in good faith, until oil and/or gas is produced in quantities deemed paying quantities by the lessee, or until said well is drilled to a depth of 5,000 feet. It is hereby agreed that the term 'commence drilling of a well for oil' means the actual spudding in of the well.

"b. That upon the cancellation of this lease, either in whole or in part, or the termination thereof under the terms hereof, either by expiration, surrender or forfeiture, it will well, truly and peaceably surrender up the possession of all those portions of said leased premises as to which this lease may be cancelled, surrendered or terminated, and execute and deliver to the lessor a good and sufficient quitclaim deed, acknowledging and evidencing such termination and cancellation according to the fact. The lessee shall restore the premises as to which this lease is terminated and cancelled to as near their original conditions as is reasonably possible so to do."

Following the execution of this lease, the defendant entered upon the leased lands and proceeded to sink a well thereon to the required depth. No oil having been discovered, work upon the leased lands was discontinued.

This action is based upon the following words appearing in the lease from which we have quoted, to wit: "The lessee shall restore the premises as to which this lease is terminated and cancelled, to as near their original condition as is reasonably possible so to do."

The record shows that there were two garages, a cow barn, and a hay barn upon the leased lands; that the garages were moved and a portion of the cow barn was taken down, and the material removed to a different place on the leased land. In addition to this, there were some shrubbery, trees, and a blackberry patch. The record is somewhat

indefinite as to just what small buildings and portions of the barn were removed, but, from what is hereinafter said, this does not appear to be material.

Prior to the execution of the lease, the transcript shows that certain negotiations were had between the plaintiffs, acting through their duly authorized agent, and the defendant, relative to the amount of a bonus to be paid for the privilege of carrying on oil exploration work on the tract of land owned by the plaintiffs. The tract of land, comprising some 2½ acres, had theretofore been used by the plaintiffs in conducting a dairy business. The testimony shows without conflict that the dairying business could not be carried on without change of location in the event that the tract of land was leased for oil development purposes. The record shows that, after the negotiations had been carried on between the respective parties, the defendant prior to the execution of the lease paid to the plaintiffs the sum of $10,000; the purposes of this payment being disputed. On the part of the defendant, testimony was introduced that it covered the expenses of moving the buildings referred to, from the place where explorations were to be carried on, and on the part of the plaintiffs, that it was simply so much paid for the privilege to be granted the plaintiffs in the way of a lease for oil development purposes of the two and one-half acres. Several witnesses testified on behalf of the defendant, to the effect that, in the first conversation with Mr. Ballsun relative to the bonus to be paid, the sum of $7,500 was mentioned and was tentatively agreed upon, but that the next time the matter was taken up, being the following day, Ballsun had raised the sum demanded, $2,500, and stated that his reason for so doing was that some of the buildings would have to be removed, and that he would have to have that sum, in addition, to cover the damages.

While the trial court's findings do not follow its expressed views, we quote here its language because it expresses our opinion as to just what the testimony does show, without setting it forth at length. The trial court, in discussing this testimony, said: "The more reasonable construction, in the mind of the court, is that Mr. Ballsun expected to reengage in the dairy business in some different location; because that was undoubtedly figured in connection with his damages in contemplation of the payment of this bonus. I have no doubt that the testimony of the witness that he raised the 'ante' from $7,500 to $10,000 was true, and that he did that for the reasons that he then gave. Upon further figuring he concluded that it would be necessary to remove or destroy these buildings, and he would suffer an additional damage by reason of that fact." The court then, in relation to the lease, explained why the facts were not found strictly in accordance with what the overwhelming weight of testimony shows in this particular. The court further said: "If the court concludes that it is bound by the plain language used (referring to the lease), and that the defendants were required, upon the surrender of these premises, * * * that it is necessary to allow damages in accordance with the strict provisions of the lease, it is rather a difficult thing for the court to know just what to allow." The findings of the court relative to this phase of the case are as follows: "Finding No. 5. That on or about the 22d day of June, 1925, pursuant to said lease, the defendant entered into possession of the property, through its agents and servants and employees, and some of the buildings (were) removed from the premises. Finding No. 6. That certain portions of the premises were graded and leveled by the defendant, but the said land was leveled in a rough and hilly condition, containing certain depressions and piles of dirt upon the said premises. That at the time of the execution of the lease, the plaintiffs well knew that an oil well was to be drilled upon said premises, and that the sum of $10,000 was paid to the plaintiffs as a bonus for the use of said premises, but that said $10,000 was paid for the use of said land for the purpose of exploring for oil and was not accepted as full or any compensation for all or any damage that might have been suffered to the plaintiffs, and that the defendant did replace some dirt, but that the work was inspected by the plaintiffs and was rejected by the plaintiffs." The court then found, in finding No. 7, that $1,210 is a reasonable sum to cover the costs of replacing said improvements on said property. Thus, inferentially, and not directly, does the court find that the bonus did not cover the cost of removing buildings, or damage incurred by the removal of buildings, if any, and only inferentially, and not directly, does the court find that the original figure of $7,500 offered as a bonus was not raised $2,500 to cover the item of costs or damage in the removal of buildings necessary to enable an oil well to be drilled upon the land.

The oral negotiations relative to the bonus to be paid, and the purposes for which it was to be paid, all took place prior to the execution of the lease, and it would appear from the transcript that the sum of $10,000 was paid prior to the execution of the lease, and the findings of the court in relation thereto should have been according to the expressed views of the court, of what facts the testimony established, without any reference whatever to the terms of the lease. The lease itself makes no mention of any bonus, and, so far as the lease is concerned, the negotiations with reference to the bonus would have no bearing unless the testimony in relation thereto might be considered in determining the interpretation to be given to the word "premises," which it is necessary to consider to as-

certain what the parties had in view as to what should be done in the event of the termination of the lease.

[1] The theory upon which the cause was determined by the court was that, irrespective of the purposes for which the bonus was paid, the terms of the lease required the lessee to replace the buildings upon the leased lands by reason of this clause which we have heretofore quoted, to wit: "The lessee shall restore the premises, as to which this lease is terminated and canceled, to as near their original condition as is reasonably possible so to do." In construing the intent and purpose of this provision we think the trial court was in error. The provisions of the lease which we have set out, gave to the lessee the right to remove all buildings which it might "desire in carrying on its business and mining operations on said premises." Here is a definite statement of what the parties intended by the use of the word "premises." The defendant was given the privilege of removing buildings from the premises, which means from the lands on which the mining operations were to be performed. The following clause in the lease goes directly to the subject "land," giving the lessee the right to use the same, save and except that the lessor retains the right to occupy and use said land, or any part thereof, for agricultural or grazing purposes, which shall be carried on without interference with the operations of the lessee. Following this we find these words: "The said land, which is the subject of this lease, is situated in the County of Los Angeles, State of California, and described as follows, to-wit:" (Here follows the description of the land.) This land is then leased to the defendant for the period of twenty years, with a possible extension of fifty years, for a specific purpose, to wit, exploration for oil products, etc. It is then provided that a well shall be sunk to the depth of 5,000 feet. After the setting forth of these terms of the lease, it is then provided that, in the event of the cancellation or surrender, the premises shall be restored to their original condition as nearly as possible. That the parties did not have in mind that the use of the word "premises," in the restoration clause, referred to anything but the land, is very well shown by the reasoning of the trial court, to wit: "The lease is for the terms of twenty years, and in the minds of all the parties undoubtedly there was the picture of a producing oil well, or producing oil wells, lasting over the period of this twenty years. They all undoubtedly thought that this was oil-producing property; and, had their expectations been realized, there never would have been any lawsuit here. So I say that the court must keep in mind, in placing a construction upon this language, if it is required to do that, the fact that, at the time, the parties had no thought, apparently, but what this lease would run for the period of twenty years. So that it is rather far-fetched to say that they at that time figured that, at the expiration of the twenty-year period, that property should be restored to its original condition for dairy purposes."

Though the trial court finally considered itself bound to give a different interpretation of the word "premises," we think that just what has been here stated is the only reasonable interpretation to be placed upon the word "premises," as used in the lease which we are here considering. The trial court was undoubtedly led into error in its interpretation of the meaning of the word "premises," as used in this lease, from the frequent use of that word where buildings only, or buildings, also, are included. The authorities are numerous to the effect that in insurance cases the word "premises" means "buildings," or in leases of buildings it sometimes means the part of a building which is leased.

In the case under consideration, land is made the subject of the lease. The lessee is given the privilege of disturbing and digging up the land, changing its surface, as it necessarily would do in digging a well to the depth of 5,000 feet. Much soil would be taken from beneath the surface, and this necessarily would have to be leveled and placed in such a position as not to interfere with the further use of the leased land. Derricks, oil tanks, pipe lines, etc., would necessarily have to be taken away.

The word "premises" has different meanings, as was said in Old South Association v. Codman, 211 Mass. 211, 97 N. E. 766, 767, where the Supreme Court of Massachusetts was considering the use of the word. We find the following in the opinion in that case: " 'Premises' is a word which may have different meanings dependent upon its connection and the object to which it is applied. It oftentimes describes the fee of land. But it may signify something less extensive, if the context seems to require it. In order to determine the sense in which it was used in this indenture, it is important to bear in mind the subject about which the parties were contracting and their general purpose." This is particularly applicable to the instant case. The parties were contracting about explorations upon the land. They had in view digging wells upon the land. They did not have in view restorations of buildings twenty years later, or, under the terms of the lease, possibly seventy years later, as an option was given for a fifty-year extension. In Webster's Dictionary (Edition of 1928), we find the following definition of "premises": "The property conveyed in a deed; hence, in general, a piece of land or real estate; sometimes in fire insurance papers, a building or buildings on land as to leased premises; the premises insured." That the word "premises" has various meanings, and must be considered in re-

lation to that which precedes, or to which it refers, is shown by the definition of the word "premises" found in 49 California Jurisprudence, p. 1328, to wit: "In popular usage the term has come to mean lands and dominions; land or lands; lands or the buildings thereon; land and its appurtenances; the grounds immediately surrounding a house; a piece of real estate. Such use seems now to have the support of wide-spread and frequent usage. It is also often construed to mean buildings; a building with its adjuncts; and even, rooms and apartments within a building, or the floor of a building. It will be seen that the word signifies a distinct and definite locality. Otherwise, its use will be misapplied." The notes found in connection with the text which we have just quoted show that the word is used as meaning lands and houses, and as meaning lands only, and as meaning houses as distinct from land; also as parts of a building. Under the liquor laws of the United States, "premises" usually includes the buildings. McSherry v. Heimer et al., 132 Minn. 260, 156 N. W. 130. In this case, while it is particularly held to mean "buildings," it was held also that it included the lands and structures thereon, so that a search warrant included the buildings and its surroundings. In the case of M. M. Rowe Co. v. Wallerstein, 145 Va. 191, 133 S. E. 669, the court was considering a lease using simply the word "premises," and it was there said that a "lease of realty, using word 'premises,' without qualifying words, means land and buildings thereon." In the case there considered, however, the premises were described as the first and second floors only, of a certain building, and the holding of the court was that the premises referred only to the building and not to the lands surrounding the building.

A summary of these authorities shows that the interpretation to be given to the word "premises" depends entirely upon its use in the instrument where it appears, and the subject-matter to which it refers. The lease under consideration specifically states that the subject of the lease is land, the language being: "The said land which is the subject of this lease," etc.; 2½ acres in extent. There is another reference to mining operations on said premises which cannot be construed to mean anything other than mining operations upon the leased land, and then, when it comes to restoring to original condition, the use of the word "premises" alone can only be logically construed to relate to that which previously appears in the lease fixing the subject-matter to which it refers, to wit, the land which is leased, and the premises or lands upon which the mining operations are conducted.

[2] While the court's findings, contrary to its expressed views, would be binding upon us where the evidence is conflicting, even though it largely preponderates against the finding of the court, yet the construction of the court given to the lease is not binding, and whether we consider the purposes for which the bonus was given, or consider the lease alone, the conclusion seems unescapable, from what we have stated, that the parties had in contemplation only the restoration of the land to its normal condition, and that the word "premises" as it appears in the restoration clause, cannot be wrested from the subject-matter of the lease and the former interpretation given by the parties in the use of the word "premises" in referring to operations thereon, and given a distinct and contrary meaning which would be evidently directly opposed to the intention of the parties when executing the lease.

[3, 4] Appellant further contends that, unless the interpretation which we have heretofore given is correct, an ambiguity exists in relation to use of the word "premises," and therefore subdivision 12 of section 1870 of the Code of Civil Procedure applies, and that testimony as to usage and custom in relation to the business being conducted, and the interpretation given to such leases in the vicinity where oil development work is carried on, is admissible. Acting in accordance with this view, the appellant placed upon the witness stand witnesses who testified as to the usage and interpretation given to the word under consideration, and what was done in the way of restoring the land to its normal condition, which testimony was stricken out by the court, and then the further question was asked of one of the witnesses, as follows: "Q. Do you know whether or not there is a custom in the vicinity of the Rosecrans' Field governing the construction of this phrase to which I have called your attention?" (The lease referred to lands in the Rosecrans' Field.) The court sustained an objection to this testimony, and in so ruling stated, in substance, that no testimony along the line pertaining to usage or custom would be admitted. No further attempt was made to introduce testimony as to custom or usage, but the ruling of the court is now urged as error. Under the cases of Pastene v. Pardini, 135 Cal. 431, 67 P. 681, and Mahoney et al. v. A., T. & S. F. Ry. Co., et al. (Cal. App.) 281 P. 1108, it was proper for the appellant to bow to the ruling of the court and not seek to offer any further testimony bearing upon the subject of usage or custom. Appellant's contention appears to be well founded.

There being no findings of the court as to what damages, if any, have been suffered by the plaintiffs by reason of the alleged failure of the defendant to restore the surface of the land to its original condition as nearly as possible, the cause must go back for retrial to determine the extent of such damages, if any.

The judgment is reversed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

105 Cal. App. 618

PEOPLE, by WEBB, Atty. Gen., ex rel. BRAY v. BARNES CITY.

Civ. 6071.

District Court of Appeal, Second District, Division 1, California.

May 14, 1930.

Rehearing Denied June 4, 1930. Hearing Denied by Supreme Court July 7, 1930.

1. Municipal corporations ⟹36(10).

Default *held* properly entered after expiration of time for pleading, notwithstanding proceeding for consolidation of defendant, Barnes City, with Los Angeles had been completed theretofore (St. 1913, p. 585, § 10, as amended by St. 1915, p. 313, § 3).

St. 1913, p. 585, § 10, as amended by St. 1915, p. 313, § 3, provides that, in event of consolidation of municipal corporations, any action brought against one of the consolidated corporations prior to consolidation shall not be affected thereby, but that all such proceedings shall be continued and concluded by final judgment or otherwise, in all respects the same as if such consolidation had not been effected.

2. Municipal corporations ⟹36(10).

City by taking over another city as part of itself through consolidation proceedings became subject to perils of pending litigation against latter city (St. 1913, p. 585, § 10, as amended by St. 1915, p. 313, § 3).

3. Judgment ⟹128.

Judgment from which no appeal was taken within 60 days from its entry *held* final; there being no motion for new trial (Code Civ. Proc. § 939).

4. Judgment ⟹395.

That portion of judgment declaring territory was unincorporated was void did not justify court in vacating balance of judgment which annulled incorporation proceedings of city.

5. Judgment ⟹346.

Where on face of record judgment is void, court may set it aside.

6. Judgment ⟹395.

Court's authority to vacate void judgment is limited to right to strike part of judgment which on face of record is void if balance is valid.

7. Municipal corporations ⟹36(10).

Where Los Angeles took over Barnes City, denying leave to substitute Los Angeles as defendant in action against Barnes City *held* not error (St. 1913, p. 585, § 10, as amended by St. 1915, p. 313, § 3).

Appeal from Superior Court, Los Angeles County; Charles C. Montgomery, Judge.

Quo warranto proceeding by the People, by U. S. Webb, Attorney General, on the relation of George A. Bray, against Barnes City. From an order vacating a default judgment, from an order denying plaintiff's motion for leave to file amended and supplemental complaint and to substitute parties defendant, and from judgment dismissing the action, plaintiff appeals.

Affirmed in part, and reversed in part.

U. S. Webb, Atty. Gen., Leon French, Deputy Atty. Gen., C. A. Lindeman, of Los Angeles, Loris V. Cady, of Santa Monica, for appellant.

CONREY, P. J.

By complaint filed on the 14th day of February, 1927, plaintiff commenced this action in quo warranto to have it adjudged that the proceedings purporting to incorporate the city of Barnes City are illegal and void, that the defendant be ousted and excluded from all municipal corporate rights, privileges, and franchises over the described territory, and that said territory be adjudged to be unincorporated territory of the county of Los Angeles. Certain stipulations were filed, signed by the attorneys for plaintiff and the city attorney of defendant, extending the time of defendant to plead to the complaint. The time allowed having expired, the default of the defendant was regularly entered on the 7th day of May, 1927. Pursuant to said default, judgment was entered on August 9, 1927, in accordance with the prayer of the complaint.

On August 11, 1927, the city of Los Angeles entered a special appearance by its city attorney and gave notice of two motions to be made on August 18. One motion was for an order vacating the default and setting aside the judgment, upon the ground that the default and judgment were attempted to be taken against a defendant which by operation of law had prior thereto been wholly dissolved and disincorporated, and that, by reason thereof, the court was without jurisdiction to entertain or pass upon any of the matters set forth in the complaint, and upon the further ground that the judgment as entered directly affects lawfully incorporated territory of the city of Los Angeles, over which that city is and for a long time has been exercising municipal control and jurisdiction. The other of said motions asked that the action be dismissed, upon the ground that by virtue of consolidation proceedings the defendant, city of Barnes City, on the 11th day of April, 1927, became dissolved, disincorporated, and non-

existent; that the matters presented in the action have become moot; that there has not been, since April 11, 1927, any defendant against whom a default or judgment could be rendered; and that the court is without jurisdiction to further entertain said proceeding. These motions were heard upon affidavits presented by the respective parties.

On the 4th day of November, 1927, plaintiff gave notice of motion to be made November 10, 1927, for leave to substitute the city of Los Angeles as a defendant, and for leave to file a supplemental and amended complaint. By stipulation the hearing of this motion was continued to November 29.

On November 9, 1927, the court made an order which recited the fact that by the judgment it appeared that by said judgment it was decreed that the territory formerly within the corporate limits of defendant city was unincorporated territory, and that it further appeared that said default judgment was based upon a misapprehension of the facts and that said adjudication of the status of the territory was not within the issues tendered by the complaint and was not a matter that could have been judicially determined in this proceeding, and that by reason thereof said judgment, in so far as it attempted to adjudicate, determine, and decree the status of the territory was void and in excess of jurisdiction. "Upon the motion of the above entitled court, it is hereby ordered and decreed that the said judgment be vacated and set aside as void and in excess of jurisdiction, and that the same be accordingly declared null and of no effect."

By order of December 30, 1927, the court denied plaintiff's motion for leave to file amended complaint. By order of January 12, 1928, the court ordered that the default be set aside and the action dismissed.

The plaintiff appeals from the order vacating the judgment, and from the order denying the plaintiff's motion for leave to file an amended and supplemental complaint and to substitute parties defendant, and from the judgment dismissing the action.

[1, 2] In the order setting aside the judgment, there is a recital of fact to the effect that the adjudication of status of the described territory was not within the issues tendered by the complaint. Although the prayer of the complaint asked that it be adjudged that the described territory is unincorporated territory of the county of Los Angeles, there was in the complaint no allegation of fact showing that it was unincorporated territory. For the present purposes let it be assumed that in this respect no issue was tendered by the complaint. It remains true that the complaint did fully present an issue concerning the validity of the incorporation of the defendant. The default was properly entered on May 7th, notwithstanding that the proceeding of consolidation with the city of Los Angeles had been completed on the 11th day of April, 1927. In section 10 of the Consolidation Act of 1913 (St. 1913, p. 585), under which the consolidation proceedings were conducted, it is provided that, in the event of consolidation of municipal corporations under the act, any action brought by or against one of the consolidated corporations prior to the consolidation shall not be affected thereby, but that all such proceedings shall be continued and concluded, by final judgment or otherwise, in all respects the same as if such consolidation had not been effected. Stats. 1915, p. 313, § 3, Deering's Gen. Laws, 1923 Ed., Act 5166. It follows that upon April 11, 1927, the city of Los Angeles, in taking over the city of Barnes City as a part of itself, became subject to the perils of the pending litigation against said city, and to all summonses or notices to which the original defendant was at that time bound to respond. Plaintiff was not obliged to serve a new summons. Moreover, there is nothing in the record tending to show that the city of Los Angeles did not have full notice of this action and of the situation in which it then was.

[3] From the foregoing, it results that the judgment entered on August 9, 1927, was regularly given, made, and entered. No appeal having been taken therefrom within 60 days from its entry, and there being no motion for a new trial, the judgment on October 8, 1927, became final. Code Civ. Proc. § 939.

[4-6] In vacating the judgment by its order of November 9, 1927, the court declared that it acted upon its own motion and that the order was made for the reason that "said judgment, in so far as it attempted to adjudicate, determine and decree the status of said territory, was void and in excess of jurisdiction." Assuming that, for the stated reason, that part of the judgment which declared that the described territory was unincorporated territory of the county of Los Angeles was void, it does not follow that the court had jurisdiction at that time to annul and declare void the entire judgment. That portion of the judgment declaring that the territory was unincorporated was a severable item, not involved with and wholly unnecessary to the remainder of the judgment which annulled the incorporation proceedings of the defendant city of Barnes City. It is true that it has been held that, where on the face of the record a judgment is void, the court at any time may set it aside. People v. Greene, 74 Cal. 400, 16 P. 197, 5 Am. St. Rep. 448; Winrod v. Wolters, 141 Cal. 399, 74 P. 1037. But this is not to say that, where the court has exceeded its jurisdiction only in this, it has included in its judgment a distinct and separate item which was beyond the powers of the court, the entire judgment is thereby rendered null and void. Under such circumstances we are of the opinion that the authority of the court is lim-

ited to the right to strike from the judgment that part thereof which on the face of the record is void. In Baar v. Smith, 201 Cal. 87, at page 99, 255 P. 827, 832, in a case where it appeared that the court in its judgment included matters outside of the issues tendered and litigated in the action, that part of the judgment extraneous to the issues was held to be void. "So much of a judgment that exceeds the issues as thus defined and determines issues not tried or involved is coram non judice and void." The implication is that the remainder of the judgment would remain in force.

[7] Our decision on the preceding point leads at once to the conclusion that the superior court did not err in making its order of December 30, 1927, whereby it denied plaintiff's motion for leave to file an amended and supplemental complaint, and for leave to substitute the city of Los Angeles as a defendant in the action. By the same token it follows that the judgment of dismissal of the action was erroneous.

The order of November 9, 1927, vacating and setting aside the judgment entered on August 9, 1927, is reversed. The order of December 30, 1927, denying plaintiff's motion, is affirmed. The judgment of dismissal entered on January 7, 1928, is reversed.

We concur: HOUSER, J.; YORK, J.

BURR v. WESTERN STATES LIFE INS. CO.★

Civ. 3994.

District Court of Appeal, Third District, California.

May 9, 1930.

Rehearing Denied June 7, 1930. Hearing Granted by Supreme Court July 7, 1930.

1. Contracts ⟹208.

Where no place of performance is expressly stipulated, contract should be held performable in place where circumstances indicate parties intended performance to take place.

2. Contracts ⟹152.

Terms of contract are understood in their ordinary sense, and provisions should be construed together.

3. Contracts ⟹209.

Where intention with reference to place of payment does not appear from contract, general rule is that debtor must seek creditor to make payment.

4. Contracts ⟹208.

Contract may be held entirely performable at place where made and partly performable.

5. Insurance ⟹146(3).

Court must avoid putting unnatural construction on insurance policy.

6. Insurance ⟹618.

Action against domestic insurance corporation to recover disability benefits *held* not maintainable in county of insured's residence, where contract was made and disability occurred elsewhere, and home office of company located elsewhere was designated as place of payment in case of insured's death (Const. art. 12, § 16).

Const. art. 12, § 16, provides that a corporation may be sued in the county "where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated." The insurance company's breach of contract to pay the disability benefits occurred at the place where payment was agreed to be made. However the rider of the policy providing for permanent disability failed to state the place of payment of the benefits, and the only place of payment designated in the contract was the designation of the home office for payment in case of death.

TUTTLE, J., dissenting.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by Leslie Lee Burr against the Western States Life Insurance Company. From an order denying defendant's motion for a change of the place of trial, defendant appeals.

Reversed.

M. H. Iverson, of Ukiah, and Thomas G. Crothers, of San Francisco, for appellant.

Hale McCowen, Jr., of Ukiah, for respondent.

FINCH, P. J.

This is an appeal from an order denying defendant's motion for a change of the place of trial from Mendocino county to the city and county of San Francisco.

In June, 1919, the plaintiff "at the town of Wailuku, in the island of Maui, territory of Hawaii, and while he was then a resident of said island of Maui, made and executed his two certain applications in writing, * * * each applying to defendant for a policy of life insurance upon the life of plaintiff in

★Hearing granted. 296 P. 273.

the sum of $5,000, and said applications were duly forwarded to defendant at its home office in the city and county of San Francisco, State of California. * * * Thereupon and in compliance with and in pursuance of said applications, defendant, in said city and county of San Francisco, made and executed the policies of life insurance forming the subject matter of the above entitled action. * * * Thereupon said policies were forwarded to said plaintiff at Wailuku, in said territory of Hawaii." The policies and the riders attached thereto and made a part thereof are identical in language except as to the policy numbers thereof, and each of said policies, in so far as material on this appeal, reads as follows:

"Western States Life Insurance Company, hereinafter known as the company, agrees to pay $5,000 * * * at the home office of the company, in San Francisco, California, as follows:

"To Olive B. Burr, wife of the insured, * * * immediately upon receipt of due proof of the death, during the continuance of this policy, of Leslie Lee Burr of Wailuku, Island of Maui, Territory of Hawaii. * * *

"In witness whereof, Western States Life Insurance Company has caused this policy to be signed by its president and secretary, or assistant secretary, at the home office of the company at San Francisco, California, this thirtieth day of June, 1919."

There was attached to each policy, at the time it was executed, and made a part thereof, a rider containing the following:

"Upon receipt of due proof * * * that the insured * * * has become wholly disabled by bodily injury or disease so that he is and will be presumably, thereby permanently and continuously prevented from engaging in any occupation, or performing any work, whatsoever for remuneration or profit, * * * then * * * one year after the anniversary of the policy next succeeding the receipt of such proof, the company will pay the insured the sum of $500, and a like sum on each anniversary thereafter during the lifetime and continued disability of the insured. * * *

"Upon receipt of due proof * * * that the death of the insured occurred before the policy anniversary nearest his sixtieth birthday as the result, directly and independently of all other causes, of bodily injury effected solely through external, violent and accidental means, and that such death occurred within sixty days after sustaining such injury, the company will pay instead of the face amount of this policy, double that amount, making $10,000, provided no disability benefit has been allowed under the policy. * * *

"Upon due proof * * * during the life of the insured, that the death of the beneficiary occurred before attaining age sixty * * * as the result directly and independently of all other causes, of bodily injury effected solely through external, violent and accidental means while traveling as a passenger on a street car, railway train, steamship, licensed for regular transportation of passengers, or other public conveyance, operated by a common carrier, * * * the company will pay the insured the sum of $2,500."

After the execution of the policies, "on or about the 14th day of October, 1922, and while plaintiff was a resident of the county of San Diego, State of California, and being at that time in said county of San Diego, said plaintiff forwarded and furnished to defendant at its home office in the city and county of San Francisco, proofs that he was then totally and permanently disabled, in accordance with the total and permanent disability provisions of said policies. Thereupon, defendant approved and allowed the claim of said plaintiff for disability benefits, * * * and thereafter and on the 26th day of December, 1922, the defendant, at its home office in said city and county of San Francisco, attached to each of said policies a total and permanent disability endorsement allowing and approving said disability benefits," reading as follows:

"Total and Permanent Disability Endorsement

"Attached to and made a part of Policy No. 30334.

"The insured under this policy, No. 30334, having become totally and permanently disabled in accordance with the total and permanent disability provision of said Policy, and proof of such total and permanent disability having been approved October 14th, 1922, by Western States Life Insurance Company, the said Company agrees, subject to all the terms and conditions contained in the Policy, to waive payment of the premiums which may become due thereunder on and after June 30th, 1923, and to pay an annual income of $500 during the lifetime of the insured, without reduction in the amount of insurance, first payment to be made on June 30th, 1924.

"Western States Life Insurance Company
"Barrett A. Coates,
"Assistant Secretary & Actuary.
"San Francisco, Calif., December 26th, 1922."

The defendant made all the payments provided for by said allowance up to and including that of June 30, 1928, but refused to make any further payments. This action was brought to recover the payment falling due on June 30, 1929.

The defendant is a corporation organized under the laws of the state of California and at all times material to the issues of this case its residence and principal place of busi-

ness has been in the city and county of San Francisco, and it has had no place of business in Mendocino county. The plaintiff was, at the time the action was commenced, and for more than two years prior thereto had been continuously, a resident of Mendocino county. Article 12, § 16, of the Constitution reads as follows: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

It is apparent that the only theory upon which the order can be affirmed, if at all, is that the contract of insurance was to be performed in Mendocino county.

[1] "In a suit upon the contract of a corporation, where no place of performance is expressly stipulated, it ought to be held performable in the place where the circumstances, viewed in the light of pertinent code provisions, indicate that the parties expected or intended it to be performed." Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 316, 74 P. 855, 65 L. R. A. 90.

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Civ. Code, § 1636. "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title." Civ. Code, § 1639. In this case there is nothing whatever except the writing from which to ascertain the intention of the parties. "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Civ. Code, § 1641. "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning." Civ. Code, § 1644. "Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention." Civ. Code, § 1655.

[2] No authorities need be cited to show that the riders attached to the contracts are parts thereof and are to be construed to the same effect as if they were set forth in the bodies of the contracts as clauses thereof. Each contract has for its object one general purpose, the payment of benefits, which are divided into four classes: (1) $5,000 upon the death of the insured when not caused by violence; (2) $500 a year upon his becoming totally disabled; (3) $10,000 upon his death by violence; (4) $2,500 upon the death by violence of the insured's wife.

The contract expressly provides that payments of the first class shall be made "at the home office of the company, in San Francisco, California." The contract is silent as to the place at which the other payments are to be made. It was probably deemed unnecessary to state expressly where the other payments, if any should become due, are to be made, the natural inference being that they are to be made at the same place as the first, in the absence of any contrary intention appearing from the terms of the contract. It would be a strained construction of the contract to hold that, after expressly making the first of these benefits payable in San Francisco, the parties intended to make the other benefits payable elsewhere, there being nothing whatever in the contract to indicate such intention. For instance, the parties having expressly made the single death benefit payable in San Francisco, it does not seem possible that they could have understood that payment of the double death benefit is to be made at some other place. The terms of the contract are to be understood in their ordinary and popular sense and as a man of average intelligence and experience would understand them. "Each clause is to be considered with reference to every other clause upon which it has any bearing, and all the clauses and provisions are to be construed together as the unified medium whereby the intent of the parties to the instrument is to be reached." Jones v. Van Nuys, 161 Cal. 158, 165, 118 P. 541, 544. "Each clause of the contract is to be looked to for light in interpreting the others." Estate of Winslow, 121 Cal. 92, 94, 53 P. 362.

[3-5] "The intention of the parties to a contract as to the place where payments are to be made usually appears by express provision, or by necessary inference in the contract itself. In cases where the intention does not thus appear, the general rule is that the debtor must seek his creditor to make payment of his indebtedness. * * * While it is a rule of general acceptation that a debtor must seek his creditor to pay his indebtedness, it is always open to the parties to show by the express terms of the contract, or by fair inference therefrom, that it was the intention of the parties to pay at a particular place or within a particular state or country." 6 R. C. L. 902; 21 R. C. L. 15. "It is a fair deduction that a contract is to be entirely performed at the place where it was made and where it expressly provides that part of the performance (payments, for instance), shall be made." 5 Cal. Jur. 454; Hammond v. Ocean Shore Dev. Co., 22 Cal. App. 167, 170, 133 P. 978; Fitzhugh v. University Realty Co., 46 Cal. App. 198, 201, 188 P. 1023. While uncertainties and ambiguities in insurance policies are to be resolved against the insurer, courts must avoid putting a strained and unnatural construction on the terms of a pol-

icy and thereby creating an uncertainty or ambiguity. No term of a contract is either uncertain or ambiguous if its meaning can be ascertained by fair inference from other terms thereof. There is no difficulty in so ascertaining the intention of the parties to this action as to the place of payment, and the court must give effect to that intention.

As said by Chief Justice Waste in Ogburn v. Travelers' Ins. Co. (Cal. Sup.) 276 P. 1004, 1005: "In the interpretation of a written instrument the primary object is to ascertain and carry out the intention of the parties thereto. * * * As to the hardships, advantages, or disadvantages which may result from such a construction, the courts have nothing to do. * * * The intention of the parties is, of course, to be ascertained from a consideration of the language employed by them and the subject-matter of the agreement. * * * A contract should be construed, however, as an entirety, the intention being gathered from the whole instrument taking it by its four corners. * * * We have not lost sight of the familiar rule requiring all uncertainties and ambiguities in a policy of insurance to be resolved against the insurer, who is presumed to have selected and incorporated into the policy the language employed therein. That rule can only have application when the policy actually presents some uncertainty or ambiguity. In the absence thereof, the courts have no alternative but to give effect to the contract of insurance as executed by the parties."

[6] The defendant's breach of contract, if any, occurred at the place where payment was agreed to be made. It may be conceded that, under the constitutional provision quoted, the action could have been maintained in the county of San Diego, that being the county in which the disability of the plaintiff occurred, but the fact that the "obligation or liability" arose in San Diego county does not give the plaintiff the right to prosecute the action in Mendocino county. "Where the action is brought in a county other than one of those mentioned in section 16 of article 12 of the Constitution, the corporation defendant is entitled to have the cause tried in the county of its principal place of business * * * and the change of venue granted because the action has not been brought in the proper county." 7 Cal. Jur. 132.

The order is reversed.

I concur: R. L. THOMPSON, J.

TUTTLE, Justice pro tem.

I dissent. Upon the statement of facts in the main opinion I reach the opposite conclusion.

As a general rule, in the absence of any agreement or stipulation to the contrary, a debt is payable at the place where the creditor resides. 48 C. J. 592—8 D.

The general rule governing venue in such cases is laid down by the Supreme Court in the case of Bank of Yolo v. Sperry Flour Company, 141 Cal. 314, 74 P. 855, 65 L. R. A. 90. There the defendant, a California corporation, with its principal place of business in San Francisco, was liable to the bank upon a contract for the payment of money, but no place of payment was specified. Under the familiar rule the court held the place of payment, where none is agreed upon, is the place where the creditor may be found, to wit, the county in which he resides, and that the venue lay in the county of the creditor, where the contract was to be performed.

Defendant issued an ordinary life insurance policy to plaintiff. It was an independent document, complete in itself. Attached to this policy was a slip of paper commonly called a "rider," upon which was printed additional stipulations covering physical disability of the party originally insured for life. The life insurance contract made the total amount of insurance payable at San Francisco. The rider was silent as to the place of payment.

The policy and "rider" are quite distinct in purpose and effect. The former covers liability predicated upon death, while the latter provides for yearly payments, predicated upon physical disability.

Under the authorities above cited, the life insurance is payable in San Francisco, and the disability compensation is payable in Mendocino county, in the absence of any inferences to the contrary, which can be logically and reasonably drawn from the policy and "rider." If we accept the language of the contract, without indulging in any inferences favorable to the insurer, we must hold that the action was properly commenced in Mendocino county. The naming of a place of payment of the life insurance in one portion of the contract, and the failure to state a place of payment of the disability compensation in another, gives rise to an uncertainty, and this court is called upon to declare the true intent of the parties.

A proper disposition of this motion requires, as the main opinion holds, an application of the rules of construction and interpretation.

The primary rule of construction is stated, in cases of this character, to be as follows: "Any uncertainty or ambiguity in an insurance contract is to be construed most strongly against the insurer. He frames it, and is supposed to make it as potent as possible, in his own favor." 6 Cal. Jur. § 185.

The Supreme Court of the United States has this to say about the manner of construing insurance policies: "The rule is settled that in case of ambiguity that construction of the policy will be adopted which is most favorable to the insured. The language employed is that of the company and it is con-

sistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it." Mutual Life Ins. Co. v. Hurni Packing Co., 263 U. S. 167, 44 S. Ct. 90, 91, 68 L. Ed. 235, 31 A. L. R. 102.

We are bound, under the foregoing rule, to draw the inference and conclude that the insurance company expressly omitted the place of payment of the disability compensation, and thereby obligated itself to perform the contract, so far as disability compensation is concerned, in the county where the beneficiary resided.

To permit defendant to prevail on this motion we must set at naught this cardinal rule of construction governing the interpretation of contracts of this character. We are expressly forbidden to indulge in an inference which will deprive plaintiff of the right of trial in the county of his residence, and thus subject him to the recognized hardship and additional expense of trial in another county. It cannot be gainsaid that such a construction would be unfavorable to the insured, within the rule stated.

In the case of Ogburn v. Travelers' Ins. Co. (Cal. Sup.) 276 P. 1004, referred to in the main opinion, the policy of accident insurance provided for coverage for bodily injuries "effected and sustained while riding as a passenger on any public conveyance provided by a common carrier and such conveyance is being propelled on land or water by mechanical power." The insured was killed while riding in an elevator, and the sole question presented was whether or not such elevator was a common carrier. There was involved in that case, as the court correctly stated, no ambiguity or uncertainty. There were no conflicting provisions to be construed, hence no occasion to apply the rule under discussion. In the instant case we have life insurance payable in one county and disability insurance, in effect, payable in another. If there is no uncertainty, then one kind of insurance is payable in one county and the other kind in another county, and the order must be affirmed. But if we hold that because the life insurance is payable in San Francisco, therefore the disability insurance is also payable in the same place, we are, in effect, admitting the uncertainty and resolving it in favor of the insurer.

The very fact that the learned trial judge reached one conclusion and this court another, in the matter of the construction of the contract, is a very persuasive indication that uncertainty and ambiguity are involved.

Our courts give a very broad meaning to "uncertainty and ambiguity," where the application of this rule has been sought. For instance, in the case of Greer-Robbins v. Insurance Co., 47 Cal. App. 63, 190 P. 187, 188, the policy covered merchandise in the rear of plaintiff's building. This merchandise was subsequently moved to another location and the insurer contended that the parties did not intend to cover the property in any other location. In holding against the insurer, Richards, J., there said: "It is true that there is some ambiguity in the language of the policy; but it is well settled that, since the language and terms of insurance policies are framed and formulated by the insurer, whenever ambiguities occur therein they are to be resolved in favor of the insured."

The main policy here provided for life insurance payable in a "lump sum." The rider, covering disability insurance, made the latter payable in installments. There is just as much reason to suppose that different places of payment were intended for different kinds of insurance, as to suppose that because the life insurance was payable in San Francisco, the disability insurance was also payable there. The insurance company used their printed form. They made the contract. As it stands, unaided by inferences, the proper venue for this case is the county of Mendocino. It was within the power of the insurance company, if it meant otherwise, to say so in plain terms. Not having done so, it must accept the consequences resulting from the rule that the doubt, for which its own lack of clearness was responsible, must be resolved against it.

For the foregoing reasons I am compelled to differ with my colleagues, and to hold that the learned trial judge was correct in his ruling, and that the order should be affirmed.

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105 Cal. App. 675

AYCOCK et al. v. CARR et al.

Civ. 4074.

District Court of Appeal, Third District, California.

May 16, 1930.

1. Deeds ⟹211(3).

Findings that defendants falsely represented value of certain patent rights, intending to defraud plaintiffs by inducing conveyance of land therefor, authorized rescission.

The evidence showed that land worth $14,000 had been conveyed to defendants in consideration of the assignment by them of certain rights under a pending application for patent, falsely and fraudulently represented to confer exclusive rights. The land had been subsequently conveyed to a codefendant who paid no consideration and had full knowledge of the transaction, and a mortgage

thereon had been given to a bona fide mortgagee. The judgment decreed rescission and cancellation, and also that defendant grantees pay to plaintiffs the sum realized on the mortgage.

2. Principal and agent ⟹157.

If grantees' agent in procuring deed were also grantors' agent, and secretly accepted commission from grantees, grantors could rescind.

3. Exchange of property ⟹8(1).

Where grantors deeded land worth $14,000 for valueless patents, grantees' contention that absence of finding of damage invalidated judgment decreeing rescission was without merit.

4. Pleading ⟹129(2).

In action to cancel deed conveying land in exchange for patents allegedly worthless, not denied by answer, proof of worthlessness was unnecessary.

Appeal from Superior Court, Los Angeles County; J. R. Hughes, Judge.

Action by John E. Aycock and another against Edward A. Carr and others. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Light & Lane, of Los Angeles, for appellants.

Kemper Campbell and Leon Yankwich, both of Los Angeles, for respondents.

PLUMMER, J.

[1] The plaintiffs had judgment in an action to cancel and set aside a certain deed of conveyance whereby a tract of land described in the complaint, valued at $14,000, was conveyed to the defendants, Edward A. Carr and Louisa F. Carr, in consideration of the assignment by said defendants to the plaintiffs of certain state rights under a pending application for patent. The lands described in the complaint were, by the defendants Carr, conveyed to the defendant Laura E. Rice, the defendant Laura E. Rice not having paid any consideration, and having knowledge of the transactions involved in this action. Subsequent to the conveyance of the premises referred to, a mortgage in the sum of $3,500 was given by the defendants upon the conveyed lands to an innocent party. Judgment went for the rescission and cancellation of the deed of conveyance, and also for judgment in the sum of $3,500, against the defendants Edward A. Carr and Louisa F. Carr, the sum realized by them on the mortgage executed as above stated. From this judgment the defendants appeal.

The record shows that this action is based upon an alleged scheme to defraud the plaintiffs and to induce them to part with valuable property, by representations regarding state rights to manufacture and vend a pencil-vending machine, for which the appellants Carr had filed an application for patent. A setting forth of a few of the findings of the trial court sufficiently discloses the facts of this case. Among other things the court found as follows: "That it is true that said defendants, Edward A. Carr and Louisa F. Carr, on or about said 12th day of May, 1925, with intent to deceive and defraud the plaintiffs, and to induce them to purchase the rights of said defendants Carr in and to the said contracts hereinabove mentioned, and to accept an assignment thereof, and to make, execute and deliver the indenture and conveyance hereinafter mentioned, falsely and fraudulently represented to the plaintiffs that the pencil-vending machine above referred to was the only pencil-vending machine in use in the United States; that said Parker, hereinabove mentioned, had the exclusive right to the use of the idea and principle embodied therein; that the use thereof and of any pencil-vending machine by any person other than said Parker, during the pendency of the proceedings for the perfection of the patent thereto, or thereafter, could and would be enjoined by said Parker through legal proceedings; that there was no other pencil-vending machine on the market, in commercial competition with said vending machine, and that there was no other pencil-vending machine being used, sold, operated or patented anywhere in the United States."

The court also found that the representations were made with intent to defraud the plaintiffs, and that the plaintiffs acted upon the representations; that the plaintiffs believed the representations to be true, and relying upon such representations, transferred to the defendants Carr the real estate described in the complaint, of the value of $14,000; that after the property had been conveyed to the defendants Carr, the defendants Carr mortgaged the same and realized therefrom the sum of $3,500. The court further found that there were a number of other patents covering the same device, preceding the application for patent made by the defendants Carr. The court further found that the rights purported to be transferred to the plaintiffs were valueless. The court also found that all of the representations made by the defendants relative to the patent rights were fraudulent and untrue. The findings, without further reference, are amply sufficient to support the judgment and need not be further mentioned herein.

[2] The appellants in their opening brief make the following statement, to wit: "Con-

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

siderable evidence was introduced on both sides as to the truth of the alleged representations. As there was a substantial conflict of testimony as to this matter, we are concluded by the decision of the trial court."

The appellants rely upon the assertion that F. E. Aycock was the "go-between" or medium by which the respective parties came together in the deal and that he was the agent for both parties, and, therefore, that the plaintiffs are not in a position to complain. The record, however, contains evidence to the effect that F. E. Aycock was not the agent of the plaintiffs, but it does show, on the contrary, that he was the agent of the defendants Carr and that the defendants Carr paid him a commission of $3,500 for putting over the deal. However, if F. E. Aycock had been acting as agent for the plaintiffs, his concealment of the fact that he was being paid by the defendants Carr would have entitled the plaintiffs to rescind. Wilson v. Southern Pacific Land Co., 61 Cal. App. 545, 215 P. 396; Newell-Murdoch Realty Co. v. Wickham, 183 Cal. 39, 190 P. 359. As shown by those cases, the fact of concealment of agency or of a special interest, such as the receipt of commissions paid by one party where there is a dual agency, entitles the opposite party to rescind.

[3, 4] We do not need to follow the authorities cited by the appellants by reason of the fact that the circumstances disclosed by the cases referred to are entirely dissimilar from those appearing in this cause. The finding of the court to the effect that the appellants committed the frauds charged is practically admitted by the quotation which we have taken from their brief, but if it were not admitted a review of the testimony, without setting it forth, shows beyond question that every fact found by the trial court is sufficiently supported. In this particular we may mention that the contention of the appellants that the court did not find that the plaintiffs had been damaged and that the rule usually followed is that rescission will not ordinarily be decreed or a deed adjudged to be canceled and given up and reconveyance directed unless the complaining party has been damaged, is entirely without merit. The assertion is made that there is no proof that the agreement or transfer of the alleged patent right or state rights to vend the pencil machine is not 100 per cent. value. The record contains no testimony relative to the value of vending the alleged patented article. It does, however, show that there was no necessity for the introduction of such proof. The complaint alleges, among other things, as follows: "That for these reasons the rights acquired by plaintiffs from the defendants were, and each of them was valueless." This has reference to the alleged rights transferred by the defendants Carr to the plaintiffs. A careful reading of the answer filed by the defendants shows that this allegation is undenied, and, therefore, the finding of the court that the alleged rights were valueless requires no testimony to support it; it stands as an admitted fact in the cause.

Counsel for the appellants cite several verses of the Bible, all of which, perhaps, are fitting when the circumstances correspond, but in this case we think the ninth commandment, given effect by the judgment of the trial court, is conclusive.

Finding no merit in the appeal, the judgment is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

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105 Cal. App. 597

RIDEOUT v. EICH, County Treasurer.

Civ. 4046.

District Court of Appeal, Third District, California.

May 12, 1930.

1. Army and navy ⟹54.

County's purchase of hall for honorably discharged soldiers, sailors, and marines *held* authorized (Pol. Code, § 4041f).

Pol. Code, § 4041f, provides any county may provide memorial halls for the patriotic, fraternal, and benevolent associations of veteran soldiers, sailors, and marines who have served the United States honorably in any of its wars.

2. Counties ⟹111(2).

Part of purchase fund for Veterans' Memorial Hall in vendor's possession under former void sale contract *held* actual part of fund, as respects contention fund was insufficient.

The contention was without merit, since as the money was paid under a void contract the vendor became a trustee holding the money for that particular county fund.

3. Counties ⟹192.

Fund for purchase of Veterans' Memorial Hall *held* sufficiently classified in budget under statute requiring auditor to tabulate proposed expenditures (Pol. Code, § 3714, subd. 2, as amended by St. 1929, p. 1129).

Pol. Code, § 3714, subd. 2, as amended by St. 1929, p. 1129, provides that the expenditures for each organization unit shall be classified under the general classes (1) salaries and wages, (2) maintenance and operation, (3) capital outlay, (4) interest

and debt redemption, and (5) expenditures proposed to be made from bonds or other income not yet authorized, and the budget showed the classification of funds as "Organization Unit: Veterans' Memorial Building. Classification: Veterans Memorial Building. Capital Outlay, 3 Lots & Building to be purchased under provisions of Sec. 4041f Political Code and/or settlement of claim for past County use and occupation thereof. (Amount) Requested, $158,093.85; Allowed, $158,093.85. Name of Fund, Veterans Memorial Bldg. Fund."

4. Counties ⟹111(2).

That fund for purchase of Veterans' Memorial Hall contained more than required to complete purchase *held* not to invalidate proceedings.

5. Counties ⟹192.

Erroneous inclusion of proposed allowance of claim for past use of building in classification of fund as capital outlay *held* not to render budget void (Pol. Code, § 3714, subd. 2, as amended by St. 1929, p. 1129).

6. Counties ⟹192.

Inclusion of claim for past use of property purchased in classification, as "capital outlay," *held* erroneous (Pol. Code § 3714, subd. 2, as amended by St. 1929, p. 1129).

The inclusion was erroneous, since "capital outlay" includes only money expended in acquiring, equipping, and promoting the enterprise.

Application by Phebe M. Rideout for a writ of mandate to be directed to Harvey Eich, as County Treasurer of the County of Yuba, to compel respondent to make payment of money under contract for purchase of veterans' Memorial Hall, in which proceeding F. W. Johnson intervened.

Writ granted.

See also 280 Pac. 140.

Brobeck, Phleger & Harrison, of San Francisco, and Warren Steel and Homer Lingenfelter, both of Marysville, for petitioner.

E. S. Norby, of Marysville, and Russell P. Tyler, of San Francisco, for respondent.

R. L. THOMPSON, J.

This is a petition for a writ of mandate to compel the county treasurer of Yuba county to pay the purchase price of a Veterans' Memorial Hall at Marysville, which had been contracted for by the board of supervisors.

The petition alleges that the board of supervisors duly levied a tax upon the assessable property of that county in 1922 and each succeeding year until 1929, at a rate not to exceed three mills per dollar of the assessable value thereof, for the purpose of creating a fund with which to purchase an assembly hall for the use of the honorably discharged veteran soldiers, sailors, and marines who had served in wars for the United States; that the fund thus created, aggregating the sum of $158,093.85, was set apart and paid into a special veterans' memorial fund; that on December 3, 1929, pursuant to section 4041f of the Political Code, the board of supervisors duly adopted a resolution to purchase from the petitioner lots 5, 6 and 7 of block 9, range F, as designated on the recorded map of Marysville, Yuba county, Cal., together with the Veterans' Memorial Hall and improvements thereon, for the sum of $150,000; that notice of the intention to purchase this property was given and published as required by law; that pursuant to said notice and proceedings, the board of supervisors, on January 7, 1930, met and consummated the purchase by the execution of a written agreement therefor and adopted a resolution to pay the grantor the consideration of $150,000, and at the same time the petitioner executed and delivered to the county of Yuba a good and sufficient deed of conveyance to said property; that the petitioner's claim for said purchase price was then duly filed and approved by the board of supervisors, and the auditor of said county thereupon drew his warrant upon said special veterans' memorial fund for said amount, which was presented to the treasurer on February 4, 1930, and payment was refused.

By an order of court F. W. Johnson, a resident and taxpayer of Yuba county, was authorized to appear in said proceeding as an intervener. Both the respondent and the intervener filed separate answers to said petition. The intervener, by way of answer, alleged that the board of supervisors adopted a budget for Yuba county for the fiscal year beginning July 1, 1929, at which time there was on deposit with the county treasurer, in a special "Veterans' Memorial Fund," the sum of only $25,000, and that on September 3, 1929, the petitioner paid into said fund the further sum of $132,117.45, which last-mentioned sum had been previously paid to her by the county of Yuba, pursuant to a former agreement to purchase the same property for a similar consideration; that in transferring said sums from the special "Veterans' Memorial Fund" to the general county budget fund for the purpose of paying for said property the said special fund was entirely exhausted; that the resolution which formed the basis for creating said special memorial fund provided specifically for "Capital Outlay, three lots and building to be purchased under provisions of section 4041f, Political Code, and/or settlement of claim for past

County use and occupation thereof, $158,093.85 Veterans Memorial Building Fund"; that in adopting the county budget for the fiscal year beginning with July 1, 1929, the board of supervisors failed to itemize the proposed expenditures included within the term "Capital Outlay" as required by section 3714 of the Political Code; that on January 7, 1930, at the time of the consummation of the purchase of said property the said "Veterans' Memorial Fund" did not contain the sum of $150,000 with which to purchase said property, but that said fund had been previously completely exhausted; and that the incurring of said obligation to purchase the Veterans' Memorial Hall property was therefore violative of article 11, § 18, of the state Constitution and void.

The answer of the respondent adopted and alleged each of the foregoing assertions of the intervener, except that he admitted that on September 3, 1929, there was and now is in said memorial fund the sum of $158,093.85.

It was stipulated that the records and proceedings of a former similar petition for writ of mandate between the same parties, designated Civil No. 3844, which was decided by this court July 26, 1929, and is reported in 280 P. 140, to be considered as evidence in this proceeding; that the Yuba county budget for the fiscal year beginning July 1, 1929, showed under the classification: "Veterans Memorial Building, CAPITAL OUTLAY; 3 Lots & Building to be purchased under provisions of Sec. 4041f Political Code and/or settlement of claim for past County use and occupation thereof, (Amount) Requested, $158,093.85; (Amount) Allowed by Board of Supervisors, $158,093.85; Name of fund, Veterans Memorial Bldg. Fund"; that the resolution of the board provided "that the following appropriations for capital outlays, set forth in said budget, be and the same are hereby specifically made for said fiscal year * * * (here follows a quotation of the foregoing language of the budget classification), and notwithstanding the appropriations for capital outlays, herein specifically set forth, that each and every item of said budget classified and appropriated for capital outlay for said fiscal year be and the same is hereby specifically appropriated in the amount and for the purpose or purposes in said budget provided for such item"; that after the adoption of said budget and on September 3, 1929, the petitioner made oath before the county auditor of Yuba county that she was then in possession of the sum of $132,117.45, which belonged to said county; that this fact was duly certified to by the auditor; and that the petitioner thereupon paid said sum to the treasurer, which was forthwith deposited in the veterans' memorial fund.

It is contended by the respondent and by the intervener that: (1) At the time the county budget for 1929 was adopted the amount which was then contained in the memorial fund was insufficient with which to purchase the property in question for the reason that the petitioner then held possession of $132,117.45 belonging to that fund, and (2) in classifying the funds for the purpose of providing for the purchase of this property the county budget did not comply with the requirements of section 3714, subdivision 2, of the Political Code.

[1] The purchase of a Veterans' Memorial Hall is authorized by law. Section 4041f of the Political Code reads:

"Any county may provide and maintain (1) a home or homes for veteran soldiers, sailors and marines who have served the United States honorably in any of its wars; (2) buildings, memorial halls, or meeting places for the use of patriotic, fraternal and benevolent associations of such persons. For these purposes the board of supervisors of any county shall have jurisdiction and power: (a) To purchase, receive by donation * * * real or personal property necessary for such building or buildings, and to improve, preserve, take care of, manage and control the same. * * * (c) To levy in any year a special tax not to exceed three mills on the one dollar of assessed valuation on all the taxable property in the county, * * * to be expended for the purposes hereof."

[2] There is no merit in the contention that the memorial fund did not actually contain sufficient money with which to purchase the veterans' memorial property at the time the budget was adopted in 1929. It is true that at the time the budget was adopted in 1929, the treasurer then had in his immediate possession only $25,976.40. The balance, amounting to $132,117.45, was then held by this petitioner, Mrs. Rideout, under a former contract to sell the same property, which agreement was held to be in conflict with the inhibition of article 11, section 18, of the Constitution and void because the first contract incurred an obligation in excess of the revenue of Yuba county which was then provided for that fiscal year. The result was that Mrs. Rideout became a trustee, holding the money for that particular county fund. The money was accessible and was an actual part of that fund, although it was temporarily held by a trustee instead of the treasurer. It was in fact subsequently returned to the treasurer September 3, 1929. It may not, therefore, be reasonably said that the last contract for the purchase of the property was void for lack of funds.

[3] We are of the opinion that in adopting the budget for the year 1929, the memorial fund was sufficiently classified to conform with the requirements of section 3714, subdivision 2, of the Political Code as amended

in 1929 (St. 1929, p. 1129), which provides with respect to the auditor's tabulation of proposed expenditures that:

"Such estimates of expenditures shall be classified to set forth the data by funds, organization units, character and objects of expenditure; the organization units may be subclassified by functions and activities at the discretion of the county board of supervisors, but the expenditures for each organization unit shall be classified under the general classes of (1) salaries and wages; (2) maintenance and operation; (3) capital outlay; (4) interest and debt redemption; and, (5) expenditures proposed to be made from bonds or other income not yet authorized."

[4] It will be observed that the contract price for the property was $150,000. The petitioner's claim was filed for this sum and the warrant of the auditor was drawn for the same amount. The petition for a writ of mandate asks that the treasurer be directed to pay the petitioner the sum of $150,000 as the purchase price of the property. While it is true that the budget shows there is in the memorial fund the sum of $158,093.85, the amount in excess of that which is required to complete the purchase of the property will not invalidate the proceedings.

The official budget of proposed expenditures of Yuba county for the fiscal year July 1, 1929, to June 30, 1930, shows the following classification of funds: "Organization Unit: Veterans Memorial Building. Classification: Veterans Memorial Building. Capital Outlay, 3 Lots & Building to be purchased under provisions of Sec. 4041f Political Code and/or settlement of claim for past County use and occupation thereof. (Amount) Requested, $158,093.85; Allowed, $158,093.85. Name of Fund, Veterans Memorial Bldg. Fund."

[5, 6] Thus it appears the particular fund or organized unit is designated "Veterans Memorial Building Fund". This fund is then classified as the statute requires that it shall be. In the column headed "Classification" there appears in capital letters "Capital Outlay," which is followed by this explanation of the purpose for which the "capital" may be expended, "3 Lots & Building to be purchased under provisions of Sec. 4041f Political Code. * * *" Thus far there is a strict compliance with the statutory requirements of section 3714 of the Political Code as amended. The language following the classification of the fund as "Capital Outlay" is merely descriptive of the proposed objects of expense. The latter portion respecting the "claim for past county use" may not strictly be said to be capital outlay. It may not constitute a proper expenditure from this particular classification. It is, however, not involved in this petition for mandate and may, therefore be disregarded as surplusage. Clearly the $150,000 purchase price of a veterans' hall is authorized by law, and this expenditure may unquestionably be classified as capital outlay. The erroneous inclusion of a proposed allowance of claim from a fund, since the law does not require the detailed classification of expenditures, does not render the budget void.

The statute provides merely that "the expenditures for each organization unit shall be classified under the general classes. * * *" Five general classes only are specified. The proposed expenditures must be designated as falling within one of these five general classes, to wit, salaries and wages, maintenance and operation, capital outlay, etc. Transfers from one of these general classes to another may not be made, provided, however, that after due notice by a four-fifths vote of the board of supervisors, any such appropriation may be canceled in whole or in part, in which event the unused balance must be returned to the original fund from which it came. It is then provided: "Liabilities incurred, or warrants issued *in excess of any of the budget appropriations* as originally determined, * * * shall not be a liability of the county. * * * The county board of supervisors shall approve no claim, and the county auditor shall issue no warrant for any expenditure *in excess of said budget appropriations.*"

In the present case the organization unit was identified in the budget as "Veterans' Memorial Building." This unit was then classified as required by the statute into a general class termed "Capital Outlay." No claim was allowed, and no warrant was issued for a sum in excess of this fund. No subdivision of these general classes is required. It would be unreasonable and would frequently defeat the business operations of a county to require the funds of a general class to be segregated into a multitude of incidental classes. There would be danger of mislabeling the character of these expenditures. The law wisely discourages such a cumbersome and futile process. People v. Cairo Ry. Co., 237 Ill. 312, 86 N. E. 721; People v. Chicago & E. I. Ry. Co., 310 Ill. 257, 141 N. E. 824; People v. C., B. & Q. Ry., 306 Ill. 529, 138 N. E. 135. The budget statute should receive a reasonable construction. People v. Jackson, 272 Ill. 494, 112 N. E. 344; State v. Hare, 78 Or. 540, 153 P. 790, 792. In the case of Du Bose v. Cranford, 131 Miss. 770, 95 So. 676, 677, in construing a similar budget statute, the court said: "The law ought not be so strictly construed as to make it impracticable to operate under it." In the case of State v. Hare, supra, it was said: "The statute was not intended to stop the wheels of progress or to be a stumbling block." The apparent effort to also authorize the allowance of a claim from this "Capital Outlay" fund in "settlement of * * * past county use" of the property was not warranted. Since such incidental specification of proposed expendi-

tures is not required, this sentence may be disregarded as surplusage and harmless. Obviously, money expended in "settlement of claim for past county use" of the property is not "Capital Outlay." Capital outlay or investment includes only the money expended in acquiring, equipping, and promoting an enterprise. Terre Haute & I. R. Co. v. State, 159 Ind. 438, 65 N. E. 401, 407.

Since the last-mentioned sentence, which appears in the budget, does not refer to a necessary classification of the fund, but rather indicates a purpose to subsequently authorize an unwarranted claim against this particular fund, it may be ignored. The legality of allowing a claim for previous use of this property from the "Capital Outlay" fund is not involved in this proceeding. This court is merely called upon to determine the validity of the proceedings incident to the purchase of the property and the payment of the warrant for $150,000 from the capital outlay fund in satisfaction of the purchase price.

We are satisfied the proceedings are valid and that the writ of mandate should issue as prayed for directing the treasurer of Yuba county to pay the petitioner's warrant for $150,000 in satisfaction of the purchase price of the property which is described in the petition. It is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

106 Cal. App. 513

BULLARD v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 7377.

District Court of Appeal, Second District, Division 2, California.
June 17, 1930.

Rehearing Denied July 16, 1930. Hearing Denied by Supreme Court Aug. 11, 1930.

1. Certiorari ⟹5(1).

Prohibition ⟹3(3).

When motion to quash service by publication is denied, remedy is by appeal, and writ of review or prohibition will not be granted (Code Civ. Proc. § 1103).

Code Civ. Proc. § 1103, provides that writ of prohibition may be issued when there is not a plain, speedy, and adequate remedy in ordinary course of law.

2. Process ⟹145.

When order of publication recites reading and filing of affidavit, it must be presumed that court read and filed affidavit (Code Civ. Proc. § 412).

Code Civ. Proc. § 412, provides that, when person on whom service is to be made resides out of the state, and such fact appears by affidavit, court or judge may order service by publication. It does not require filing of affidavit before making of order, and neither that section nor any other section makes such filing jurisdictional. Affidavit bore filing marks of date subsequent to order.

Original application by Kate A. Bullard for writs of prohibition and review directed to the Superior Court in and for Los Angeles County and the Judges and Clerk thereof.

Writs denied.

William Ellis Lady, of Los Angeles, for petitioner.

GATES, Justice pro tem.

Responsive to an application for a writ of prohibition and for a writ of review, this court heretofore ordered to issue its alternative writ of prohibition. It appears that on or about the 26th day of July, 1929, Jennie Rosenberg instituted in the respondent court a certain action in which she is plaintiff and petitioner is defendant. In the action Mrs. Rosenberg seeks to obtain a judgment against petitioner for the sum of $110,690 and certain other and further relief. On or about July 26th a summons was issued on the complaint and directed to the petitioner herein, and thereafter a writ of attachment was issued and levied against her property in California. On December 2, 1929, the respondent court by one of its judges, Hon. Leon R. Yankwich, made an order for publication of summons upon the petitioner, who is a resident of Iowa. The order of publication recites, among other things, the following: "Upon reading and filing of the affidavit of A. E. Coppleman, and it satisfactorily appearing therefrom to me that the defendant Kate Bullard resides out of this state. * * *" The affidavit upon which this order for publication of summons is based shows thereon the following indorsement and file mark: "Filed 1929, Dec. 4, p. m. 2 46 L. E. Lampton, Co. Clerk, B. N. Hollister, Deputy." On December 7, 1929, petitioner was served in the state of Iowa with a copy of the summons and complaint. On March 20, 1930, summons and proof of service were filed with the clerk of the superior court, respondent herein. On April 19, 1930, Hon. Marshall F. McComb, one of the judges of the superior court, made an order entering the default of petitioner here for her failure to answer the summons and complaint. Thereafter, on April 19, the superior court made and entered judgment against petitioner in the sum of $65,350 and costs. This judgment has not been vacated or set aside. On April 29, 1930, petitioner prepared and served upon counsel for Mrs. Rosenberg a notice of motion to quash the service of summons. On May 2 the motion to quash came on regularly for hearing before the Honorable Myron Westover, a judge of the respondent court, and was denied.

Petitioner claims that she is not indebted to Mrs. Rosenberg in any sum, and that the superior court action is not brought in good faith. She further avers that, unless the judgment is annulled, Mrs. Rosenberg will cause an execution to be issued on the judgment, and petitioner will suffer irreparable damage.

The sole contention here is that the order of publication of summons is void and of no effect, for the reason that there was nothing officially before the superior court; nor did the court have any judicial knowledge of the fact that petitioner here was not a resident of the state of California when the order of publication was granted. Petitioner bases her contention upon the theory that the only proper means of knowledge of the judge or the court was by the filing of an affidavit to that effect, that no such affidavit was filed until two days after the making of the order for publication, and that, before an order of publication of summons can be made, there must be on file in the clerk's office, an affidavit stating the facts provided for by section 412, Code of Civil Procedure.

[1] Before considering petitioner's contention, it may be well to ascertain if she is pur-

suing the appropriate remedy. It is quite clear that this is not a proper matter in which to grant a writ of review, for the reason that petitioner has a plain, speedy, and adequate remedy by appeal in the ordinary course of law. It was held in Mayer v. Superior Court, 84 Cal. App. 265, 257 P. 893, which was a proceeding for a writ of certiorari to review an order of the superior court denying a motion to vacate an order for publication of summons where no proper showing was made as a basis for the order, that any alleged error of the superior court could be reviewed on appeal from any adverse judgment which may be rendered upon trial, even though a judgment by default be entered, citing Columbia Screw Co. v. Warner Lock Co., 138 Cal. 445, 71 P. 498, and Lima v. Lima, 26 Cal. App. 1, 147 P. 233, 237. In the instant case, if the superior court has erred in denying petitioner's motion to quash the summons, she can have the alleged error reviewed on appeal from any adverse judgment rendered. It is well settled that, where a person has a right of appeal and such error can be corrected on appeal, no writ of review lies. Stoddard v. Superior Court, 108 Cal. 303, 41 P. 278; Butler v. Superior Court, 82 Cal. App. 322, 255 P. 548; Martin v. Miller, 65 Cal. App. 581, 224 P. 783.

Nor is a writ of prohibition proper where there are not sufficient facts alleged to show that the petitioner has not a plain, speedy, and adequate remedy in the ordinary course of law. Code Civ. Proc. § 1103. It is well settled that, where the defendant's motion to quash the service of summons is denied, the right of appeal from an adverse judgment thereafter rendered affords a plain, speedy, and adequate remedy to have any erroneous ruling of the court reviewed, and that a writ of prohibition is not proper. Germain Seed, etc., Co. v. Justice's Court, 41 Cal. App. 397, 182 P. 784; Burge v. Justice's Court, 11 Cal. App. 213, 104 P. 581; Simpson v. Police Court, 160 Cal. 530, 117 P. 553; McDonald v. Agnew, 122 Cal. 448, 55 P. 125. In Mines D'Or de Quartz Mountain Societe, etc., v. Superior Court, 91 Cal. 101, 27 P. 532, a matter wherein the lower court made an order in an action directing that the summons therein be served upon defendant by publication thereof, the Supreme Court said: "That court has jurisdiction of the subject-matter of the action, and whether it has jurisdiction over the persons of petitioners is a question which it must determine for itself before entering judgment in the action, and which it has the same authority to pass upon as any other question of law or fact which may arise during its progress, and, if in the decision error shall be committed to the prejudice of petitioners, the law affords them a plain, speedy, and adequate remedy by an appeal from any judgment which may be entered against them. Agassiz v. Superior Court, 90 Cal. 101, 27 P. 49, and cases cited." See Lumas Film Corporation v. Superior Court, 89 Cal. App. 384, 264 P. 792, where cases upon the above principle are collated and discussed.

The case of Knox v. Superior Court (Cal. App.) 280 P. 375, cited by petitioner, is not in point for the reason that the court in that case was dealing with a different situation than the one now before us.

[2] As to petitioner's point that the order of publication is invalid, it may be said that the order of publication recites that it was granted "upon the reading and filing of the affidavit of A. E. Coppleman." Therefore it must be presumed, in the absence of anything to the contrary, that the court both read and filed the affidavit before making the order of publication. There are no facts alleged nor shown as to why the affidavit bore filing marks of a date two days subsequent to the making of the order of publication. Section 412 of the Code of Civil Procedure provides: "Where the person on whom service is to be made resides out of the state * * * and the fact appears by affidavit to the satisfaction of the court, or a judge thereof * * * such court or judge may make an order that the service be made by the publication of the summons." The section nowhere provides that such affidavit must be filed before the making of the order by the court. The Supreme Court of South Dakota, in Allen v. Richardson, 16 S. D. 390, 92 N. W. 1075, held that, under Comp. Laws, § 4900, subd. 5, which reads, "and that fact appears by affidavit to the satisfaction of the court, or a judge thereof"—wording identical with that contained in section 412, supra—making no other requirement as to filing except that, where publication of summons is made, the complaint must be first filed, failure to file the affidavit and order for publication until the time of taking judgment is immaterial. The filing of the affidavit before the issuance of the order of publication, under section 412, Code of Civil Procedure, is not, by the section mentioned or any other section, made jurisdictional. A similar view was taken by the District Court of Appeal in Zumbusch v. Superior Court, 21 Cal. App. 76, 130 P. 1070, 1071, which was a proceeding for a writ of mandamus to compel the hearing of a cause in which the publication of summons was ordered and the court had declined to hear the matter for the reason that no affidavit for publication of summons was on file at the time the matter was set down for hearing. The court in that case, speaking through Presiding Justice Allen, said: "We are of opinion then that, the affidavit presented before the issuance of the order being admittedly sufficient, the court possessed the right to make the order for publication, and that proof of compliance therewith conferred jurisdiction over the person of defendant.

even though such affidavit was not placed on file until the day when the action was called for trial. * * *"

Peremptory writ of prohibition denied. Writ of review denied.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

In re RICHARDSON et al.
L. A. 11297, 11311.

Supreme Court of California.
May 29, 1930.

Rehearing Denied June 26, 1930.

1. Attorney and client ⟹53(2).

Evidence *held* to sustain recommendation that attorneys be disbarred for procuring dismissal of criminal case and exoneration of bail through false representations to prosecutor and court (State Bar Act).

2. Attorney and client ⟹49.

Disciplinary investigation by Board of Bar Governors is ancillary to judicial review by Supreme Court of Board's decisions (State Bar Act).

3. Attorney and client ⟹53(1).

Admitting hearsay and irrelevant testimony in disbarment proceedings is improper, since statute contemplates application of established rules of evidence (State Bar Act, § 26).

State Bar Act, § 26 (St. 1927, p. 41, § 26), has been construed to authorize a reexamination by the Supreme Court of the entire record of the proceedings before the Board of Governors as these are required to be kept and in due course transmitted to the Supreme Court, which can be asked in such review to consider the sufficiency of legal evidence only.

In Bank.

Separate applications by Howell W. Richardson and Benjamin Elconin for a review of the action of the Board of Governors of the State Bar recommending their disbarment.

Petitioners ordered disbarred.

Jerry Geisler and Vincent Morgan, both of Los Angeles, and Gus. P. Higgins, for petitioner Richardson.

Kirkland I. Perky, Richard Kittrelle, and George D. Higgins, all of Los Angeles, for petitioner Elconin.

Nathan Newby, John Perry Wood, William J. Clark, Frank W. Stafford, and Jerold E. Weil, all of Los Angeles, for the State Bar.

WASTE, C. J.

Applications have been made to this court by Howell W. Richardson and Benjamin Elconin, attorneys at law, for a review of the action of the Board of Governors of the State Bar of California recommending their disbarment following an investigation and report by local administrative committee No. 6 of Los Angeles county. The two attorneys were involved in the same transactions out of which the disbarment proceedings arose, and the legal questions raised by each are exactly the same. Therefore the applications will be considered as one proceeding.

[1] On October 21, 1925, Lewis H. Allen was arrested in Los Angeles county and charged with a serious offense, to wit, a violation of section 288 of the Penal Code. Allen employed applicant Benjamin Elconin to represent him at the preliminary examination in the justices' court and paid him between $300 and $400 for such service. Allen was held to answer before the superior court and his bail fixed at $5,000. He received $6,000 by a telegraphic order, which he indorsed and turned over to Elconin, who secured the money, deposited $5,000 of it as the bail and turned over the balance of $1,000 to Allen. Subsequently, Allen made a written assignment to Elconin of all his interest in and to the $5,000 deposited as bail, which assignment stated, in substance, that it was made in payment of Elconin's fees for his services in defending Allen, and the payment of any other attorney Elconin might associate with him to represent Allen. Elconin thereupon employed petitioner Howell W. Richardson, who had but recently resigned from the district attorney's office, as associate counsel, and promised to pay him a $2,500 fee, which Richardson fixed for his services. When Allen's arraignment in the superior court came on, the people were represented by Forrest F. Murray and David Clark, deputy district attorneys, and the defendant by Elconin and Richardson, although Richardson had not been formally associated of record in the case. After some delay, to which Deputy District Attorney Murray consented, and statements to the court by Allen's counsel that Elconin had not been able to get in touch with Allen, and that there were some rumors that Allen had committed suicide, Richardson appeared in court and stated that Allen had not been located, and asked that the cause be put off the calendar and a bench warrant issued for Allen. The deputy district attorney (Murray) consenting, the court ordered a bench warrant to issue, and fixed bail thereon at $10,000.

About six months after the issuance of the bench warrant, Allen not having been apprehended, Richardson inquired of Murray what disposition he proposed to make of the Allen case, and Murray stated, in substance, that he did not know—it would depend upon the wishes of the parents of the children involved in the accusation against Allen. Thereafter, Richardson met George F. Ryan, an investigator in the district attorney's office, who was on friendly terms with the parents of the boys involved, and requested Ryan to find out what the parents desired to have done. Ryan had Richardson's stenographer typewrite two letters, addressed to the district attorney, the wording of which, according to the testimony

of Assistant District Attorney Tracy Chatfield Becker before the local administrative committee, was substantially in the form of letters used for many years in the district attorney's office in such cases, where, for good reasons, prosecution was to be dropped. These letters were signed by the parents. Ryan had misrepresented to the parents that Allen was dead; otherwise, they testified, they would not have signed the letters, in which they acquiesced in the dismissal of the case. Ryan also misrepresented to Murray that Allen was incarcerated in jail in Illinois, that the parents did not want to prosecute the case, that they did not want their children to testify and that the case could not be successfully prosecuted. Murray repeated these statements to Hon. Harry A. Hollzer, in whose department of the court the cause was pending, and in open court thereafter asked for a dismissal of the case, which the court ordered. Murray testified before the committee that, in making the representations to the court, he relied entirely upon Ryan's statements to him, and could not say that Richardson was present. Elconin became aware of the dismissal of the case on the day it was ordered, and immediately withdrew the $5,000 cash bail and paid Richardson his fee of $2,500.

About a year and a half after the dismissal an investigation of the matter was made by the county auditor, who claimed the county had been defrauded of the sum of $5,000 by the dismissal. Ryan made an affidavit, in which he stated he had been paid $500 by Richardson for assisting him in the Allen case. A motion to set aside and vacate the order dismissing the Allen case and exonerating the bail was made on the ground that the order had been procured by fraud practiced upon the court. Notice of the motion was served on Elconin and Richardson. They made no effort to deny or disprove the charges on which the motion was based, but appeared specially and objected to the hearing upon the merits on the ground that the court had no jurisdiction by reason of failure to give notice to the defendant Allen or to any one authorized to represent him; their contention being that the dismissal of the action had terminated their employment as attorneys for Allen. However, prior to the hearing of the motion they paid into court $5,000, and stipulated that the same should be disposed of in such manner as the court should deem proper under the circumstances. The $5,000 was thereafter declared forfeited as bail money and was turned over to the county of Los Angeles. Ryan subsequently repudiated the affidavit alleged to have been made by him, as containing statements he did not remember making, and as having been obtained when he was under the influence of liquor. He denied receiving any money from Richardson in the Allen case. A grand jury investigation followed the publicity given the affair by the auditor. Other than admitting the division of the $5,000 between them, Richardson and Elconin refused to testify before it. An investigation into the matter was launched by the Los Angeles Bar Association, which was dismissed. All of these matters were read into the record in this proceeding. Ryan was not called as a witness.

On June 11, 1928, local administrative committee No. 6, of the bar of Los Angeles county, gave notice, in the form of an order to show cause, to Elconin, Richardson, and Murray, that it would, at a time and place designated, proceed with the investigation of certain acts on the part of the three as attorneys at law and members of the State Bar of California, which acts were charged to be misconduct in violation of their oaths and duties as attorneys, to involve moral turpitude, dishonesty, and corruption committed by them in making, and causing to be made, conspiring for, and conniving in the making of, false representations to the superior court, for the purpose of wrongfully procuring the dismissal of the Allen case, for the purpose of securing the exoneration of the bail in the case, and of receiving and appropriating the $5,000 cash bail deposited in the case; and in wrongfully procuring the dismissal of the case, securing the exoneration of bail, and in wrongfully receiving, securing and appropriating, and causing to be appropriated, said sum of $5,000; and in wrongfully conspiring to procure, and in wrongfully conniving at the procurement of, the dismissal of the case, and actually procuring the exoneration of the bail, and receiving, securing, and appropriating the $5,000. Hearings were begun and continued, the testimony and proceedings making a voluminous record. On September 28, 1928, the committee filed its findings and recommendations with the Board of Governors. It recommended that Elconin and Richardson be disbarred, and that the charges against Murray be dismissed. A further hearing was asked for and was had before the Board of Bar Governors. The matter was referred to one of the Governors for report and recommendation, and on November 22, 1928, the Board of Governors adopted the findings of the local administrative committee, and recommended that Benjamin V. Elconin and Howell W. Richardson be disbarred. The record of said Board of Governors in the matter was filed in the Supreme Court, and Elconin and Richardson filed their separate applications for a review of the proceedings.

Substantially, the two applications present the same legal questions: (1) As to the retroactive jurisdiction of the Board of Governors; (2) the constitutionality of the State Bar Act; (3) that if said act be unconstitutional, this court may not take action predicated upon evidence elicited before local administra-

tive committee No. 6 of Los Angeles county; (4) as to whether legal rules of evidence control such an investigation. These questions are practically all moot, by reason of recent decisions of this court. State Bar v. Superior Court, 278 P. 432; In re Cate, 279 P. 131; Matter of Shattuck, 279 P. 998. The last two points deal with the evidence in its application to the individual applicants, and this review of the lengthy record must be undertaken with a view to ascertaining if there be substantial evidence to support the findings. As the proceedings here were instituted before the court had decided a number of questions involved in the construction of the State Bar Act (St. 1927, p. 38), the local committee proceeded on the theory that it was conducting an "administrative proceeding in which some of the rules of evidence are customarily observed," but not in the strict sense as understood by lawyers. The volume of testimony taken is beyond all reason and apparent necessity, and suggests, at the outset, the pertinent query whether it was at all possible that a fair conclusion could be reached uninfluenced by extraneous and other disturbing considerations prejudicial to the applicants as the result of the creation of an atmosphere of public clamor, political intrigue, and general corruption and dishonesty claimed to exist in the administration of criminal affairs in Los Angeles county. Much of the evidence which no doubt contributed to the "atmosphere" was only remotely relevant to the issue before the committee. Much of it was hearsay, and otherwise incompetent as to the attorneys involved. Because the members of the committee confessed themselves perplexed as to the admission and rejection of evidence offered for their consideration, they concluded to receive all evidence offered, "giving consideration to the circumstances," as stated by it, "that if we should err by excluding evidence which should have been admitted, there would be no opportunity to cure that error; and on the other hand if we would err by admitting evidence which should be excluded, that may be cured by action of either the Board of Governors or the bar association or the Supreme Court on review." Accordingly, a great mass of evidence found its way into the record. Many motions to strike were interposed, but rulings were reserved and not made until the end of the proceeding, when much evidence and many of the exhibits were ordered stricken out. We have the statement in the brief of counsel for the State Bar that the committee "itself struck out the hearsay evidence before reaching its conclusions, and neither hearsay evidence nor findings based upon it were before the Board of Governors." An examination of the citation of evidence which the record shows was stricken out and not considered, as is made to appear in the supplemental brief of the State Bar, seems to support the assertion that hearsay and irrelevant evidence was not considered.

We have carefully considered the entire record, and are entirely satisfied that after the elimination therefrom of all hearsay evidence, which was stricken out by the local administrative committee, there was remaining sufficient competent evidence before said committee to support and justify the findings of the committee on which the recommendation of disbarment is based. Not only so, but after weighing the whole evidence, including that in favor of the accused as well as that adverse to them, we are further of the opinion that the preponderance of this evidence, as a whole, is against the accused and in support of the findings of said local committee.

[2, 3] We cannot approve of the course followed in this proceeding of admitting evidence without the application of those established rules governing such matters, and with which courts and lawyers are, of course, familiar. While the Board of Bar Governors has not been invested with judicial power (In re Shattuck, supra), the investigation it is authorized by the State Bar Act to make in disciplinary matters is ancillary to, and is a most important adjunct of the judicial review by this court of the decisions of the board. This review we have construed to be a reexamination by this court of the entire record of the proceedings before the Board of Governors, as these are required to be kept, and in due course transmitted to this court under the provisions of section 26 of the State Bar Act (St. 1927, p. 41, § 26). Legal evidence alone should be required to deprive a duly admitted attorney of the vitally important and valuable right to practice his profession, and to impose upon him the stigma of disbarment. The court can be asked in such review only to consider the sufficiency of legal evidence. We are of the view, therefore, that only legal evidence, as that term is understood among lawyers, should receive the consideration of the Board of Governors and committees of the State Bar in the exercise of the disciplinary features of the Bar Act.

The general findings adopted by the Board of Governors in this cause are based upon specific overt acts found in the other findings, and are to the effect that Elconin and Richardson entered into a conspiracy to and did "wrongfully, fraudulently and unlawfully procure the dismissal" of a criminal action, "and the exoneration of the cash bail deposited" by Allen, for the purpose of depriving the people of the county of Los Angeles of said bail, and with the intent to wrongfully convert "said bail money" to their own use and benefit; that said "Richardson and Elconin unlawfully conspired together to pervert and obstruct justice and due administration of the law by procuring the improper dismissal" of a criminal action "and the exoneration of the cash bail" and "the appropriation and conversion of said bail to their own use"; by said Richardson falsely representing or caus-

ing to be represented to said Forrest Murray that the defendant Allen was in a penitentiary in Illinois; that said Richardson and Elconin were guilty of deceit and collusion in doing these things.

Eliminating the hearsay and otherwise irrelevant and incompetent testimony, as it is contended by the bar that the Governors did, and as we have endeavored to do and feel we have done, there still remains in the record much direct and circumstantial evidence from which the conviction irresistibly arises that the applicants conceived the idea of securing, in an easy manner, and appropriating to their own use, the $5,000 bail deposited in the superior court for the appearance of the defendant Allen in the criminal cause. It seems to be clearly established that the conduct of Elconin and Richardson in the matter of procuring the attendance of their client in the superior court was not what it should have been. They followed out a consistent plan of silence and misrepresentation, while, at the same time, they were making a pretense of desiring to procure the attendance of Allen through the instrumentality of a bench warrant. The record is replete with the testimony of circumstances from which the committee and the Board of Governors have drawn, and this court may well reach the conclusion that the incident relating to the issuance of the bench warrant was but a camouflage, intended to conceal the real desires of Allen's attorneys.

Laying aside much of the evidence tending to establish certain of the "overt acts" on which the general findings of the committee were rested, and which "overt acts" the applicants contend were not proven, there still remains sufficient to support the conclusion of the committee, which was accepted by the Board of Governors of the State Bar in recommending the disbarment of the applicants. It would serve no useful purpose for us to endeavor to review, in detail or in substance, the seventeen hundred pages of record and testimony. The minds of the administrative committee and of the members of the State Bar differed from the minds of the applicants and their counsel as to the construction to be given to the evidence. The construction we place upon the testimony will, of course, be challenged by the applicants and their counsel. The nature of the testimony is, in large part, such that plausible explanations can be offered to refute the charges made against the attorneys. The general charge, that the applicants conspired to make false representations to the superior court and that they made or caused to be made such misrepresentations for the purpose of carrying out their scheme for obtaining and appropriating the $5,000 bail posted by Allen, finds substantial support in the record, which points irresistibly to the conclusion that the attorneys involved disclosed such a lack of integrity and fair dealing with the court as to render them unfit to be attorneys at law. As part of the scheme to secure and appropriate the amount of the bail money, it was necessary to procure a dismissal of the charge against Allen and the exoneration of the bail; and the order of the court to that effect was procured through the connivance of the attorneys with a representative of the district attorney's office who, in turn, led the deputy district attorney in charge of the cause to make false representations to the court. It serves no purpose to the petitioners here for each of them to disclaim connection with the entire scheme because, at different times, one or the other of them does not appear on the face of the record to have been associated with any particular incident. We are concerned, as were the representatives of the State Bar, with the transaction in its entirety, and we cannot escape the conviction that, so viewed, the evidence warrants the sustaining of the recommendation of that body. The special local administrative committee of the bar, and the examiners who conducted the hearing before it, were composed of men eminent in their profession. The hearing was exhaustive and painstaking, and the record gives indication that the accused attorneys were given every possible opportunity to refute the charges made against them before the State Bar. The rulings on the admissibility of evidence were, as has already been pointed out, extremely favorable to the accused. There is not the slightest evidence in the record that animosity or prejudice on the part of the committee or the examiners entered into the hearing, or that general conditions surrounding the conduct of criminal cases in the Los Angeles courts influenced the result. From every consideration, the hearing appears to have been fair and impartial, and in our opinion no showing has been made which would justify us in holding that the recommendation of the committee is either erroneous or unlawful.

The applications of the petitioners for an order dismissing the proceedings against them, and setting aside the recommendation of disbarment are denied. It is therefore ordered that the petitioners, Howell W. Richardson and Benjamin Elconin, be, and they each are, disbarred from the further practice of law in this state as an attorney and counselor, and that each of their names be and is hereby ordered stricken from the roll of attorneys and counselors at law of the state of California.

We concur: CURTIS, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

GRAY et al. v. CITY OF LOS ANGELES et al.

L. A. 11652.

Supreme Court of California.

May 29, 1930.

Rehearing Denied June 26, 1930.

1. Municipal corporations ⟹292(3).

That property owners, who were members of Chamber of Commerce, filed petition with council before passage of ordinance of intention in street improvement proceedings, did not make ordinance void.

2. Municipal corporations ⟹106(1).

City council, before taking action on legislative questions, may receive petitions and remonstrances from citizens to be affected.

3. Municipal corporations ⟹278(½).

City council's acceptance from certain citizens of bond, conditioned that, if street improvement was protested out, incidental expenses in getting proceedings started would be paid by surety, was not illegal (Street Opening Act of 1903, supplemented by Street Opening Act of 1911, § 4).

The improvement was being carried out under Street Opening Act of 1903, supplemented by Street Opening Act of 1911 (Deering's Gen. Laws 1923, Acts 8198, 8199), and under section 4 of the act a protest by the owners of a majority of the frontage might effectually prevent a consummation of the improvement.

4. Municipal corporations ⟹477.

Assessment for street improvement *held* regular in form.

The court found that board of public works directed its corps of experts to prepare details of assessment map and rolls, and that director of bureau of assessment with his assistants worked out details of assessment, according to definite theory of benefits; that before putting map and assessment roll into final shape he took up matter with members of board at informal meeting; that, members of board having in general way expressed themselves as satisfied with scheme, the map and assessment roll were completed, and thereafter assessment was formally and officially adopted by board of public works.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Alexander C. Gray and others against the City of Los Angeles and others to enjoin the collection of an assessment levied in a street proceeding. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Robert Young, of Los Angeles, for appellants.

Erwin P. Werner, City Atty., Frederick Von Schrader and William H. Neal, Deputys City Attys., all of Los Angeles, for respondents.

PRESTON, J.

The judgment is affirmed.

It is difficult to find in this record matters of sufficient importance to warrant discussion. The suit is brought by a number of property owners against the city of Los Angeles and certain of its officers to enjoin the collection of an assessment levied in a street proceeding. The attack is general and desultory. The council of the city are carrying out a comprehensive improvement commonly known as the Hollywood five-finger plan under the Street Opening Act of 1903, supplemented by the Street Opening Act of 1911 (Deering's Gen. Laws, Acts 8198, 8199, pp. 3309 et seq.), which involves the widening of Cahuenga avenue, between Highland avenue and Hollywood boulevard, and from Hollywood boulevard southward the opening and widening of several streets, all having for its object the accommodation of traffic along said first-mentioned avenue from the San Fernando valley to the business centers of Hollywood and Los Angeles.

No complaint is made of the proceedings on their face, which are in substance as follows: An ordinance of intention containing a description of the improvement, the boundaries of the assessment district, and all the other elements required by law, was passed by unanimous vote of the city council on November 6, 1925, approved by the mayor, and published as required by law with the insertion therein of a declaration that the city itself would pay $148,708 toward said improvement. Thirty days were allowed for the filing of written protests against said improvement and said district, and the owners of some 3.7 per cent. of the property fronting on said streets sought to be improved and within the assessment district filed protests, which were heard and denied on January 27, 1926. Thereafter, and on February 17th, Ordinance No. 54065 was passed ordering the said work and directing the city attorney to bring an action in the superior court for the condemnation of the real property described in the ordinance of intention and required for the construction of the contemplated improvement.

Thereafter, and on August 6, 1926, an action was filed for the condemnation of said lands. Thereafter an interlocutory judgment was entered awarding the owners of the lands to be taken $4,044.961.05, in addition to which there were incurred expenses of condemnation amounting to $117,179.20, making a total sum of $4,162.140.25. Deducting from this sum said above-mentioned sum of $148,708 left the

sum of $4,013,432.25 to be assessed upon said property within the said district described in said ordinance.

None of the plaintiffs whose appeals are before us protested in any manner against the said improvement or against the said district. Following said interlocutory judgment of condemnation, the board of public works of said city caused to be prepared and filed with the city clerk an assessment of the property in said district sufficient to pay said sum. Certain of these plaintiffs only thereupon filed objections to the confirmation of this assessment, which said objections were thereafter heard by the city council and denied, following which the assessment was by the council regularly confirmed. After said confirmation, the assessment was delivered to the board of public works, and was by it recorded on February 27, 1929, in a book kept for that purpose, together with a diagram and certificate appended thereto.

The parties now before us, after their assessment had become delinquent, to wit, on April 16, 1929, filed the present action, praying that said ordinance of intention and the assessment levied upon their property be declared void, and that the purported lien of said assessment be removed as a cloud upon the title to their respective properties, and that an injunction issue restraining the sale of the property covered thereby and asking other specific relief.

Regular answer was made by the city to this complaint, and certain special defenses were interposed. The cause went to trial on April 25, 1929. After a patient hearing, the court made findings and gave its judgment in favor of defendants, denying all relief to plaintiffs. Thereafter, and on June 3, 1929, plaintiffs gave notice of appeal. On June 28, 1929, the transcript was lodged with this court. Appellants' reply brief was filed February 11, 1930. We have advanced the cause for hearing because of the public interest in the contemplated improvement.

It is to be noted at the outset that plaintiffs are in a prejudiced position because of the fact that they neither protested the making of the improvement nor the boundaries of the district fixed upon which the assessments were to be levied. Indeed, plaintiffs are now making no specific objection as to the improvement, the district, or the assessment. Their objections, as above noted, are purely general, and in our opinion entirely without merit.

[1, 2] The first contention is that the city council was unduly influenced by a petition filed with it prior to the passage of the ordinance of intention signed by some eighteen citizens who owned property in the proposed district and who were members of the Hollywood Chamber of Commerce. We know of no reason why a city council prior to taking action on legislative questions may not receive petitions and remonstrances from some or all citizens to be affected thereby. It is not only within its province, but well-nigh its duty to do so.

[3] But it is contended that the members of said council transferred their functions as legislators to the said eighteen members of the Chamber of Commerce of Hollywood, in that they allowed said citizens to tender a bond in the sum of $3,000 conditioned to the effect that, if the street improvement was "protested out," the incidental expenses necessary to get the proceedings started would be paid by the said surety. In view of the fact that under section 4 of the act a protest by the owners of a majority of the frontage might effectually prevent a consummation of the improvement, it was well within the discretion of the council to require indemnity against the incidental outlay necessary to set such a proceeding on foot, in that it requires maps, surveys, and other data. This was not an illegal, but a commendable, act. Thereafter, when the proceeding had passed this protest stage, the indemnity undertaking was conceled.

[4] The next objection made is that the board of public works did not in fact make the assessment. The court, however, on a proper showing in the record, found that the "board of public works directed its corps of experts to prepare the details of the assessment map and rolls; that the director of the bureau of assessments with his assistants worked out the details of the assessment according to a definite theory of benefits; that before putting the map and assessment roll into final shape he took up the matter with the members of the board of public works at an informal meeting which lasted about an hour, at which meeting he outlined the general scheme and theory upon which the assessment was based and the manner in which it had been carried out. The members of the board having in a general way expressed themselves as satisfied with the scheme the map and the assessment roll were completed and about a month or so thereafter the assessment was formally and officially adopted by said board of public works." In the face of a finding of this kind, it is useless to contend that the assessment was not regular in form.

In closing this discussion, it may be said that the court below granted to plaintiffs' counsel the utmost latitude in the presentation of his cause. He allowed certain signers of the petition to be examined as witnesses, certain members of the city council, certain members of the board of public works, the city engineer, and various clerks and others, upon matters relating to the internal workings of the various departments and having to do with the initiation and consummation of these street proceedings. The examination extended even to their knowledge of the proj-

ect and the motives actuating their official action. An examination of the evidence shows nothing of a substantial character whatsoever upon which to base a claim that the proceedings were anything other than absolutely regular. There is absolutely no showing whatsoever of a fraudulent purpose or arbitrary conduct or oppression that would cause fraud to be presumed.

The whole proceeding, to our mind, is singularly free from objectionable criticism of any kind whatsoever. The fact that the scheme was part of a comprehensive plan to improve traffic conditions in the city, and that it was indorsed by the city, and also the county planning commissions and by numerous civic bodies, and that it was protested by only a few of the property owners, argues loudly for the soundness of the conclusion of the trial court that the proceeding was regular, free from fraud or oppression, and conducted in good faith.

In fact, the complaint on its face shows no equity, and the court below would have been sustained in refusing to admit most of the evidence offered. The record discloses no facts upon which a judicial question of any kind has arisen; hence we have reached the conclusion first herein announced.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

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106 Cal. App. 1

CURTIS et al. v. McAULIFFE.

Civ. 277.

District Court of Appeal, Fourth District, California.

May 21, 1930.

1. Evidence ⟹219(3).

Testimony of witness riding in automobile in which plaintiffs' intestate was killed that witness had been compensated for injuries received in same accident *held* inadmissible.

Plaintiffs contended that evidence complained of was admissible upon theory that it amounted to a declaration against interest by defendant, in effect admitting his negligence in operation of car at time of accident. Defendant contended that such testimony was irrelevant and immaterial and that it tended to prove a compromise between witness and defendant and therefore improper under provisions of Code of Civil Procedure prohibiting proof of compromise agreement.

2. Trial ⟹110.

Permitting argument before jury, in action for damages for death, on admissibility of testimony, *held* improper.

Argument complained of related to admissibility of testimony by witness who was riding in automobile at time plaintiffs' intestate was killed, to effect that witness had been compensated by defendant for injuries he received in same accident.

3. Appeal and error ⟹1060(1).

References during examination of jurors upon voir dire, in action for death resulting from automobile accident, on defendant's being indemnified by insurance, *held* prejudicial error.

Plaintiffs' counsel, during examination of jurors upon their voir dire, asked them whether any one was connected with a certain insurance company, whereupon certain jurors responded that they were interested as brokers or agents, whereupon defendant's counsel stated that insurance company named by plaintiffs' counsel was not interested in case and that he was representing defendant. Thereafter an extended argument took place between plaintiffs' and defendant's counsel relative to what insurance company was actually interested in case. Remarks of various counsel on subject of insurance were stricken on defendant's motion, and jury instructed to disregard them.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by Sarah M. Curtis and others against Frank McAuliffe. Judgment for plaintiffs, and defendant appeals.

Reversed.

Wakefield & Hansen, of Fresno, and Bronson, Bronson & Slaven, of San Francisco, for appellant.

M. F. McCormick, of Fresno, for respondents.

MARKS, J.

Respondents in this case are the heirs at law of Stephen D. Curtis, who was killed in an automobile accident in the county of Fresno, Cal., on the 26th day of August, 1928. Deceased, at the time he met his death, was operating his automobile in which T. M. Wells was riding with him. The machine came into collision with one driven by appellant. The case was tried before a jury, and a verdict was rendered in favor of respondents and against appellant in the sum of $7,500.

Appellant relies upon two grounds for a reversal of the judgment: First he maintains

that prejudicial error resulted from a question asked by counsel for respondents of the witness T. M. Wells and in the argument following it. This question was whether or not Wells had been compensated for the injuries in the accident resulting in Curtis' death. To this question Wells replied that he had, and, during the ensuing argument between counsel for the parties, the following occurred:

"Q. Were you injured as a result of the collision? A. I was pretty badly skinned up. My elbow and shoulders and hips and this leg was smashed, and that knee fractured. They took seven stitches in that shin, two across my scalp, two in my ear and patches on my elbow and hips about that big around; just skinned places.

"Q. Have you been compensated for your injuries? A. I have.

"Mr. Hansen: Now, Judge McCormick knows that is inadmissible, that it has no bearing on the issues in this case. He knows this man was a passenger, and he knows he can't be charged with negligence. It is a palpable piece of misconduct. He also knows Mr. Curtis is dead and can't be sued, or he would be sued, and I assign this remark as prejudicial; the grossest kind I ever heard in my life.

"Mr. McCormick: I know it is perfectly legitimate and I will state to your Honor and everyone within the hearing of my voice that it is legitimate.

"The Court: Let me hear what the remark was. (Question and answer read.)

"Mr. Hansen: I ask it be stricken out.

"Mr. McCormick: I am ready to argue that when you are through.

"The Court: Your motion is to strike that answer out?

"Mr. Hansen: Yes, and also that the jury be instructed to disregard the question of counsel and the answer of the witness.

"The Court: If you want to argue it, Judge McCormick, proceed.

"Mr. McCormick: If your Honor please, I am entitled to prove in any way that I can, an admission on the part of the defendant here of his negligence. Our whole case is based on negligence on the part of Mr. McAuliffe, and if he has said to somebody at the time of the accident, 'I am very sorry; I am terribly grieved; I realize it was my negligence,' would I be permitted to prove that statement? Why certainly. It would not so much as be argued about. There would be no question about it. Mr. Hansen would not even suggest I didn't have the right to prove admissions against interest. Now, how that admission is made, whether it is by paying somebody who was injured in the same wreck for his damage sustained by reason of personal injuries or whether it is an oral declaration or a written statement, it makes no difference, and I asked that question of this witness who was injured in that collision, to show that somebody had admitted that Mr. McAuliffe was negligent and owed Mr. Wells a sum of money as damages and I am entitled to show that.

"Mr. Hansen: Are you through?

"Mr. McCormick: I will quit when I get through, Mr. Hansen. Now if as is pleaded here, there was contributory negligence on the part of Mr. Curtis, if the defendant is able to prove that, he has a right to. He has pleaded it. He said in his answer here that Mr. Curtis was negligent and he propounded a question here in regard to whether or not the jury would follow an instruction of the court to the effect that if both drivers were negligent neither can recover, and we all know that is the law, but it is not for me to go into questions as to whether there was negligence on the part of Mr. Curtis. I am here, and the burden is upon me of proving negligence by the defendant McAuliffe, and this is one of the ways I propose to do it because this man who was injured in the same accident by the act of Mr. McAuliffe has been compensated for his injuries. Now, that is the kind of admission that is the very best of proof, there can be no question about misunderstanding a statement of that kind. It is impossible for there to be any uncertainty in this thing, and by his act, the act of compensating Mr. Wells for his injuries, I announce to your Honor that we have proved absolutely the negligence of Mr. McAuliffe. It has been proved in other ways, but we are not limited to any particular proof. I will prove it in as many ways as I see fit.

"Mr. Hansen: The policy of the law is simply this: That the law looks towards avoidance of litigation, and any offer to compromise is not admissible as an admission of liability. The law protects people who are trying to be honest with their fellow men to that extent. I submit an offer of compromise is not an admission of liability. Suppose your Honor had a dispute with someone and you said, 'Well, you might have something coming; I don't think so,' and if you offer him five dollars and then he refuses to take it, the law would not let him come into court and say, 'Judge Church is liable because he offered to settle the case.' Now, with reference to this matter right here, this man was injured by the negligence of the deceased, Mr. Curtis, more than he was by the negligence of the defendant. Judge McCormick knows well that Mr. Curtis is dead and that no recovery can be had from him. In other words, he is out of it. Now, if we choose to pay this man a small amount of money to get rid of litigation, to avoid something like this, it is not admissible before a court to show we were negligent. If it was, you couldn't deal with your fellow men and you couldn't carry

on business. Any offer of compromise, or a compromise is not an admission of liability, and the cases even go so far as to say, your Honor, that a judgment in a case—if this man had sued Mr. McAuliffe and had gotten a judgment and the court adjudicated we were at fault, that would not be admissible in this case, and Judge McCormick knows it. In this case, here, your Honor—

"Mr. McCormick: Speak for yourself. I will say what I know.

"Mr. Hansen: You have said more than you know. In this case, your Honor, the complaint shows that the decedent was killed on the 26th day of August, 1928, in an automobile collision. The complaint says, 'Filed September 4th, 1928,' eight days later. On the same basis your Honor, as Judge McCormick is attempting by an act on our part to avoid litigation, to get an admission in another matter. It is not the policy of the law that an offer of compromise or a compromise can even be admissible, that is not the policy of the law, otherwise we would have to adjudicate all our rights in open court. If we didn't, they would say we had been admitting something. This man sitting on the witness stand cannot be charged with contributory negligence. He wasn't driving that automobile; he was a passenger. He was on a different status than Mr. Curtis. Mr. Curtis was driving that automobile, proceeding west on Ashlan avenue, and drove onto Blackstone avenue. His claim is on an absolutely different basis. I take it your Honor will instruct the jury in this case that any contributory negligence, however slight, on the part of the decedent, Curtis, that contributed in the slightest degree to the happening of this accident would bar a recovery. In other words, if there was any negligence whatsoever, if one one-thousandth of the negligence in this case was the negligence of the decedent, it would be the duty of the jury to find in favor of this defendant. That rule does not apply to this man sitting here. It can't apply. He wasn't driving that automobile, and on that basis, and in view of the fact the policy of the law is to keep a compromise fully, and not regard it as an admission of liability that I ask at this time that the answer be stricken out, and that the jury be admonished to disregard, if they can, the question of Judge McCormick and the answer of the witness.

"Mr. McCormick: Might I just add a word? I don't want to prolong this discussion, but Mr. Hansen has referred to the matter of compromise here, an offer of compromise as between parties litigant or parties who may become involved in a lawsuit, and of course negotiations pointing to a settlement where there is threatened litigation, or after suit has been filed, are no part of the proof in the case, and it would be altogether out of place to make inquiry touching upon things of that kind, but as I said before, that is not the case here. We had nothing to do with this man's settlement; he is no party to this litigation. Whether there was threatened litigation or not between him and Mr. McAuliffe, I know not. I have no knowledge of it, but I take it for granted that there would have been no compensation paid to Mr. Wells for his injuries if there hadn't been liability on the part of Mr. McAuliffe, and that can only arise out of the negligence of Mr. McAuliffe.

"Mr. Hansen: No; out of his desire to avoid litigation.

"Mr. McCormick: Why should Mr. McAuliffe, or anybody on his behalf make any payment to Mr. Wells in compensation of Mrs. Wells' injuries unless there was negligence on the part of Mr. McAuliffe? The answer is perfectly obvious. People are not making settlement for injuries unless there is a liability and obligation. They might make a gift out of the goodness of their hearts, and they might come and visit the widow of the deceased, or come and visit the injured man, and such acts as that would be nothing in the way of admissions at all. It would be construed in favor of, rather than against, the person who had been instrumental in a way—apart from the injuries and the death—but the whole reason for compensating Mr. Wells, was because there was an obligation and a liability, and that would only arise out of negligence on Mr. McAuliffe's part. Reference was made to when the death occurred, and when that complaint was filed. Now, if I should tell your Honor why that was done Mr. Hansen would even make more noise that he has up to the present.

"Mr. Hansen: You go ahead and tell it.

"Mr. McCormick: I will do it, because, if your Honor please, under that challenge, I have had so much experience with drivers of automobiles who carry insurance—

"Mr. Hansen (interrupting): Your Honor, at this time I will assign this remark as prejudicial misconduct. I don't know what Judge McCormick is trying to do here, today.

"Mr. McCormick: I am trying to answer your challenge. If you withdraw it, I will say nothing more.

"The Court: Gentlemen, gentlemen. It is true you challenged him and opened the gate and now you don't like the course he is taking, so we will now close the gate you opened.

"Mr. McCormick: I am willing to withdraw it.

"Mr. Hansen: Before we go a step further I assign Judge McCormick's remarks as prejudicial misconduct and an attempt to influence and prejudice the minds of this jury, and an attempt made on the part of Judge McCormick to try a case something other than in an orderly fashion, and right here I will say this, in answer to his argument that he just made that

Mr. Wakefield and myself are not here for our health—

"The Court (interrupting): Judge McCormick has the floor.

"Mr. McCormick: I will not pursue that statement I intended to make because you objected to it.

"Mr. Hansen: All right.

"Mr. McCormick: I wasn't through with the statement, but I am not going on with it because of your objection. I respect your objection.

"The Court: The jurors are instructed to disregard the remarks of Judge McCormick wherein he referred to some insurance company.

"Mr. Hansen: Now, on the general ground, my first objection to strike. May I have a ruling on that, your Honor? I move to strike the answer, or the question of Judge McCormick and the answer of the witness from the record.

"The Court: Well, it seems to me, Judge McCormick, there are a couple of reasons why that should be granted. One is that the status of Mr. Wells and the status of Mr. Curtis might be entirely different in every way, shape and form. It might be in reference to this situation. If they are on different statuses, he might as well be trying to introduce evidence that he received settlement from somebody in regard to another accident. I recognize the fact it might be very different, and the motion to strike out is granted.

"Mr. McCormick: Well, I have no desire to pursue an inquiry after the court's ruling, but it is understood and conceded, is it, in this ruling, that the question as to the injury and compensation relating to this particular accident at the time that we have been speaking of—

"The Court: Oh, yes, this witness was riding with Mr. Curtis, the subject of this particular litigation, in Mr. Curtis' car, and Mr. Curtis being the driver."

It is contended by appellant that the question asked of the witness as to whether or not he had been compensated for his injuries received in this accident was improper, upon the ground that it tended to prove a compromise between Wells and appellant, and therefore was improper under the provisions of the Code of Civil Procedure prohibiting proof of compromises. He also maintained that in the argument of counsel there was prejudicial error. Respondents contend that the evidence was admissible upon the theory that it amounted to a declaration against interest by the appellant, in effect admitting his negligence in the operation of this car at the time of the accident.

[1, 2] It will be noted that the deceased was the driver of the car and that Wells was riding with him. Whether Wells was a passenger or a guest, or whether Wells and deceased were engaged in a joint undertaking does not clearly appear. If Wells was a passenger or a guest, an entirely different rule of liability for his injuries would arise than would apply to the deceased, Curtis. We think the evidence was inadmissible under any theory of the case. The argument between counsel, which we have heretofore set forth at length, should not have been permitted in the presence and hearing of the jury. Many of the statements of counsel for respondents should not have been made in the hearing of the jury, and probably left an impression in their minds that would be difficult to erase by the court's striking from the record parts of these statements, as well as the question to the witness Wells and his answer that he had been compensated by appellant for his injuries in the accident.

The second ground for reversal relied upon by appellant refers to references made by counsel for respondents during the examination of the jurors upon their voir dire to the fact that appellant was indemnified by an insurance company. In this connection the transcript shows that the following occurred:

"Mr. McCormick: Is any gentleman in the box who has been called and sworn, connected with the National Union Fire Insurance Company?

"A Prospective Juror: I am.

"Q. A stockholder?

"The Prospective Juror: No.

"Q. What capacity?

"The Prospective Juror: Business broker, or agent.

"Another Prospective Juror: I am, also.

"Q. Are any of the others in the box stockholders in this company I have mentioned, or have you any business connection with this company? Do any of you men know of any reason why you can't try this case fairly and impartially if you were sworn as jurors, and render a fair and impartial verdict as between the plaintiffs on one hand and the defendant on the other?

"A Prospective Juror: If I may make a little statement?—If the National of Pittsburg, Pennsylvania, is involved in this, I think I would be a little prejudiced in their favor, being that I represent them.

"Mr. Hansen: I can say to Judge McCormick that the National Union Fire Insurance Company has nothing to do in any way with this case.

"Mr. McCormick: What is the name of the company, then?

"Mr. Hansen: Your Honor, I assign Judge McCormick's remarks as prejudicial misconduct, trying to put something into this case that does not belong here, and I ask the court—

"Mr. McCormick (interrupting): I am perfectly willing to be corrected. I don't want to pursue this dialogue to any detriment of counsel, or whoever he may represent.

"Mr. Hansen: The defendant in this case is Mr. McAuliffe, and I am representing him.

"Mr. McCormick: I understand that perfectly. I have asked my questions and when Mr. Hansen states that the National is not involved in it in any way I am asking him to tell me who is?

"Mr. Hansen: I assign counsel's remarks as prejudicial misconduct, and an attempt to influence this jury.

"Mr. McCormick: My information is in support of the questions that I have asked. I may have been misinformed. I may be in error as to the facts upon which I base my questions.

"Mr. Hansen: Now, I assign that remark, your Honor, as prejudicial misconduct, and an attempt on the part of Judge McCormick to prejudice this jury.

"The Court: You have your record on it.

"Mr. McCormick: I wish to assure court and counsel there is no attempt on my part to mislead the jury or bring any factors into this case that are not proper evidence.

"Mr. Hansen: I don't know what you are trying to do.

"Mr. McCormick: Just to find out what I did get from Mr. Madsen.

"Mr. Hansen: At this time I ask that the jury be instructed to disregard all the remarks of counsel in regard to an insurance company as an attempt on the part of Judge McCormick—

"Mr. McCormick (interrupting): I am perfectly willing the statements of counsel, and the statements I have made to the court in that regard may be stricken out and disregarded.

"The Court: The remarks of the various counsel in regard to this subject they have just been discussing will be stricken from the record, and you are instructed to disregard it as far as you can."

The right to interrogate jurors upon their voir dire as to whether any of them were stockholders or interested in corporations writing indemnity insurance has been upheld by the courts in this state. Roche v. Llewellyn Iron Works, 140 Cal. 563, 74 P. 147; Pierce v. United Gas & Elec. Co., 161 Cal. 176, 118 P. 700; Dameron v. Ansbro, 39 Cal. App. 289, 178 P. 874, 878; Arnold v. California Portland Cement Co., 41 Cal. App. 420, 183 P. 171; Citti v. Bava, 204 Cal. 136, 266 P. 954.

In the case of Dameron v. Ansbro, supra, the court said:

"Dr. Priestly, a witness for plaintiff and appellant, testified that he was a member of the San Joaquin County Medical Association, and he was asked if Dr. Dameron and Dr. Fitzgerald were members. To this question an objection was made, and in reply to the court's inquiry as to the purpose of the question, counsel for respondent stated: 'The purpose of showing whether or not the association protects any member in litigation brought against him in a case of the present character.' It was not admissible for that purpose, as is virtually conceded by respondent. In Pierce v. United Gas & Electric Co., 161 Cal. 188, 118 P. 706, the Supreme Court said: 'Evidence that a defendant in an action for damages is insured against loss by reason thereof is not admissible (Roche v. Llewellyn Iron Works Co., 140 Cal. 563, 74 P. 147), and it would undoubtedly be improper for counsel for plaintiff to endeavor to get such a fact before the jury by question designed solely for that purpose.'

"In Shay v. Horr, 78 Wash. 667, 139 P. 604, it was said: 'We have held in these cases [supra] that it is improper to either directly or indirectly get before the jury any fact which conveys information that the defendant is insured against loss in case of a recovery against it, and that the striking of the answers conveying such information, and the instructing of the jury not to consider it, will *not save the error.*'

"It is altogether probable that the jury would be more inclined to find a verdict against appellant if it were believed that he was indemnified than if it were understood that he was to bear the burden alone.

"Granting that the question was proper to show the interest or bias of the witness, the statement of counsel was likely to be prejudicial, and the court should, at least, have permitted appellant to show as a matter of fact that no such indemnity really existed. It has been held that even in examining jurors such questions are highly improper. Pierce v. United Gas & Electric Co., supra." (Italics the court's.)

We have in mind the rule laid down in the cases of Cozad v. Raisch Improvement Co., 175 Cal. 619, 166 P. 1000, Nichols v. Nelson, 80 Cal. App. 590, 252 P. 739, Williamson v. Hardy, 47 Cal. App. 377, 190 P. 646, Baldarachi v. Leach, 44 Cal. App. 603, 186 P. 1060, Arnold v. Calif. Cement Co., 41 Cal. App. 420, 183 P. 171, and other cases which permit interrogation of the jurors on their voir dire as to whether or not they were stockholders in or interested in an indemnity insurance company. We believe that counsel for respondents went far beyond the rule announced in these cases in his interrogation of the respective jurors and in his argument to the court. The rule established in these cases goes far enough, and we cannot approve any extension of it. We believe that the questions propounded to the jurors and the arguments which we have quoted constitute prejudicial error which will require a reversal of the case.

The judgment appealed from is reversed.

We concur: BARNARD, Acting P. J.; OWEN, Justice pro tem.

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105 Cal. App. 780

VON STEIN v. HARDIE.

Civ. 6354.

District Court of Appeal, Second District, Division 2, California.

May 21, 1930.

Rehearing Denied June 20, 1930. Hearing Denied by Supreme Court July 17, 1930.

1. Libel and slander ⟹6(1).

Letter to be libelous per se need not ascribe lack of specific virtue, but is sufficient if generally besmirching another's character.

2. Libel and slander ⟹9(1).

Letter to plaintiff's employer, after plaintiff left defendant's employment, *held* libelous per se as having direct tendency to injure plaintiff in his occupation (Civ. Code, § 45).

Letter to plaintiff's employer stated, in substance, that writer owed apology for recommending plaintiff at time he applied for position, and that writer had learned a great many things about plaintiff after latter left writer's employment, causing writer to change his opinion of plaintiff, and further stated that "I am sure when you know him as well as I now do that you will feel as I do." Civ. Code, § 45, defines libel as a false and unprivileged publication exposing any person to hatred, contempt, ridicule, etc., or which has tendency to injure him in his occupation.

3. Libel and slander ⟹2.

Excluding defendant's testimony regarding his intentions in writing letter *held* not error, where letter was libelous per se.

Defendant sued for libel, based on letter written to plaintiff's employer, offered testimony showing that he did not intend by letter to convey impression that plaintiff was unfit, unworthy, or incompetent to hold position then held by him, and that employer did not so understand letter.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Henry C. Seymour Von Stein against Leonard A. Hardie. From an order granting defendant's motion for a new trial after verdict for plaintiff, plaintiff appeals.

Reversed.

Henry M. Lee, of Los Angeles, and E. T. Young, for appellant.

Kelby & Lawson, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

The plaintiff brought an action for libel, and after trial the jury returned its verdict in favor of the plaintiff in the sum of $1,000. The court granted the defendant's motion for a new trial, and the cause is here upon an appeal from that order. It is insisted by appellant that the letter which is the cause of the litigation is libelous per se, and urged with equal earnestness not to be, by the respondent. Our first inquiry will be to determine the libelous character of the writing. The letter follows:

"Edwin G. Hart, Inc.,
"724 Van Nuys Bldg.,
"Los Angeles, Calif.

"November 24, 1925.

"Mr. Frank Meline, 6332 Franklin Ave., Hollywood, Calif.

"Dear Sir: I have your letter of November 16th which was sent to my home. I am rather surprised at your taking this matter up for Von Stein. I certainly owe him no apology, but did feel that I owed Mr. Wagner an apology and did so express myself to him at the time and I feel I owe you an apology for recommending Von Stein to you at the time he applied for a position with you.

"I learned a great many things about him after he went with you which caused me to change my opinion of him and I am sure when you know him as well as I now do that you will feel as I do.

"I have entirely dismissed him from my mind and trust I will not have occasion to think of him again. I think you have taken an undue liberty in sending Mrs. Hardie a copy of the letter you sent me. She is not at all interested in the matter and I think your action in addressing her is entirely uncalled for.

"Very truly yours,
"[Signed] Leonard A. Hardie."

[1, 2] The respondent says he owes Mr. Meline an apology for having recommended appellant in the first instance. Why? Is it because he is professionally unfit or unworthy or because respondent dislikes his personality? If it were a personality incompatible with his own how could respondent have failed to discover that fact prior to the letter of recommendation? Or why should he be certain that Mr. Meline upon further acquaintance would be equally dissatisfied with appellant? It was by reason of several things which respondent learned after the plaintiff left his employ and went to work for Meline. What were they? Evidently they were of very serious character because the respondent has put him out of his mind, as he hopes, for good and all, and were such as not only to

render appellant unfit for a recommendation but also to cause respondent to apologize for having given him one in the past. We confess our inability to see through the veil of generality the specific objection to the character of the appellant entertained by the author of the letter, but of this we feel convinced, that the writer intended to convey to Mr. Meline that plaintiff was unworthy of and unfit for employment, which fact Mr. Meline would discover through experience. Section 45 of the Civil Code defines libel as a "false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." It cannot be doubted that the letter here involved had a direct tendency to injure the appellant in his occupation. In that regard the letter is not susceptible of two interpretations. It is not mere innuendo. It charges the appellant with being unfit for employment to the degree that the author feels obliged to apologize for his recommendation. Nor was it necessary that the letter ascribe some specific lack of virtue to the appellant. It is sufficient if it seeks generally to besmirch the character of another. As was said by this court in Pyper v. Jennings, 47 Cal. App. 623–634, 191 P. 565, 569, "What we do hold is that where, as here, the libelous article, without imputing any specific act of dishonesty, seeks to blacken the good name of the object of the defamatory words by vague references to some ill-defined opprobrious opinion others have of him, without conveying to the readers any sharply edged delineation of that opinion, the defendant can only justify by direct proof of bad, or at least impaired, reputation in the community or among the class of persons referred to in the defamatory article." Under the authority from which we have quoted, the code section and Tonini v. Cevasco, 114 Cal. 266, 46 P. 103, and cases there cited, we feel compelled to hold the language employed to be libelous per se. The trial court should not have ordered a new trial on the ground that it is not.

[3] It is insisted by respondent, however, that the court erred during the trial of the action in excluding testimony proffered by the defendant to show that he did not intend by the letter to convey the impression that Mr. Von Stein was unfit, unworthy, or incompetent to hold the position then held by him with the Meline Company, and that Mr. Meline did not so understand the letter. Were the language doubtful and covert the contention of respondent would be good, but as is said in Hearne v. De Young, 119 Cal. 670, 52 P. 150, 153, 499, "When the article is libelous upon its face, and the party libeled is named upon the face of the article, there is no room for the introduction of evidence of witnesses as to their understanding of its meaning." And again it is declared in Harris v. Zanone, 93 Cal. 59, 28 P. 845, 846, "Where the matter published is in a language which he who hears or reads it understands, it will be assumed he understood it in the sense which properly belongs to it." It is to be noted in this connection that exemplary damages were not sought by the plaintiff and for that reason actual malice was not an issue to be submitted to the jury. Our attention is not directed to any error of law occurring at the trial of the action warranting the court in ordering a new trial of the action.

Order reversed.

I concur: CRAIG, Acting P. J.

Owing to the absence of Presiding Justice WORKS, he does not participate in this decision.

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105 Cal. App. 744

CHASE et al. v. BLAIR et al.

Civ. 213.

District Court of Appeal, Fourth District, California.

May 20, 1930.

1. Parties ⟹63.

In suit for specific performance of land contract, vendor substituted as defendant in place of bank which held contract and deed in escrow, *held* not entitled to benefit of bank's answer (Code Civ. Proc. §§ 385, 386).

The vendor was already a party defendant when substituted in place of bank on condition that bank deliver to court documents held in escrow. The vendor contended that he was entitled ipso facto to the benefit of the denials contained in the answer of the bank then on file, and that therefore no default could rightly have been taken against him.

2. Specific performance ⟹129.

In suit for specific performance, damages suffered by delay in performance may be recovered.

3. Specific performance ⟹129.

In suit for specific performance, plaintiff's pleading did not justify recovery of damages.

In plaintiff's complaint the only reference to damages was found in the prayer which asked "for $1200 damages for withholding the same."

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Suit by R. G. Chase and others against Alfred G. Blair and another. Judgment for plaintiff, and named defendant appeals.

Modified and affirmed.

Merriam, Rinehart & Merriam, of Pasadena, for appellant.

Olney Scott Williams, of Oceanside, for respondents.

CARY, P. J.

The defendant Alfred G. Blair appeals from a default judgment rendered against him.

Plaintiffs brought this action to specifically enforce a contract between plaintiffs as vendees and the defendant Blair as the vendor for the purchase of certain real property. Defendant First National Bank of Oceanside was made a party because it held in escrow the contract and deed involved. Defendant bank filed its answer denying the allegations of the complaint, and upon application to the court secured an order apparently under Code of Civil Procedure, § 386, substituting appellant Alfred G. Blair (already a party defendant) and Susie A. Blair, his wife, as defendants in place of the bank, upon condition that the bank deliver to the court the documents held in escrow. This being done, a further order was entered discharging the bank from all liability to the parties. Defendant Alfred G. Blair having failed to answer the summons issued on the original complaint, a judgment was rendered against him for a small amount of money and also directing the clerk to deliver to plaintiffs the documents theretofore surrendered by the bank. No judgment was rendered against the substituted defendant Susie A. Blair.

[1] Appellant contends that, when he was substituted by order of the court for the defendant bank, he was entitled ipso facto to the benefit of the denials contained in the answer of the bank then on file, and that therefore no default could rightfully have been taken against him.

Had this been a substitution of parties, because of death or disability or because of the transfer of an interest in the subject-matter of the litigation, as contemplated by Code of Civil Procedure, § 385, there would be force to this contention. But in the case at bar there was no mere substitution of one defendant as successor in interest of another, but rather the attempted substitution of defendant Blair, who did claim certain rights to the documents involved, in place of defendant bank, which claimed no interest in the documents whatsoever and whose only interest was to deposit these documents in court so that the real litigants might proceed to a determination of their rights. Clearly there was no privity of interest between the bank and the appellant by which appellant could claim the benefit of the denials of the bank's answer. There was in reality no substitution at all, since the first sentence of section 386 is by its terms limited to the substitution of persons not a party to the action, while here appellant was a party from the inception of the proceedings.

[2, 3] Appellant's second and last point is that the court gave judgment for damages, whereas the complaint sets forth no facts entitling plaintiff thereto.

This contention must be sustained. In an action for specific performance there may be included in the relief granted not only the specific enforcement of the contract, but also such damages as the vendee may have suffered by reason of the delay in performance. Abbott v. 76 Land & Water Co., 161 Cal. 42, at page 47, 118 P. 425. However, in plaintiff's complaint the only reference to damages is to be found in the prayer, the second subdivision of which is as follows: "For $1200 damages for withholding the same." That this is not sufficient has been held in Bradbury v. Higginson, 162 Cal. 602, at page 609, 123 P. 797.

It is ordered that the decree herein be modified by striking therefrom the following: "The sum of $37.20 United States gold coin, with interest thereon at the rate of 6 per cent per annum from date hereof until paid, together with," "together with $54.40 in money," "$52.40 in money," "and it is further ordered, adjudged and decreed that said plaintiffs do have execution against the property of Alfred G. Blair for the sum of $———," and "the sum of $52.40 now in the hands of the clerk is hereby ordered applied to said judgment, leaving a balance of $——— for which it is hereby ordered that no execution issue therefor." And as so modified the judgment is affirmed. Each party is to pay his or their own costs on appeal.

We concur: MARKS, J.; BARNARD, J.

105 Cal. App. 653

HELLMAN COMMERCIAL TRUST & SAVINGS BANK v. MAURICE et al.

Civ. 5990.

District Court of Appeal, Second District, Division 2, California.

May 15, 1930.

1. Mortgages ⟹218.

Evidence of notice of sale under trust deed, to which mortgage securing note sued on was subject, *held* to establish prima facie case.

The trustee's deed, introduced in evidence in action to recover amount of note on ground that obligation was no longer secured by second mortgage on property sold, contained uncontradicted recitals by trustee that notice of sale was posted and published as required, the trustee's secretary and manager testified that he prepared and caused publication and posting of notice, and the publisher's affidavit, together with affidavit of posting, were received in evidence.

2. Evidence ⟹441 (11).

Evidence of unexecuted parol agreement without consideration to return note secured by mortgage subject to trust deed *held* inadmissible.

It was claimed that bank officer agreed to reduce interest and return note to makers, if trustees would deed land to purchaser assuming and agreeing to pay note and makers would pay interest to certain date, which they were already obligated to do.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by the Hellman Commercial Trust & Savings Bank, a corporation, against Mabel R. Maurice, Bessie M. Maurice, and another. From a judgment against named defendants, they appeal.

Affirmed.

Charles L. Evans and Dwight V. Maurice, both of Los Angeles, for appellants.

Rohe & Freston, by Ralph E. Lewis, all of Los Angeles, for respondent.

IRA F. THOMPSON, J.

The defendants and appellants executed their note in the sum of $1,600 in favor of the plaintiff, and secured it by the execution of a second mortgage upon certain real property in Riverside county, subject to a deed of trust to secure the repayment of $3,500. The property was conveyed to the defendant W. H. Weeks, who assumed and agreed to pay the incumbrances, but who although named as a defendant was never served with process and never appeared in the action. Upon default in the payment of the note plaintiff brought action for the recovery of the principal sum with interest, alleging that the property had been sold under the deed of trust already mentioned, and that hence the obligation was no longer secured by a lien thereon. Judgment was rendered in favor of plaintiff, and this is an appeal therefrom.

[1] The appellants assert that before the plaintiff could recover in such a proceeding it was necessary for it to prove all the prerequisites to a valid sale under the power contained in the deed of trust, and further that the respondent here failed in establishing the requisite notice of sale by the trustee. Further it is claimed that the trial court erred in rejecting testimony tending to establish the satisfaction of the note sued upon. It is apparent that we need not concern ourselves with the contention that it was necessarily incumbent upon the respondent to establish all the prerequisites of a valid sale by the trustee under the deed of trust, if in fact such proof was actually supplied in the instant case. We therefore turn to a consideration of that question first, and of course limit ourselves to the particular in which it is said the proof was not sufficient, that of notice of sale. The first observation to be made is that the trustee's deed which was introduced in evidence contains a recital by the trustee to the effect that the notice of sale was posted and published as required, setting forth the details thereof. No evidence was offered to contradict or discredit these recitals. In addition thereto, the secretary and manager of the trustee testified that personally he received from the beneficiary an order to foreclose; that he prepared and recorded notice of default; that he prepared notice of trustee's sale and caused the same to be published and posted; that he examined the notice in each issue of the paper; and that he personally conducted the sale, giving the details thereof. The affidavit of the publisher of the paper printing the notice of sale, together with the affidavit of posting, were also received in evidence. There can be no doubt under this state of the record that the plaintiff established a prima facie case. In Hihn v. Peck, 30 Cal. 288, while discussing the evidentiary character of the recitals in a sheriff's deed, the court says: "The power to sell, to recite, and to deed, having its origin in the judgment and execution, must be proved by a production of both under the rule of best evidence; but when the power has been so proved, the Sheriff becomes, so to speak, the accredited historian of his acts under it. He may narrate his proceedings on the back

of the execution and return it into Court, and, with or without that, he may issue a certificate to the purchaser, and both the certificate and return, if made, would, within the limits of the authority delegated to him, be evidence against all persons of the facts stated or recited therein. As already remarked, it is also the official duty of the Sheriff to make a like statement or recital in his deed, and it follows that a recital so made must be entitled to the same effect as an instrument of evidence as all the authorities concede to be due to the official return on the execution if one be made." So, too, the case of Savings & Loan Society v. Deering, 66 Cal. 281, 5 P. 353, decides that the trustees may convey the legal title even though it is sold in violation of the trust, and says that the recitals in the trustee's deed of the acts done by him in the exercise of the power, such as notice, sale, and the like, is to be taken as evidence of those facts. Reference may also be had to Duncan v. Wolfer, 60 Cal. App. 120, 212 P. 390, wherein it is said that the recitals of compliance with the methods of the sale are sufficient for that purpose. In view of the evidence in addition to the recitals of the trustee's deed, it cannot be seriously argued that plaintiff failed to establish a sufficient case.

[2] The appellants also contend that the court erred in rejecting testimony supporting their claim that there existed an agreement for the return of the note. We think it hardly necessary to do more than to recite the terms of the claimed agreement to demonstrate the untenable nature of the assertion. The defendants claim that one of them prior to the filing of the action had a conversation with one of the vice presidents of the respondent bank in which this officer told the defendant that if the trustees would deed the land to a purchaser of the property in which deed the purchaser assumed and agreed to pay the note, he would reduce the interest from 10 per cent. to 7 per cent. and deliver the note up to the defendant. The defendants were also to pay the interest to February 1, 1923, the asserted conversations having been said to have taken place in January and February. Of course, if the respondent were to deliver up the note, it cared not whether some one assumed its payment, and the defendants were already obligated to pay interest to February 1st. We are therefore faced with an unexecuted parol agreement to alter the terms of a written instrument, and the agreement is without consideration. The situation is so obvious as not to require citation of authority.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; GATES, Justice pro tem.

105 Cal. App. 724

KRUKOW et al. v. SILVIUS et al.

Civ. 4095.

District Court of Appeal, Third District, California.

May 20, 1930.

1. Mortgages ⟹461.

Admitting note and mortgage in action on note and to foreclose mortgage securing it *held* not error.

2. Appeal and error ⟹1050(1).

Admitting letters, in action on note and to foreclose mortgage, stating check was returned and demanding payment of note, if error, *held* not prejudicial.

Whether ruling admitting letters in evidence, one reciting that check referred to was returned to mortgagor and the other demanding payment of note, was erroneous or not, could have resulted in no damage, where it was admitted that check was returned to mortgagor and retained by him and because demand for payment could not possibly result in any prejudicial error, being nothing more than reminder of existence of obligation.

3. Appeal and error ⟹1170(1).

Substitution of parties' plaintiff, in suit on note and to foreclose mortgage commenced by guardian, if error, *held* not prejudicial, precluding reversal (Const. art. 6, § 4½).

Note in suit was payable to guardian for minor heirs, and suit was commenced in name of guardian, but subsequently, through filing of various supplemental complaints and pleadings, heirs appeared as plaintiffs without aid of guardian. The pleadings throughout entire case showed heirs as real parties in interest. Const. art. 6, § 4½, provides that no error as to any matter of pleading shall effect reversal unless prejudice has resulted. Before guardian was discharged, she had legal right to institute action, and, after her discharge and transfer of property to minors, proper proceeding was to substitute them as plaintiffs without intervention of guardian.

4. Mortgages ⟹309(3).

Mortgagor's recording of satisfaction, obtained under circumstances showing mistake and no right thereto, *held* ineffective and not available as defense in suit to foreclose.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Wilma S. Krukow and another against F. D. Silvius, Hazel R. Silvius (his

wife), and others. Judgment for plaintiffs, and defendants named appeal.

Affirmed.

Albert G. Payne and Howard C. Cameron, both of Los Angeles, for appellants.

Evans, Pearce & Campbell and Earl Oakley, all of Los Angeles, for respondents.

PLUMMER, J.

The plaintiffs had judgment against the defendant F. D. Silvius for the foreclosure of a certain mortgage mentioned in the pleadings, and also to recover the amount alleged to be due upon a certain promissory note for the security of which the mortgage just referred to was executed and delivered. From this judgment the defendant F. D. Silvius appeals.

Upon this appeal four propositions are urged as reasons for reversal: (1) That the finding of the trial court that the note for which the mortgage was given was unpaid was not supported by the testimony; (2) that the court erred in admitting the note and mortgage sued upon, in evidence; (3) that the court erred in admitting two letters in evidence; (4) that the trial court erred in permitting the substitution of parties plaintiff.

As to the first specification, the finding of the court is: "That nothing has been paid upon the principal of said note, and that the principal sum thereof, $1800.00, is now wholly due and unpaid. That nothing has been paid upon the interest upon said promissory note since the 14th day of May, 1925, and that said interest is now wholly due and unpaid. That the amount due at the time of making the finding relative thereto was and is the sum of $2,777.53."

[1] A reference to the testimony shows that the note and mortgage belonged to the plaintiffs, and constituted a part of their estate as minors; that one Jennie E. Krukow had been for some time, and was at the institution of this action, the duly appointed, qualified, and acting guardian of the persons named as plaintiffs in this action. The testimony of the guardian is to the effect that no payments were made upon the principal sum due on said note, and that no interest was paid after the date mentioned. After the beginning of this action, the estate of the parties named as plaintiffs in this action was settled, the guardian ordered to transfer to the plaintiffs all of the estate for which she had been acting as guardian, and the property was thereupon transferred to the plaintiffs, including the note and mortgage involved in this action. The testimony of the plaintiffs in this action shows that after the transfer nothing was paid to them upon the note and mortgage referred to. That the trial court erred in admitting the note and mortgage in evidence is without merit, but whether they constituted valid and subsisting obligations will be considered further on.

[2] Objection No. 3 relates to two letters which were admitted in evidence, one letter reciting that a check hereinafter referred to was returned to the defendant F. D. Silvius. The other was a demand for payment of the note. Whether the ruling was correct or incorrect is wholly immaterial, as no damage resulted therefrom. The record shows, and it apparently stands admitted, that the check referred to in the letter was returned to the defendant F. D. Silvius and retained by him. The demand for payment of the note in controversy could not possibly result in any prejudicial error. The court having found that the note and mortgage were subsisting obligations, demand for payment would amount to nothing more than a reminder of the existence of the obligation. The objection to the testimony was that the two letters referred to were copies of the original, and that no demand was made for the originals before introducing the copies. While considerable space has been given in the briefs relative to these two letters, we will content ourselves simply with the statement that, even if erroneously admitted, no prejudice could possibly result.

Appellants set out in their brief all the amended pleadings, the petition for substitution of parties, and some of the mistakes in the caption of the pleadings.

[3] The facts disclosed by the record are, as we have stated, that this action was begun by the guardian of the plaintiffs. In the action originally instituted, the title read: "Jennie E. Krukow, as the duly appointed, qualified and acting guardian of the persons and estate of Wilma S. Krukow and Walter R. Krukow, minors." Through the various transmutations of the parties affected by reason of the supplemental complaints and pleadings filed in the action, Wilma S. Krukow and Walter R. Krukow appeared as plaintiffs without the aid of any guardian. The pleadings all the way through show the real parties in interest; that the property involved was a part of the estate of the plaintiffs in this action. The note in question, so far as material, reads as follows: "Three years after date, for value received, I promise to pay to Jennie E. Krukow, guardian for the minor heirs, Wilma S. Krukow and Walter R. Krukow." This was the note secured by the mortgage, and whether the rulings of the court by which the persons named in the note became the parties plaintiff were in error, no prejudice could possibly result to the defendants, and section 4½ of article 6 of the Constitution applies. This section specifies that no error as to any matter of pleading shall effect a reversal unless prejudice has resulted. Even though, as alleged by the appellants,

that the plaintiffs in this action were not minors at the time of its institution, nothing appears by which appellants can complain. The estate of the plaintiffs had not yet been transferred to them; it was still under the control of the person who had been, and was, up to the time of her discharge after this action was begun, legally appointed and acting as guardian, and prior to her discharge she had a legal right to institute the action, and, after her discharge and the transfer of the property in her custody to the plaintiffs herein, we think the proper proceeding was to substitute the persons named herein as plaintiffs, without the intervention of a guardian. There is some contention made that the guardian was married during the course of the proceedings, and that she bore a different name from that of Krukow. Here again no prejudice has been suffered by the appellants, as the pleadings throughout show the real parties in interest, Wilma S. Krukow and Walter R. Krukow. To hold otherwise would be to ignore matters of substance and give effect to the barest technic.

[4] Objection No. 2, that the court erred in admitting the note and mortgage in evidence, is based upon the fact that the official records of Los Angeles county show that the mortgage was once marked "Satisfied." This action was brought to set aside and cancel the release just referred to, for judgment in the amount due upon the promissory note, and for foreclosure of a mortgage heretofore referred to, given to secure the payment of the note. It is based upon the allegation that a satisfaction of the mortgage was delivered to the defendant F. D. Silvius by mistake, and by him acting upon such mistake, fraudulently filed it for record, and the mortgage in this manner marked "Satisfied."

The fifteenth, sixteenth, and seventeenth findings of the court sufficiently disclose the transaction without our setting forth the testimony, and all we need to state is that such findings are fully supported by the testimony, and show that the satisfaction of mortgage involved in this action was delivered to the defendant F. D. Silvius under mistake; that he knew of such mistake; knew that he had no right to the satisfaction of mortgage, and therefore, the recording of the same by him was fraudulent and should be held void. It appears that a transaction had been entered into between Jennie R. Krukow, acting as guardian for the plaintiffs in this action, whereby a satisfaction of the mortgage involved herein had been placed in the custody of the bank referred to in the findings, with directions to deliver the same to F. D. Silvius upon his paying the full sum of money due thereon, and that F. D. Silvius obtained possession of said satisfaction of mortgage not by paying the full sum due thereon, but by leaving a receipt for an alleged claim which he had against the estate of one Lewis G. Krukow, which, of course, was not, whether valid or otherwise, a claim against the estates of the minors. The trial court held that such claim was without any validity. The findings referred to, supported by the evidence, and showing the right of the plaintiffs to prevail in this action, are as follows:

"That thereafter and on or about the 2nd day of September, 1925, the defendant F. D. Silvius, did present to the said Wm. Goss, as an officer of the said Glendale Branch of the Security Trust and Savings Bank, a corporation, a certain alleged claim against the estate of Lewis G. Krukow, deceased, for services rendered as administrator of said estate in the sum of Six Hundred Twenty and no/100ths ($620.00) Dollars as an offset against the note secured by mortgage, hereinabove referred to; that said F. D. Silvius did further present a certain check in the sum of Twelve Hundred Eighteen and 15/100ths ($1,218.15) Dollars, drawn on the Western Avenue Branch of the California Bank, Los Angeles, California, and payable to the said Glendale Branch of the Security Trust and Savings Bank, a corporation. That the said Security Trust and Savings Bank, a corporation, by and through its said officer and employee, Wm. Goss, did refuse to accept said claim and said check as payment of said note secured by mortgage. That said Glendale Branch of the Security Trust and Savings Bank, a corporation, did through its officer and employee, Wm. Goss, inform said F. D. Silvius that the said alleged claim and said check would be received by them subject to the following conditions: That said Glendale Branch of the Security Trust and Savings Bank, a corporation, would ascertain from the said Jennie E. Krukow, acting as guardian of the estates of Wilma S. Crawford, then Wilma S. Krukow, and Walter R. Krukow, minors, if said alleged check and claim would be accepted by said guardian, as aforesaid, in payment of the note and mortgage, hereinabove referred to.

"That said offer of F. D. Silvius was refused by the said Jennie E. Krukow, acting as said guardian, as aforesaid, and was never accepted by her.

"That said F. D. Silvius did deposit said check and said alleged claim with one E. H. Galvin, another employee of the said Glendale Branch of the Security Trust and Savings Bank, a corporation, and did obtain said satisfaction of mortgage from said bank, with the knowledge that said Glendale Branch of the Security Trust and Savings Bank, a corporation, was not authorized to deliver said note and mortgage or said satisfaction of said mortgage upon said offer of said check and claim as aforesaid, and did obtain said satisfaction of said mortgage without the knowledge and consent of the plaintiffs herein, or their representative, Jennie E. Krukow, as guardian of the said estates, and without the

knowledge or consent of the said Glendale Branch of the Security Trust and Savings Bank, a corporation."

The recording of the satisfaction of mortgage under such circumstances, where no innocent parties are involved, of course availed the defendant nothing. The following authorities sufficiently establish the law in this regard: 41 C. J. p. 822, par. 992; Red Jacket Tribe v. Gibson, 70 Cal. 128, 12 P. 127; Martin v. De Ornelas, 139 Cal. 41, 72 P. 440; San Francisco Mutual Loan Ass'n v. Bowden, 137 Cal. 236, 69 P. 1059.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

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105 Cal. App. 718

HOT-N-KOLD CORPORATION v. TODD et al.

Civ. 7072.

District Court of Appeal, First District, Division 1, California.

May 20, 1930.

1. Appeal and error ⟹176.

Objection that no attempt was made to rescind sales contract cannot be first urged on appeal, where necessary steps were conceded at trial.

2. Sales ⟹89.

Written order for refrigeration equipment containing words "guaranteed and service for year" and permitting purchase on installment plan *held* contract and later refinancing contract an amendment thereto becoming part of original contract.

3. Sales ⟹89.

Contract for purchasing refrigeration equipment containing guaranty, not changed, *held* not rescinded nor suspended by later refinancing contract.

4. Sales ⟹261(3).

In agreement for selling refrigeration equipment, word "guarantee" *held* used in sense of warranty.

5. Sales ⟹279.

Dealer guaranteeing refrigeration equipment sold, though not warranting equipment fit for particular purpose, like manufacturer warranted fitness for general purpose intended.

6. Sales ⟹120.

Where thing tendered is, because not conforming to seller's guaranty, inadequate for purpose sold, buyer may repudiate transaction, and statute permitting rescission for lack of consideration applies.

7. Sales ⟹127.

Where refrigeration equipment was unfit for purpose for which purchased and designed, failure of consideration was total making formal rescission unnecessary.

8. Appeal and error ⟹171(3).

Where case proceeded on theory issue existed as to general fitness of refrigeration equipment sold, that no such issue was raised by pleadings *held* immaterial.

9. Sales ⟹120.

Where refrigeration equipment was unfit for purpose purchased, purchaser may rescind transaction and is not limited to damages.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by the Hot-N-Kold Corporation against W. A. Todd and Katherine B. Todd, doing business under the fictitious firm name and style of the Mastic Bakery and Delicatessen. From an adverse judgment, the plaintiff appeals.

Affirmed.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco (W. T. Fitzgerald, of San Francisco, of counsel), for appellant.

Walker & Walker, for respondents.

CAMPBELL, Justice pro tem.

Plaintiff sued to recover $521, the balance of the purchase price of certain Kelvinator refrigerator equipment sold by plaintiff to defendant Katherine B. Todd under a contract of conditional sale providing for monthly payments. The total purchase price was $572, and a down payment of $51 was made, leaving $521 claimed to be due.

The plaintiff Hot-N-Kold Corporation was engaged in the sale and distribution of Kelvinator refrigeration equipment—not, however, in the manufacture thereof. The defendant Katherine B. Todd conducted a delicatessen business in the city of Alameda under the name and style of Mastic Bakery and Delicatessen. On August 30, 1928, defendant Katherine B. Todd, the proprietor of that business, executed a written order addressed to plaintiff whereby she ordered certain Kelvinator refrigeration equipment and certain display cases to be placed in her bakery and delicatessen store for the purpose of keeping delicatessen supplies and other goods in a fresh and salable condition. She paid in cash at that time the sum of $75 and agreed to pay the balance in twenty-four equal monthly in-

stallments of $25.28, including finance charges; the total amount payable under this order was $681.72. All of the equipment described in the order was delivered to and installed in defendant's place of business by plaintiff. Thereafter two other contracts were signed by defendant Katherine B. Todd. One of these dealt with the show and display cases described in the earlier order and was between her and the Oakland Show-Case Company. We are not here concerned with the enforcement of that contract. The other contract, dated October 5, 1928, included only the Kelvinator equipment described in the order and is the contract declared upon by the plaintiff in this action. This contract shows a total purchase price for the Kelvinator equipment of $572, a cash payment of $51 credited thereon, and a balance of $521 due in monthly installments of $21.73 each beginning on October 8, 1928. Respondent maintains that there was but one contract and that the written order bearing date August 30, 1928, wherein the terms of sale are set forth and wherein the so-called Re Dis. Co. contract dated October 5, 1928, is specially referred to as being "part and parcel of" the document dated August 30, 1928, and that the contract dated August 30, 1928, is the real contract in the case and the latter contract is a part of the original agreement. None of this balance alleged to be due was paid, and plaintiff commenced this suit upon the contract to recover the entire balance of $521.

Defendants answered and defended upon the following grounds: That W. A. Todd was not a party to either of said contracts and had no interest in the delicatessen business, which it was admitted belonged to his wife, the other defendant; that defendant Katherine B. Todd had rescinded the sales agreement and offered to return the Kelvinator equipment for the reason that it failed to furnish such refrigeration as it was supposed to furnish; and consequently that there was a failure of consideration. The defendant Katherine B. Todd, also, by way of cross-complaint claimed damages in the sum of $86.06 for breach of warranty.

Judgment was entered against plaintiff and in favor of defendant Katherine B. Todd for $86 and $16.50 as costs, and from such judgment plaintiff has appealed.

The testimony of defendant's witnesses was that the temperatures required for the purposes of defendant's business were between 38 degrees and 48 degrees, but that the machine maintained temperatures ranging from 45 degrees to 56 degrees and that the equipment as installed was insufficient to provide the refrigeration for such purposes. It further appears that after the installation of the equipment considerable difficulty was experienced. Respondent reported the failure of the equipment to properly function, and appellant made changes in the mechanism, changed the motor, and did certain repair work without the desired result. Respondent put up with the inconvenience for a considerable time, giving appellant ample opportunity to adjust in some manner the equipment so that proper refrigeration might be had, and finally notified appellant to remove the equipment. Upon appellant's failure to do so respondent had it removed and placed in storage, subject to appellant's order. Plaintiff's witnesses were unable to testify as to the temperatures maintained, but testified that in servicing the machine only minor repairs were necessary and that the equipment as installed was sufficient to provide the ordinary refrigeration for which such machines are made. The case was tried by the court without a jury. Findings were waived and judgment was given against plaintiff and for Katherine B. Todd.

Appellant urges that the evidence shows no attempt to rescind on the part of Katherine B. Todd; that if, however, it be assumed that there was evidence of rescission, there was no such right to rescind because Katherine B. Todd was in default; that there was no breach of warranty to enable respondents to rescind; and that if there were a breach of warranty, such breach did not give the right to rescind, but, at most, damages as an offset to the purchase price.

[1] As to appellant's first contention that Katherine B. Todd made no attempt to rescind, but that the notices of rescission contained in letters written by attorneys Walker & Walker stated that W. A. Todd rescinded, who, the evidence and pleadings show, had no interest in the business, it may be said that counsel for appellant at the trial conceded that the necessary steps to rescind were taken, as is shown by the following colloquy between the court and counsel:

"Mr. Fitzgerald: We deny that they rescinded.

"The Court: No; here is what I mean; you are willing to concede that they took the necessary steps for rescission if they had a right to rescind.

"Mr. Fitzgerald: Yes, if they had a right to rescind."

It was therefore unnecessary to show that Mr. Todd was the agent of his wife or that the attorneys writing letters of rescission stating that they were instructed by Mr. Todd to write, using "Mr." instead of "Mrs." in the notices of rescission, were acting for Mrs. Todd. It being conceded that the necessary steps to effect a rescission were taken, this matter was not further gone into, and no one was deceived by this failure to connect the authority of Mr. Todd. The necessary steps to effect a rescission being conceded at the

trial, the objection cannot be urged for the first time on appeal.

[2] The written order dated August 30, 1928, and which is claimed by respondents to be the contract, after reciting the equipment of Kelvinator refrigeration, contains the words "guaranteed and service for one year," and: "It is understood and agreed that should the purchaser desire to purchase this equipment upon the deferred payment plan, the regular Re Dis. Co. contract will be signed by the purchaser upon presentation, and the said Re Dis Co. contract will carry a financing and interest charge over and above the net sum heretofore mentioned, as the agreed purchase price of this equipment, and that the said Re Dis Co. contract when signed *will become a part and parcel of this order.*" We agree with respondents' contention that the order of August 30, 1928, carrying the guaranty is the contract and that the later refinancing contract is an amendment thereto and becomes a part of the original contract. It is so expressly stated in the former contract, nor can there be any doubt that such was the intention of the parties.

[3] The cases cited by appellant to the effect that a subsequent written contract rescinds, supersedes, and is substituted for the earlier contract are therefore not in point. While it is true that in the modification of the contract executed October 5th there is a variance as to the monthly installments and total purchase price, and also that the payments under the contract as amended were to be made to Refrigeration Discount Corporation instead of to appellant, the original contract containing the guaranty, not being modified nor changed in this respect, is not rescinded nor superseded.

[4, 5] In the agreement concerning the sale of refrigeration equipment the word "guarantee" was used in the sense of "warranty" (Accumulator Co. v. Dubuque St. Ry. Co., 64 F. 70, 76, 12 C. C. A. 37), and, therefore, while appellant was not a manufacturer and the equipment was not warranted to be fit for a particular purpose, appellant by guaranteeing or warranting the equipment stood in the same relative position as a manufacturer so far as warranty is concerned, and warranted the fitness of the equipment for the general purpose for which articles of the kind are designed and used.

[6, 7] It is common knowledge that a refrigerator is manufactured and intended for the purpose of keeping food products in a wholesome condition and prevent their spoiling. This, according to the testimony of respondents' witnesses, it did not do, and therefore the refrigeration equipment was of no value at all to respondent Katherine B. Todd. This fact could not have been foreseen by Mrs. Todd before the installation of the equipment. Where the thing tendered is by reason of nonconformity to the seller's guaranty inadequate to the purpose for which it is sold, the buyer is entitled to repudiate the transaction, and the statutory provision permitting rescission for failure of consideration is applicable. Mahony v. Standard Gas Engine Co., 187 Cal. 405, 202 P. 146. In the present case, as in the one just cited, the failure of consideration was total, as it appears that the refrigeration equipment was of no use for the purpose for which it was purchased and for which it was designed and generally used. "Nor, where the failure of the consideration is total, which implies, of course, that nothing of value has been received under the contract by the party seeking to rescind, is it necessary that a formal rescission be made before bringing suit." Richter v. Union Land, etc., Co., 129 Cal. 367, 373, 62 P. 39, 40; Mahony v. Standard Gas Engine Co., supra.

[8] Appellant urges that the question of the general fitness of the equipment for the purpose for which it was manufactured is quite immaterial because such issue is not raised by the pleadings, nor evidence produced nor finding by the court on such issue. That there is no finding is conceded, as findings were waived. There was, however, evidence that the equipment would not perform the purpose for which it was manufactured and intended. That no such issue was raised by the pleadings is answered by the fact that the "guarantee" contract by which appellant warranted the equipment, which was received in evidence, was not objected to as not being an issue, but only "it does not constitute the contract of the parties," and the case proceeded on the theory that there was an issue on this question.

[9] From what has been said it is apparent that there is no merit in the remaining contention that the breach of warranty did not give the right to rescind, but only damages as an offset.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

105 Cal. App. 657

SMITH et al. (AMERICAN RY. EXPRESS CO., Intervener) v. LOS ANGELES RY. et al.

Civ. 4068

District Court of Appeal, Third District, California.

May 15, 1930.

Rehearing Denied June 14, 1930. Hearing Denied by Supreme Court July 14, 1930.

1. Negligence ⟹83.

Parties having last clear chance to avoid injuring one apparently unaware of danger in which he negligently placed himself, but failing to exercise ordinary care, are liable for resulting injuries.

2. Street railroads ⟹118(15).

Evidence, in wagon driver's action for injuries in street car collision, *held* to justify last clear chance instruction.

There was evidence that the wagon weighed two tons, was about 24 feet long from end gate to end of pole extending 10 feet beyond bed, and was moving at three miles per hour, that distance from side of avenue to car tracks was some 45 feet, that wagon was struck at front wheels, that street car was moving some 25 miles per hour, and that motorman's view was unobstructed for several blocks as he approached intersection. The motorman testified that he could see at least 150 feet ahead and stop car within 70 feet, but did not see wagon until horses were on tracks some 30 feet away. Plaintiff testified that horses could have been stopped within one foot, but there was no evidence that he saw car or its light at any time.

3. Negligence ⟹83.

One whose negligence, until moment of collision, contributed to his injury cannot recover under last clear chance doctrine.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by Jordan L. Smith against the Los Angeles Railway, a corporation, and another, in which the American Railway Express Company, a corporation, intervened as a party plaintiff. Verdict for defendants, and, from an order granting a new trial, they appeal.

Affirmed.

Gibson, Dunn & Crutcher, Philip C. Sterry, and LeRoy M. Edwards, all of Los Angeles, for appellants.

William C. Ring, Carl W. Faucett, Newlin & Ashburn, and Clive W. Johnson, all of Los Angeles, for respondents.

TUTTLE, Justice pro tem.

[1] This is an action brought to recover damages for personal injuries alleged to have been inflicted through the operations of defendant railway company's street car. The jury returned a verdict in favor of defendant. A motion for new trial was made and granted upon the sole ground that the court had erred in refusing to give the following instruction: "You are instructed that though the plaintiff and defendants were each guilty of negligence, if the defendants had the last clear chance of avoiding injury to plaintiff by the exercise of reasonable care and failed to do so, defendants are liable. The ground of liability presupposes the negligence of plaintiff resulting in his being placed in a situation of danger from which he could not escape by the exercise of ordinary care; that defendants were aware of plaintiff's dangerous situation under such circumstances that they realized, or ought to have realized, his inability to escape therefrom; that defendants then had a clear chance to have avoided injuring plaintiff by the exercise of ordinary care, and failed to do so. For this ground of liability to exist it need not appear that it was physically impossible for plaintiff to have escaped danger, but it is sufficient in this connection if it appears that plaintiff was unaware of the danger and for that reason was unable to escape it. If you find that the foregoing grounds of liability exist here, you are instructed that defendants had the last clear chance of avoiding the injury to plaintiff, and your verdict should be for plaintiff."

It is first contended by appellants that this instruction was properly rejected because it is an incorrect statement of the law. No authorities were cited by appellants upon this question. The objection is without merit. Palmer v. Tschudy, 191 Cal. 696, 218 P. 36.

[2] The question next presented is whether or not the evidence in the case justified the giving of an instruction upon the doctrine, the "last clear chance."

The injury was received at the intersection of Santa Fé avenue and Third street in the city of Los Angeles. The former street runs north and south, while Third street runs east and west, and terminates at the said intersection. It was about 5:15 p. m.; the weather was clear and one could see several blocks away. At the point where the collision occurred, defendant railway company maintains a single street car track, upon which is operated a one-man car, commonly known as a "dummy." Plaintiff was a driver for an express company. His wagon weighed some 4,000 pounds, and was about 24 feet long from end of pole to end gate. The horses and pole or tongue extended some 10 feet beyond the bed of the wagon. The point where the

collision occurred was a very busy one, so far as vehicular traffic was concerned. Opposite the point where Third street intersects Santa Fé avenue is the express depot of the railroad company, and this depot was the objective of plaintiff on the day of the accident. All such traffic had to cross the said track of the defendant, in reaching said depot. The distance from the west line of Sante Fé avenue to the car tracks is some 45 feet. Plaintiff drove his wagon easterly along the south side of Third street, and, entering said intersection, approached and drove upon the car track. His wagon was struck at the front wheels, breaking the kingbolt and severing the vehicle completely. Plaintiff was thrown to the ground and received the injuries complained of. The view of the street car conductor was unobstructed for several blocks as he approached Third street. There is no evidence that he was distracted by any unusual occurrences while he was operating his car for the distance mentioned. As far as the record shows, he was engaged solely in operating the car during that time. He testified that he could see at least 150 feet ahead, but that he did not see the wagon until the horses were on the tracks, some 30 feet away. He said that he could stop his car within a distance of 70 feet. The horses could have been stopped (so plaintiff testified) within a distance of a foot. The wagon had proceeded some 10 or 12 feet over the west rail before it was struck. There was no evidence that plaintiff saw the street car or its light at any time. The foregoing résumé of the testimony and evidence comprises that which was not disputed, and also, that most favorable to plaintiff. Other witnesses testified in behalf of plaintiff, but their testimony had little or no bearing upon the question here presented.

The doctrine of "last clear chance" has occasioned more discussion in our legal reports than any other phase of the law of negligence. It has been referred to as a humanitarian doctrine (20 R. C. L. p. 139; Hamblin v. Schultis, 64 Cal. App. 104, 220 P. 320); for the reason that it permits one to recover, though his negligence may have contributed to the injury, and forbids exoneration to the other party who, notwithstanding such contributory negligence, still persists in a course of conduct which results in the injury. As a concise statement of this doctrine in its elemental and primary form, there is no better statement than that found in the case of Townsend v. Butterfield, 168 Cal. 564, 143 P. 760, 762, where the court approved of the following instruction: "You are instructed that the party who has the last clear chance to avoid the accident, notwithstanding the previous negligence of his opponent, is considered solely responsible." While the court, in that case, referred to this instruction as "extremely bare and terse," it has the advantage of being readily understood and comprehended by the average layman. Upon this logical, clear and understandable statement of the rule we have engrafted various "elements," "exceptions," and "qualifications" until we have become enmeshed in a maze of superrefinements. For instance, we tell the jury that there can be no recovery under this doctrine, unless plaintiff is negligent. We then proceed to tell them (under the rule of concurring negligence), *that if the plaintiff is negligent (down to and at the precise time of the impact), he cannot recover.* The abolition of the jury system is the theme of nearly every exponent of legal reforms, but what can be expected of twelve laymen who are forced and expected to absorb and reconcile, in a half hour, involved and intricate legal questions upon which neither judges nor lawyers can agree. A very similar condition prevailed in respect to the instruction upon reasonable doubt in criminal cases, and so urgent was the necessity for clarification, that the Legislature intervened and laid down a terse definition of "reasonable doubt," with the positive injunction that no further instruction was required. And in this case defendant relies upon a necessary "element" of the rule under consideration, to the effect that the party inflicting the injury must have had actual knowledge of the perilous position of the party injured, in sufficient time to have avoided the injury. The motorman testified that he did not see plaintiff on the tracks until the car was within some 30 feet of the wagon, and that the horses were then upon the track. It is contended that there is no other evidence in the record which would justify a contrary finding. The track, for some blocks leading to Third street, was straight; one could see for several blocks; the motorman himself admitted he could see for some 150 feet ahead. He was sitting on his chair at the front of the car, with his hand on the control, for several hundred feet while approaching the scene of the injury. The wagon was moving at the very slow speed of 3 miles per hour. The car was moving about eight times as fast, or some 25 miles per hour. The wagon had proceeded some 12 feet into the path of danger before being struck. Under all the circumstances and conditions as disclosed by the record the jury might have found that the motorman saw plaintiff in time to have avoided the injury, and while plaintiff was actually in peril. Hoy v. Tornich, 199 Cal. 545, 250 P. 565; Darling v. Pacific Electric R. Co., 197 Cal. 702, 242 P. 703.

[3] Another situation which appellant contends should bar plaintiff from the benefit of the rule is where the negligence of the injured party was contemporaneous, concurrent, continuing, and contributory with the negligence of the party inflicting the injury. Young v. S. P. Co., 189 Cal. 754, 210 P. 259. The law is well settled in this state that the rule cannot

be applied to a situation where the negligence of the deceased continued to the moment of the impact and actively contributed to his own injury. The injured party being actively and contemporaneously at fault until the moment of the collision, he is barred from the right to recover for any act up to that time. Green v. L. A. Ry. Co., 143 Cal. 41, 76 P. 719, 101 Am. St. Rep. 68. The liability is placed upon the party inflicting the injury only if, immediately before the actual infliction of the injury, the injured party was in such a situation as to be unable, by the exercise on his part of reasonable and ordinary care to extricate himself, and vigilance on his part would not have averted the injury. Young v. S. P. Co., supra. In other words, the "last clear chance" must be solely upon the part of the person inflicting the injury. If both parties have that chance it cannot be said that there is any "last clear chance" at all. However, if plaintiff was oblivious to or unconscious of this position of danger, the question of his duty to extricate himself does not arise, and the doctrine is applicable. The law in this respect is laid down in the case of Berguin v. Pacific Electric Ry., 203 Cal. 123, 263 P. 220, 223, as follows: "The sum of the adjudicated cases bearing upon the relative rights of street cars and citizens traveling in vehicles drawn by horses or other animals is that both have a right to use the street, but neither has the exclusive right. The motorman of a street car is not necessarily obliged to stop his car when he sees a man driving in a vehicle along the line of a railway ahead of the car, but he may continue to run the car in a proper manner until he is conscious of the fact that the driver is unaware or heedless of his danger. * * * Seeing a man driving along the track, the motorman may assume that he will turn aside and out of the way of the car; but he cannot rest on the assumption so long as to allow his car to reach a point where it will be impossible for him to control his car or give warning in time to prevent injury to the man or vehicle."

We are satisfied that there is evidence in the record from which a jury could reasonably conclude that although plaintiff realized he was in a dangerous position, extrication was physically impossible, or they could have found that plaintiff was oblivious to or unconscious of his position of peril. The car was approaching at a speed of 25 miles per hour, while the wagon, as it started across the tracks, was moving at the rate of 3 miles per hour. What method of escape was open to plaintiff? He could either back his team or attempt to accelerate his speed ahead. With a wagon weighing two tons, and the car approaching at the rate of 35 feet a second, the jury might well have found that when plaintiff had partly crossed the track he had reached a point where he could not help himself, and from that time on vigilance on his part would not have averted the injury. His negligence in reaching that position becomes the condition, not the proximate cause, of the injury. If we are to retain the humanitarian aspect of this doctrine, we are impelled to the conclusion that it is applicable to the facts of this case.

The learned trial judge did not err in granting the motion for new trial. It follows that the order granting a new trial must be, and said order is, affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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106 Cal. App. 39

GENERAL ACCIDENT, FIRE & LIFE ASSUR. CORPORATION, LIMITED, OF PERTH, SCOTLAND, v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 7065.

District Court of Appeal, Second District, Division 1, California.

May 23, 1930.

1. Evidence ⟹509.

In compensation proceedings, question concerning probable future history of pulmonary tuberculosis, of which employee suffered, *held* matter exclusively for medical expert opinion.

2. Evidence ⟹574.

Court is bound by evidence given by medical experts on matter within their province, even if contradicted by nonexpert witnesses.

3. Master and servant ⟹403.

Burden of proving existence of permanent disability in compensation proceedings rested on employee (Workmen's Compensation Act).

4. Master and servant ⟹405(6).

Evidence in compensation proceedings *held* insufficient to sustain finding that employee, suffering from pulmonary tuberculosis, had permanent disability (Workmen's Compensation Act).

Proceedings under the Workmen's Compensation Act (St. 1917, p. 831, as amended), by Hazel Farrell, claimant, opposed by Raymond G. Osborne, employer, and the General Accident, Fire & Life Assurance Corporation, Limited, of Perth, Scotland, insurer. To review an order of the Industrial

Accident Commission awarding compensation, the insurer brings certiorari.

Award annulled, and cause remanded, with directions.

Joe Crider, Jr., of Los Angeles, for petitioner.

Edward O. Allen, of San Francisco, for respondents.

CONREY, P. J.

Petitioner is the insurance carrier for Raymond G. Osborne, who was the employer of Hazel Farrell in the employer's chemical laboratory. Pursuant to application made by the employee the commission in due course made its award, based upon a finding that the injury of which she complained was proximately caused by her employment, and was a direct result of exposure to the fumes of hydrochloric acid, ammonia, and acetic acid in a sunless unventilated basement room; that the injury caused temporary total disability from December 31, 1924, continuing indefinitely. This award was dated May 8, 1925. Thereafter the employee filed an additional application for adjustment of claim. After hearing thereon, the commission made an amended award of date October 20, 1926, which contained an additional provision requiring that medical, surgical, and hospital treatment be furnished to the employee. Thereafter the applicant petitioned for a further hearing and allowance and the employer and the insurance carrier applied for an order terminating disability and discharging defendants from further liability.

After further hearing and in due course the commission made its order of September 3, 1929, wherein it was found, in addition to the previous findings, that said injury caused permanent disability consisting of a moderately advanced active pulmonary tuberculosis, the percentage of permanent disability being fixed at 82¼ per cent. The award thus finally made provided for the sum of $16.39 weekly, beginning January 8, 1925, continuing for 240 weeks, and thereafter a life pension at the rate of $5.61 per week; together with further medical and hospital treatment and nursing. These awards were made against the insurance carrier, the employer being relieved from liability.

Rehearing having been denied by the commission, application was made to this court for writ of review, and the writ was issued, on which return has been duly made.

Petitioner contends that the evidence does not show any permanent disability. Aside from certain testimony of Miss Farrell at the last hearing before the commission, the evidence concerning the nature and extent of disability of the employee consists of reports made by physicians on behalf of the respective parties, and by a physician appointed by the commission. The position of the respondent on this question is announced by its counsel as follows: "Respondent frankly admits that there is not to be found in the record any positive expression of opinion of a medical expert stating in so many words that the injured employee's disability is permanent other than the statements of the three doctors testified to by Miss Farrell and hereinafter quoted or that she will not recover from the pulmonary tuberculosis which was active at the time the medical examinations were made and the permanent disability rating issued. On the other hand, there is no medical assertion making any unequivocal statement that she will recover and be restored to industry. The possibility of the continuance of the diseased condition in disabling form for the remainder of life was not ruled out nor does there appear to be any discussion as to the fact and extent of remaining disability were the tuberculosis to be arrested in the near future."

It must be taken as an accepted fact that the injury of the employee took the form of pulmonary tuberculosis. With the exception of Dr. Brown, the physicians agree on this point. The only question is whether or not the injury has resulted in permanent disability. The conclusions of Dr. Otto, in his report of June 15, 1929, described the condition as follows: "Moderately advanced active pulmonary tuberculosis, which shows remarkable progress in fibrosis and arresting of activity. * * * In my opinion it is out of the question for Miss Farrell to consider resumption of her work, which she is so anxious to do." Dr. Cunningham, in his report of June 17, 1929, states that he has examined the patient at regular intervals for two years; that she has made good progress against the disease, but there is evidence of active tuberculosis now. "She is too weak to work even part of the time, and I consider her totally disabled, and recommend the continuance of medical treatment." In the report of Dr. Gill, June 29, 1929, he stated that the tuberculosis process was being fairly well controlled, but felt that, while she has been making fairly consistent progress, perhaps the patient would do better if she sought a higher altitude. In his report of June 25, 1929, there is contained the following statement: "Prognosis—good."

Dr. Cunningham was appointed by the commission to make an examination and report. In his report of July 9, 1929, among other things, he said, "In so far as the tuberculosis is concerned, the prognosis is favorable. The disability, while total, ought to be of a temporary type and is so considered by me. The prognosis, while favorable, carries with it some degree of uncertainty as to time required for a complete recovery. I should estimate that a period of total disability will probably extend to from one to two years

from date. Patient has responded well in the past to rest and a regular dietetic—hygienic treatment, and it is my belief that this method should be followed until recovery is complete."

[1, 2] The record contains a report of Dr. Brown dated May 8, 1929, and of Dr. Bowman (X-ray expert) dated May 25, 1929. These two reports furnish, to say the least, no evidence more favorable to the theory of permanent disability than those found in the reports of the other physicians. Respondent commission contends that the testimony of Miss Farrell alone is sufficient to support the findings. That testimony, however, is merely a reflection of the opinions of her physicians, which are in the record. Moreover, the subject of inquiry, concerning the probable future history of the disease of the patient, is one which belongs entirely within the scope of expert opinion. This being so, the court is bound by the evidence given by the physicians, even if it is contradicted by nonexpert witnesses. William Simpson Const. Co. v. Ind. Acc. Comm., 74 Cal. App. 239, 243, 240 P. 58. The opinion of the Supreme Court as stated in Rolland v. Porterfield, 183 Cal. 466, 191 P. 913, is not in conflict with the ruling in the William Simpson Const. Co. Case.

[3, 4] The burden of proving the existence of a permanent disability in this case rested upon the applicant for relief. We have come to the conclusion that the finding of permanent disability is not sustained by the evidence.

The said award of September 3, 1929, is annulled, and the cause is remanded to respondent commission, for such further proceedings as may be appropriate in accordance with this decision.

We concur: HOUSER, J.; YORK, J.

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105 Cal. App. 760

CRAWFORD v. PIONEER BOX & LUMBER CO.

Civ. 4017.

District Court of Appeal, Third District, California.

May 20, 1930.

1. Logs and logging ⟹8(5).

Question how far notice to stop cutting timber, under contract, had effect of denying access to lands was one of fact as well as law.

2. Appeal and error ⟹928(1).

Where no complaint was made regarding instructions, appellate court must assume that law applicable was given to jury.

3. Logs and logging ⟹8(3).

Effect and intent of defendant's order to plaintiff to stop cutting timber under contract must be ascertained from all facts in case.

4. Contracts ⟹314.

Where subject-matter of contract is such that ability to perform is contingent on permissive entry upon lands of one party and entry is refused, recovery in damages may be sustained.

5. Logs and logging ⟹8(3).

Where defendant notified plaintiff to stop cutting timber upon its lands, plaintiff was unable to perform contract with defendant and could recover damages.

The contract referred to required plaintiff to fall, limb, buck, and deliver to defendant's loading skids certain timber standing upon lands described. Shortly after execution of the contract, on February 25, 1926, plaintiff commenced working, and on August 10, 1926, plaintiff was ordered by defendant to stop falling and clean up. In February, 1927, when weather conditions permitted, plaintiff resumed operations with defendant's permission, but in June received letter from defendant to effect that no timber was to be felled other than on section where plaintiff was then working until he was further notified, and when plaintiff finished work on this section he stopped, and thereafter received no further orders.

6. Logs and logging ⟹8(3).

Plaintiff not continuing cutting timber, under contract, after directions to stop, *held* not estopped by acquiescence from claiming damages for breach of contract.

7. Logs and logging ⟹8(3).

Defendant preventing performance of contract for time could not urge that, when notice to stop cutting timber was given, term of contract had lapsed.

8. Contracts ⟹314.

Prevention of performance by promisee is equivalent to performance by promisor.

Appeal from Superior Court, Siskiyou County; C. J. Luttrell, Judge.

Action by R. R. Crawford against the Pioneer Box & Lumber Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Stanley Pedder and William S. Bayless, both of San Francisco, for appellant.

Allen & McNamara, of Yreka, for respondent.

PARKER, Justice pro tem.

The action was to recover certain sums of money alleged due plaintiff from defendant. The cause of action embraced two counts. The first count sought a recovery as damages on account of defendant's breach of a contract and the second count was to recover amounts alleged to have accrued from performance by plaintiff up to the time of the breach by defendant.

The case was tried by the court sitting with a jury and resulted in a verdict for plaintiff on both counts. At the conclusion of plaintiff's testimony defendant moved for a nonsuit, which motion was denied. When the verdict of the jury was returned defendant moved for judgment in its favor notwithstanding the verdict, which motion likewise was denied. Thereafter defendant moved for a new trial, which was denied. From this history of the procedure it will be noted that the case has received much consideration in the court below, and that appellant's contentions have been frequently urged at every available opportunity, excepting only a motion for a directed verdict.

It is the claim of appellant that the evidence, as a matter of law, is insufficient to support the verdict and the judgment based thereon. As a welcome exception to the ordinary appeal on this ground, appellant does not attempt to have any conflicts in the evidence again determined. It rests its appeal upon the insufficiency of the plaintiff's case, regardless of any alleged defense thereto and also upon such other evidence as is undisputed. Therefore this appeal requires that the facts be reviewed in some detail.

Plaintiff and defendant corporation on February 25, 1926, entered into a written contract whereby plaintiff bound himself to fall, limb, buck, and deliver to defendant's loading skids certain timber standing upon the lands described.

The territory wherein stood the timber to be cut and hauled appears to be, and admittedly is, a section wherein seasonal hardships prevent all-year hauling. It was anticipated, therefore, that conditions might arise which would cause greater difficulties or would necessitate complete cessation of the work for a time. The contract provides that if the roads get in such condition that trucks could not travel and plaintiff is forced to quit hauling, then plaintiff will return as soon as the fall rains come and the roads are made passable and will complete the work during the next fall, winter, and the following spring.

After the execution of the contract plaintiff arranged for the necessary equipment, including trucks, logging paraphernalia, bunk houses, etc., and shortly thereafter began the work. The work of falling the timber began on or about March 12, 1926. On July 30th the parties entered into a second or supplementary agreement, being in effect a modification of the first agreement.

This latter arrangement was in writing and provided that defendant would pay plaintiff, over and above the price agreed upon in the original contract, the sum of $1 per thousand for all logs delivered under the contract after July 31, 1926, which additional amount, however, was to be held back until the completion of the contract.

About August 10, 1926, plaintiff was ordered by defendant to stop falling and clean up. At this time the conditions of the roads had become such as to make hauling difficult and impracticable, if not impossible. It does not seem, however, that this was assigned as the reason for the order to stop, nor does it appear that this condition was agreed upon as being the basis of the order. And in this connection it might be noted that under the contract it was the judgment of plaintiff that should determine the necessity of a cessation of operation. The work was stopped and all operations in the timber for the time discontinued. In September of the same year, within a month from the time of discontinuance, the road conditions improved to normal or better and plaintiff was desirous of resuming activities. Without reciting in detail the various conferences between plaintiff and the representatives of defendant, it will suffice to say that the record gives ample support to the conclusion that the defendant company kept deferring action and evading the demands of plaintiff and through one pretext or another put off the entire matter. Finally, plaintiff sought the aid of attorneys. These attorneys wrote to the president of defendant company, notifying him of their retainer and advising that a further failure to come to some understanding with plaintiff as to his contract would necessitate suit for the damages resulting to their client. Thereupon, defendant replied that there was nothing to stop plaintiff from resuming his work. This was in December, 1926. Weather conditions prevented an immediate return, but on February 10, 1927, plaintiff moved back into the woods and resumed his operations. In June, plaintiff received a letter from defendant company as follows:

"Mount Shasta, Siskiyou County, California,
May 13–27.

"Mr. R. R. Crawford, Mount Shasta, California.

"Dear Sir: In regard to further delivery of logs at Morrison.

"We are advised by our city office that no timber is to be felled other than on the North half of Section 15 where you are now working until such time as you are further notified.

"Yours truly,
"Pioneer Box & Lumber Company,
"E. H. Kaupp.
"By E. H. Kaupp.

"cc Mr. Pedder."

In explanation thereof it may be noted that Morrison was the loading station and that Mr. Pedder, to whom copy is noted as sent, was the president of the defendant company and that the lands other than section 15 were owned by defendant. At this time there was a small portion of section 15 to be cut and this was done and plaintiff stopped. In addition to the letter the order was given verbally to stop all cutting outside of section 15. Plaintiff received no further orders, and hence the present action.

In the court below plaintiff offered to prove what disposition he thereafter made of his trucks, but defendant objected, contending that it was wholly immaterial. Likewise, plaintiff attempted to show that at or about the time defendant notified plaintiff to stop cutting it had adopted a changed policy in its lumber business to the end that the lumber would be handled differently. Defendant again objected. In both instances it was defendant's claim that the only question involved was whether or not defendant had breached the contract; that if defendant had breached the contract its reasons for so doing were immaterial. We are not reviewing the trial court's action on these objections, but simply stating the defendant's position there as here. To some extent the position of defendant negatives the argument that will be later considered.

First, we may clear away some of the claims of defendant anent the authority of its agents and particularly the writer of the letter ordering cessation of work. There is no question but that the contract itself was the contract of the company, executed by one in a position similar to that of E. H. Kaupp. The letter, on its face, indicates that a copy thereof was forwarded to the president of the company, Mr. Pedder. This gentleman, aside from his position as president, was and is also one of the counsel appearing in the case and was a witness at the trial. As a witness he made no denial of his receipt of a copy nor did he make any claim or give any testimony questioning the authority of the writer. Mr. Kaupp was likewise a witness, called by defendant, and his entire testimony was on the assumption that he was authorized to handle the matter for the company. He was not asked as to his authority and no serious dispute seems to have arisen in the court below on that question and is urged for the first time here. Without further detail of facts there was sufficient in the record to sustain a finding of authority on the part of Kaupp Ellet v. Los Altos, etc., Inc., 88 Cal. App. 740, 264 P. 270. It is appellant's argument that, conceding the authority of Kaupp, which is only perfunctorily questioned, the letter and his orders to stop were not sufficient to warrant plaintiff in declaring the contract breached. It is contended that plaintiff could have and should have wholly ignored these orders and gone on with his contract and delivered logs until defendant refused to accept more; that, irrespective of what might be said or what orders might be given, plaintiff was bound under his contract to deliver the logs and that there was nothing that defendant was bounden to other than acceptance thereof and payment therefor. In its last analysis the argument in effect is that if performance were made impossible, still plaintiff must perform, because, in effect, the order to cease cutting timber on the land of defendant took from plaintiff the right of entry thereon and without such a right of entry it would be impossible to fell timber thereon.

Elaborating further the argument of appellant it is claimed that the right of entry upon the lands was not a condition precedent in so far as plaintiff's duty of performance was concerned. In Alderson v. Houston, 154 Cal. 1, 96 P. 884, 888, being a case relied upon by both sides here, the court says: "Stress is laid by counsel upon the words 'prevented from going on.' * * * The same language—i. e., that the party suing must be 'prevented' from performance—has been used in numerous cases; but, wherever the attention of the court has been directly called to the sense in which the word has been used, it has been held, not to mean that there must be physical prevention, but that any acts, conduct, or declarations of the party evincing a clear intention to repudiate the contract, and to treat it as no longer binding, are a legal prevention of performance."

And further in the same case: "It would seem clear, on principle, that a mere declaration of the party of an intention not to be bound, or acts and conduct in repudiation of the contract, will not, of themselves, amount to a breach, so as to create an *effectual* renunciation of the contract; for one party cannot, by any act or declaration, destroy the binding force and efficacy of the contract. (Italics ours.) * * * 'Its real operation appears to be to give the promisee the right of electing either to treat the declaration as brutum fulmen, and holding fast to the contract to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. * * * If he does so elect, it becomes a breach of contract, and he can recover upon it as such.' Upon the election to treat the renunciation, whether by declaration or by acts and conduct, as a breach of the contract, the rights of the parties are to be regarded as then culminating, and the contractual relation ceases to exist, except for the purpose of maintaining the action for the recovery of damages. These views are amply sustained by numerous decided cases."

[1] The decision cites many authorities from our own and other jurisdictions. The

principles announced have never been questioned. The difficulty arises in their application to varying conditions of fact. In many decided cases it has appeared that the declarations, acts, and conduct or even the actual breach affect only a portion of the contract or else goes to some act or requirement which does not control or affect a complete performance. These cases present instances of the violation of some covenant which is not a condition precedent to the performance by the party seeking damages for the breach. The law in such cases is announced in the older case of Cox v. McLaughlin, 54 Cal. 605. But the doctrine of a violation or breach going to a condition precedent is not here involved. The performance of the contract here depended wholly and entirely upon plaintiff's access to the lands of the defendant company. Such access being denied him, he could proceed no further. Just how far the notice to stop cutting timber had the effect of withholding or denying access to the lands was a question of fact as well as one of law. If the lands had been so situated that access thereto was possible only over a certain road or trail it can be readily seen that a blocking of or destruction of the road by the company would have accomplished a complete prevention of performance. In only a slighter degree did this order to stop act as a barrier to approach. Under the contract no interest in or title to the lands involved passed to plaintiff. All that distinguished plaintiff from a mere trespasser was the implied license of defendant. The latter retained at all times control of the lands and the disposition of any timber thereon standing. Whether plaintiff was removed from the lands by actual physical force or merely by order the effect is the same. The appellant's theory in the court below that the reason for the order was immaterial supports such a conclusion.

As urged by respondent, it might very well be that changes in the market or the desirability of leaving the timber stand awaiting a more opportune time may have influenced the decision of appellant. A variety of circumstances can be readily assumed wherein appellant might have been much advantaged by leaving the timber stand and paying plaintiff his anticipated and normal profits under the contract rather than to pay the entire price for a completion of the contract and then leave the timber lie unused and decay.

[2, 3] It is to be noted that there is no complaint in the admission or rejection of evidence. Neither is complaint made on the matter of the court's instructions to the jury. Therefore we assume, as we must, that the law applicable was given to the jury and that every legal principal controlling the acts was fully explained by the court below. Further, the jury doubtless took into consideration the early notice to quit, given in 1926, and withdrawn only after a delay of some five months. It could be fairly inferred that in the first instance there was manifest some design to abandon the contract on the part of defendant company. And the effect and intent of the order to stop was to be ascertained from all of the facts in the case. Appellant in the court below made no attempt to show that the order had any different intent behind it than a complete abandonment on its part. It makes no such attempt here. It rests wholly upon the proposition that plaintiff could have ignored the order and was bound to proceed until a refusal of acceptance by defendant.

[4, 5] It would be a laborious task and a useless one to attempt to cite and then distinguish all of the cases on the subject of breach of contract, because the variety of contracts is infinite and each case necessarily is controlled by the particular facts under discussion. The general principles hereinafter stated will suffice. And mindful of and in conformity with these principles, we hold it to be the law that where, as here, the subject-matter of the contract is such that ability to perform is contingent upon a permissive entry to or upon the lands of one of the parties and such entry is refused, a sufficient record is presented wherein recovery in damages may be sustained. Therefore, we conclude that when appellant notified plaintiff to stop all cutting of timber upon its land, plaintiff was thereafter unable to carry through with his contract and was entitled to his remedy in damages, and particularly where, as here, the record is silent as to any subsequent action on the part of the appellant, either by way of explanation or otherwise.

[6] Appellant further argues that plaintiff by his acquiescence is estopped. Estoppel was not pleaded and even if it had been the facts would not sustain the plea. There is no evidence of affirmative assent and the only acquiescence noted is the failure of plaintiff to continue on after the directions to stop. Sufficient has been said thereon. It is true that if plaintiff had made inquiry and waited some months, as was the case in 1926, and finally threatened suit, the defendant may have again changed its attitude. In fact, many things might have happened, But we are considering only what did happen.

[7, 8] Appellant next urges that at the time the notice to stop was given the term of the contract had lapsed. This contention is based upon the provision of the contract wherein plaintiff agreed that if the road got in condition to prevent hauling he would stop and would return again as soon as the roads were passable and would complete the work during the next fall, winter, and following spring. The answer to this contention is that from August, 1926, to January 27, 1927, plaintiff was prevented from performing his contract by refusal of the right of access to the

lands. And appellant cannot now claim the benefit of its own prevention. Prevention of performance by the promisee is equivalent to performance by the promisor. Alderson v. Houston, supra.

Finally, appellant contends that with reference to a small portion of the moneys alleged to have been due in the second count the action was prematurely brought, inasmuch as under the contract defendant was to hold back a certain amount until all limbs and brush had been cleared and burned. It is needless to discuss this. While the facts might sustain the claim, and we do not so decide, yet the record discloses that all of the requirements had been complied with at the time of trial, and the money claimed is now due. Therefore if we should hold with appellant here, it would simply necessitate a new trial on that one issue where appellant concedes its liability. There is abundant evidence to sustain the verdict of the jury on the theory of a substantial compliance prior to the time of bringing suit.

Upon the entire record we find no sufficient reasons to hold that either the verdict or the judgment or any of the intermediate orders complained of were erroneous.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

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105 Cal. App. 705

DONAHOO v. LOVAS.

Civ. 143.

District Court of Appeal, Fourth District, California.

May 19, 1930.

1. Physicians and surgeons ⟹15.

Plaintiff in malpractice action against physician must prove negligence, as distinguished from mere errors of judgment.

2. Physicians and surgeons ⟹18(8).

Generally, in malpractice actions against physicians, expert evidence is necessary.

3. Physicians and surgeons ⟹18(8).

That alcohol injection into sciatic nerve caused increased pain was insufficient to show physician's negligence in adopting such treatment.

Plaintiff's testimony showed that, prior to the injection of alcohol, the pain had been confined to a small area on the hip, but that he had subsequently suffered extreme pain in his left foot, which before that time had been painful only when he stepped upon it.

4. Physicians and surgeons ⟹18(8).

In malpractice action against physician for injecting alcohol into sciatic nerve, only questions being diagnosis and treatment, expert testimony *held* essential to show negligence.

5. Physicians and surgeons ⟹18(8).

In malpractice action against physician, expert testimony that injecting alcohol into sciatic nerve caused subsequent increased pain *held* insufficient to show negligence.

The testimony in question failed to disclose whether the injection had given rise to greatly increased pain in plaintiff's foot and caused the prolonged disability which followed, or whether that result, if it were a result, should have been expected, or whether the physician had exercised the skill ordinarily practiced in that community.

6. Evidence ⟹222(2).

Physician's admission he erred in injecting alcohol into sciatic nerve was not confession of negligence, being mere opinion based on result.

The evidence showed that another doctor, to whom plaintiff had been sent by defendant, his physician, said it was a mistake for defendant to have injected alcohol into the sciatic nerve, because it had killed the nerve and blocked the circulation and was causing the severe pain which plaintiff was experiencing, and that defendant, when informed of this statement, said, "He's right." This admission, however, was based merely on the result, and was of no value in showing whether ordinary skill had been used in adopting such treatment.

7. Evidence ⟹222(2).

In action against physician for injecting alcohol into sciatic nerve, defendant's admission injection was used only in severe cases was immaterial; evidence indicating severe case.

It was contended that the physician had admitted plaintiff was only mildly affected, and hence that the treatment was improper, because the physician had described mild sciatica as being where the patient could walk around and be on the job, although still having pain in the sciatic nerve. But the undisputed evidence showed that, at the time plaintiff had consulted the physician, plaintiff had been

going about on crutches and unable to work, and that he had been under the care of another doctor for two weeks without apparent benefit, and that he desired quicker relief.

8. Physicians and surgeons ⟹18(8).

In action against physician for injecting alcohol into sciatic nerve, being improper treatment in mild cases, whether plaintiff was mildly afflicted required expert testimony.

9. Physicians and surgeons ⟹18(8).

Proof of result alone was insufficient to establish physician's negligence in injecting alcohol into sciatic nerve, as being improper treatment.

Plaintiff's claim of negligence was not that the injection had been improperly performed, but that the treatment itself was improper; it being claimed that the physician was negligent in making no diagnosis of the case, in giving wrong advice as to the effect of the treatment proposed, in making an injection of alcohol under the circumstances then existing, and in not first applying the methods of treatment ordinarily used in mild cases. Those matters, however, showed no more than mistaken judgment.

10. Physicians and surgeons ⟹14(4).

Whether physician was negligent in injecting alcohol into sciatic nerve depended on whether physician in applying treatment used reasonable skill ordinarily possessed by physicians in same locality.

11. Trial ⟹165.

In considering motion for nonsuit, every reasonable inference must be drawn in favor of plaintiff's evidence.

12. Physicians and surgeons ⟹18(6).

In malpractice action against physician for injecting alcohol into sciatic nerve, negligence could not be presumed.

Appeal from Superior Court, Kings County; Frank Lamberson, Judge.

Action by Fred E. Donahoo against A. Lovas. A motion for a nonsuit was granted, and, from the order and judgment, plaintiff appeals.

Affirmed.

S. L. Heisinger, Jr., of Reedley, and M. G. Gallaher, of Fresno, for appellant.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, for respondent.

BARNARD, Acting P. J.

This is an action against a physician for alleged negligence in diagnosis and treatment.

About the 1st of August, 1927, the plaintiff arose one morning with a very severe pain in his hip. Being away from home at the time, a physician who was called gave him a hypodermic injection to relieve the pain until he could return home. He returned home the next day and called another doctor, who treated him until August 14. During this time he continued to have a sharp pain whenever he stepped on his left foot. On August 15 he went on crutches to defendant's office for treatment. He told the defendant that he had been taken care of by the other physician, but that "he hasn't done me no good." The defendant replied: "Well if he hasn't done you any good with medicines, I don't think I will do you any good with medicines, so we will inject the nerve with alcohol." The plaintiff testified that, upon being asked if this would be painful, the defendant replied that it would not, and also that the defendant said: "You're liable to walk right out of the office and go to work." The defendant injected the alcohol into the sciatic nerve. The plaintiff testified that this operation was very painful and that he lost consciousness for a time; that prior to the injection his pain had been confined to a small area on the hip, but thereafter he suffered excruciating pain in his foot; that he went home and went to bed, and his foot remained "dead," but very, very painful; that he had no feeling when his foot was pricked with pins; that the defendant continued to give him treatment, particularly an opiate to relieve the suffering; that, after treating him for about two weeks, the defendant recommended that he go to California Hot Springs and see Dr. Corwin, the physician in charge. He was taken to the springs, where he remained about a week. On his return, he told defendant that Dr. Corwin had told him that his circulation had been blocked and he could not do anything for him, and that the defendant replied: "He's right." In this connection plaintiff's wife testified as follows:

"A. Dr. Lovas wanted to know what success we had had, and what the doctor had done and said, and Mr. Donahoo told him that Dr. Corwin said that he should never have shot the alcohol in the sciatic nerve, that he had killed the nerve and blocked the circulation, and that was what was causing him pain.

"Q. And what, if anything, did Dr. Lovas reply to that? A. He says, 'He's right.'"

He also told the defendant that Dr. Corwin had advised him to have his teeth X-rayed and the bad ones taken out, although he stated that the teeth had nothing to do with the present condition of his foot, but that this procedure might assist his earlier recovery. The defendant continued to treat the plaintiff oc-

casionally until December, 1927. Plaintiff testified he was not able to go to work until the following July, and that at the time of the trial, in April, 1929, while he was able to walk without crutches, he had not yet full use of his foot, and no control of his ankle.

There was evidence that while the defendant was still treating the plaintiff a consultation was held between the defendant and the first doctor who had treated plaintiff at which both doctors agreed that the plaintiff should have his teeth X-rayed and any bad ones removed; also that some years prior to that the plaintiff had had all of his upper front teeth removed and was wearing a partial upper plate. The evidence showed that the plaintiff had previously been in good health, except that in the year 1922 he was afflicted with influenza and also neuritis in the shoulder. At the close of plaintiff's evidence, the court granted a motion for a nonsuit, and this appeal is from such order and judgment.

The main question here presented is whether or not there was sufficient evidence of negligence on the part of the respondent to justify the submission of the case to the jury. In Hesler v. California Hospital Company, 178 Cal. 764, 174 P. 654, 655, the court said:

"The law on the subject of care and skill required of physicians in the treatment of patients is well settled: 'A physician and surgeon, by taking charge of a case, impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where he practices, and which is ordinarily regarded by those conversant with the employment as necessary to qualify him to engage in the business of practicing medicine and surgery. Upon consenting to treat a patient, it becomes his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed. He is under the further obligation to use his best judgment in exercising his skill and applying his knowledge.' Pike v. Honsinger, 155 N. Y. 209, 63 Am. St. Rep. 655, 49 N. E. 762. 'The difficulties and uncertainties in the practice of medicine and surgery are such that no practitioner can be required to guarantee results, and all the law demands is that he bring and apply to the case in hand that degree of skill, care, knowledge, and attention ordinarily possessed and exercised by practitioners of the medical profession under like circumstances.' Zoterell v. Repp, 187 Mich. 330, 153 N. W. 695. 'It is never enough to show that he has not treated his patient in that mode, nor used those measures, which in the opinion of others, even medical men, the case required, because such evidence tends to prove errors of judgment, for which the defendant is not responsible, as much as the want of reasonable care and skill, for which he may be responsible.' Leighton v. Sargent, 27 N. H. 474, 59 Am. Dec. 388."

[1, 2] Not only must negligence on the part of a physician be proved, but as a general rule, from the very nature of the case, expert evidence is required. Perkins v. Trueblood, 180 Cal. 437, 181 P. 642; Houghton v. Dickson, 29 Cal. App. 321, 155 P. 128; Scherer v. Eidenmuller, 45 Cal. App. 372, 187 P. 445; Markart v. Zeimer, 67 Cal. App. 363, 227 P. 683, 685. No such evidence appears in the record here, except as hereinafter mentioned. An earnest effort is made by appellant to bring his case within this rule, or to establish it as an exception.

[3, 4] It is first contended that expert evidence is not necessary in all cases, and that the numbness and pain suffered by appellant were so clearly the result of the injection of the alcohol that no expert evidence is needed to show negligence. Assuming, however, that such injection was the cause of the subsequent pain, this is not sufficient to establish that the physician was negligent in using that treatment. There is a restricted class of medical cases in which it has been held by the courts that the mere happening of the event raises a presumption of negligence. For instance, where a sponge or surgical instrument is left in the incision, it has been held that the burden was upon the doctor to clear himself. It has also been held, in connection with certain X-ray cases, that, where a dangerous instrumentality is in the possession of a party, the proper and skillful use of which would result in no injury, and where an injury follows the use of the same, negligence on the part of the person having charge thereof may be inferred. No such question is presented by the facts in this case; there being here involved only the question of diagnosis and treatment with a certain drug. Nothing in the nature of the facts herein, takes this case out of the general rule.

[5] It is next claimed that there was some expert evidence going to show the negligence of the defendant. In this respect reliance is placed upon the testimony of the physician who first gave the plaintiff a hypodermic injection, in order to assist him in reaching home, which testimony was as follows:

"A. Yes, sir. Now, from—basing my answer on the history of the case as given by Mr. Gallaher, it seems evident that the symptoms added to Mr. Donahoo's condition immediately after the injection were due to the effect of the injection itself. I think that covers the point."

It is apparent that this testimony goes no further than an opinion that the injection caused the suffering which immediately followed. It neither gives us light upon whether the injection caused the prolonged difficul-

ty later suffered, nor as to whether or not that result, if it was a result, was to have been expected. It does not go to the question as to whether the respondent used the skill ordinarily practiced and used in that community. In this connection it is further urged that the respondent made certain admissions showing that he was negligent, and that, coming from a physician, such admissions constitute expert evidence. This will be treated in discussing the admissions claimed to have been made.

[6] It is next urged that the admissions of the respondent were sufficient to fasten negligence upon him. It is first insisted that his admission that Dr. Corwin was right in asserting that the alcohol should never have been injected into the sciatic nerve is a confession of negligence. In support of this, appellant relies upon the case of Scott v. Sciaroni, 66 Cal. App. 577, 226 P. 827. In that case the physician admitted that the condition of the plaintiff was due to his negligence. We are unable to draw such an inference from the evidence in this case. In the case of Markart v. Zeimer, supra, the court says:

"An admission to be sufficient must be an admission of negligence or lack of the skill ordinarily required for the performance of the work undertaken. This 'wrong operation' may have been deemed right at the time it was performed.

"If it was so mistakenly performed as the result of a bona fide judgment by a qualified surgeon, he will not be held liable for the unfortunate results of his mistake."

[7, 8] The admission in question went no further than an expression based on the results and is of no value in showing whether or not ordinary skill was used in the first place. It is also urged that respondent admitted he should not have used this treatment in the instant case, when he testified that an injection of alcohol into the sciatic nerve "is not done" in mild cases of sciatica. The claim is made that he established this as a mild case, when he testified: "Mild sciaticas—that is where people have it and are walking around and on the job, but still have pain in the sciatic nerve, but they can get around with it." There is evidence that at the time of going to respondent the appellant had been under the care of another physician for some two weeks, that respondent was told that the results were not satisfactory, and that quicker action was wanted. The evidence is uncontradicted that at the time the plaintiff was going about on crutches and was not on the job. Under such circumstances, this evidence cannot be held to be an admission that the plaintiff was suffering from a mild case of sciatica. Although respondent testified that he did not know of any doctors in his locality who employed that method of treating sciatica, there is no evidence that it was not so used, and such evidence as exists is to the effect that this was the usual and customary method of treating sciatica, except in mild cases. Whether or not this was such a mild case was peculiarly a question calling for expert evidence. The respondent himself testified that he regarded the case as a severe one.

[9] Appellant's claim of negligence is not that the injection was improperly performed, but that the treatment itself was improper; it being claimed that the respondent was negligent in making no diagnosis of the case, in giving wrong advice as to the effect of the treatment proposed, in making an injection of alcohol under the circumstances then existing, and in not first applying the methods of treatment ordinarily used in mild cases. Without further proof than the result alone, those matters show no more than a mistaken judgment. More than this is required.

"Under the circumstances, he should not be held liable for what was at most a mistake of judgment in weighing the probable consequences of the different methods that might be pursued. A physician is required to possess only ordinary skill in his profession and to use his best judgment in the exercise of that skill, and, if he complies with these requirements, he is not liable for the nonsuccess of his treatment." Linn v. Piersol, 37 Cal. App. 171, 173 P. 763, 764.

The following language used by the Supreme Court, with slight changes, might well have been used in regard to the case before us: "This action was brought on the theory of negligent diagnosis and care on the part of the defendant, resulting in loss of time, expense, and suffering on the part of the plaintiffs from March until June. The record presents a case of mistaken diagnosis by a reputable physician, without the incidents of carelessness or unskillfulness necessary to constitute actionable negligence. There is an entire absence of evidence that the treatment prescribed on the original diagnosis was improper. A physician is not held to a higher degree of responsibility in making a diagnosis than in prescribing treatment. See Brewer v. Ring, 177 N. C. 476, 99 S. E. 358, 364. When due care, diligence, judgment, and skill are exercised, a mere failure to diagnose correctly does not render a physician liable. Jaeger v. Stratton, 170 Wis. 579, 176 N. W. 61. A mistake in diagnosis in the present case was alleged and proved, and is conceded to have taken place. But it was not only necessary for the plaintiffs to prove such mistake, but also that the mistake was due to failure to exercise ordinary care, diligence, and skill in making the diagnosis. Schumacher v. Murray Hospital, 58 Mont. 447, 193 P. 397, 403. Mere proof that the diagnosis was wrong would not support a verdict." Patterson v. Marcus, 203 Cal. 550, 265 P. 222, 223.

In Markart v. Zeimer, supra, the court says: "Plaintiff's case is founded upon the claim that the operation was negligently performed. This negligence must be made to appear from the evidence in the case. The facts must establish such a condition as would warrant the jury in saying that as a matter of common knowledge the cutting of the cord complained of was an act of negligence, or it must be shown by expert testimony that this act resulted from the failure of the defendants to possess and use that degree of care and skill ordinarily possessed and used by physicians and surgeons in good standing practicing in the same locality."

[10] Appellant argues that the principles laid down in Markart v. Zeimer, supra, do not apply to the case at bar, for the reason that the former involved negligence in the performance of an operation, while the latter relates to the propriety of certain treatment. We see no such distinction. It would seem that whether or not a course of treatment was proper, under the existing circumstances, is as difficult a question for the layman as whether an operation was properly performed, and equally calls for expert testimony. Assuming that plaintiff's later difficulties came from the treatment here complained of, there is no way by which a layman can tell from the evidence whether that was the usual and natural result, or a great exception. Regardless of the result, the evidence leaves us entirely in doubt as to whether the doctor used ordinary skill under the circumstances. All that was alleged in the complaint to have happened might well have happened, as far as any layman may be able to know, if the highest degree of skill and care was used in the treatment. Proof that the treatment did not turn out to be successful is not alone sufficient. It is entirely a question of whether or not respondent, in applying the treatment in question, used that reasonable degree of learning and skill that is ordinarily possessed and used by physicians in that locality. We find no evidence in the record to show that this was not done.

[11, 12] While, in passing upon a motion for a nonsuit, every reasonable inference must be drawn in favor of the plaintiff's evidence, the negligence of the defendant may not be presumed.

"Negligence on the part of a physician or surgeon is not presumed, but must be affirmatively proved. The same is true ordinarily with respect to the possession by the physician or surgeon of the requisite skill and learning. On the contrary, in the absence of evidence on the subject, it will be presumed that a physician or surgeon discharged his full duty to the patient, including the exercise of reasonable care and skill in his treatment." 48 C. J. 1142.

Certain rulings on the admission of evidence are also questioned, but need not be considered, under the view we take of the main issue.

The judgment is affirmed.

We concur: MARKS, J.; OWEN, Justice pro tem.

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105 Cal. App. 645

ROLOFF v. HUNDEBY et al.

Civ. 3875.

District Court of Appeal, Third District. California.

May 14, 1930.

Rehearing Denied June 13, 1930. Hearing Denied by Supreme Court July 7, 1930.

1. Fraud ⟹11(1).

False statements as to location of land in distant state, quantity of timber thereon, and character of soil *held* not mere expressions of opinion.

Defendants represented that land was situated six, instead of eight, miles from certain town, that it was rich, black soil, whereas it was actually sandy, covered with rocks, and untillable, and that there were over 33,000 standing trees thereon, whereas majority of timber had been cut and removed therefrom.

2. Appeal and error ⟹1010(1).

Trial court's findings, supported by competent evidence, that representations were untrue, are conclusive on appeal, though there was evidence warranting different conclusion.

3. Appeal and error ⟹758(3).

Permitting opinion as to value of lands *held* not available error, where record showed only single question and answer and objection made, and transcript of evidence disclosed much other testimony before court not mentioned in brief.

4. Trial ⟹404(1).

Court's fact findings must be reasonably interpreted as whole.

5. Trial ⟹404(2).

Fact finding, inaccurately described as conclusion of law, still stands only as finding of fact.

6. Damages ⟹222.

"Conclusion of law" that plaintiff was entitled to receive stated sum from defendants *held* fact finding, constituting, with finding

that plaintiff was damaged, complete response to issue of damages.

7. Appeal and error ⟹1033(9).

Judgment will not be reversed because appellee was not awarded sufficient damages.

8. Fraud ⟹58(1).

Judgment awarding $881.50 damages for fraudulent representations in procuring exchange of property *held* justified by evidence.

There was evidence that defendants realized $2,475 from sale of plaintiff's land, that defendants' 160 acres were worth $1,600 at most, and also that they were worth from $20 to $25 per acre as against a represented value of $30 per acre.

9. Fraud ⟹59(2).

Measure of damages for deceit in exchange of realty is difference between actual and represented value of property received by defrauded party.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Action by H. C. Roloff against Oscar Hundeby and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Hugh H. Sydenham, of Sacramento, and S. W. Green, of Isleton, for appellants.

Chester F. Gannon and P. H. Johnson, both of Sacramento, for respondent.

PARKER, Justice pro tem.

This is an action for damages for fraudulent representations whereby defendants procured an exchange of property between themselves and the plaintiff. Defendants appeal from a judgment in favor of the plaintiff. The appeal presents questions of mixed law and fact which necessitates somewhat of a review of the case as found.

While appellants concede the finality of the trial court's determination on the conflicting facts, at the same time they ignore the court's findings, and base their arguments as to the sufficiency of the evidence upon their view of the evidence in the light most favorable to them. We will not attempt to follow them in this particular. There was sufficient competent evidence to establish the facts as they will be herein narrated.

Plaintiff was a man wholly unfamiliar with business affairs. He was a plasterer by trade, and it was while he was engaged in plastering a church that he met defendant Hundeby. Hundeby was on the building committee of the church, and as a member of that committee had employed the plaintiff, and to that extent supervised the work of the mechanics. Continuing the acquaintance thus made, Hundeby called upon plaintiff at the latter's home, and suggested to him a trade or exchange of properties whereby plaintiff would secure a ranch in Minnesota, and defendant would obtain the land of plaintiff in Sacramento county. Defendant Hundeby stated that his sisters owned 160 acres in Minnesota, and that the family was desirous to trade the Minnesota property for California property because the latter could be used in the Los Angeles deal. Hundeby told plaintiff that he would find out all of the details concerning the Minnesota land and would advise him thereon. Accordingly, after a brief lapse of time, Hundeby again visited the plaintiff and told him that he had heard from his sisters, and he then gave him more details of the Minnesota property. He told him that the property consisted of 160 acres of good timber land, though he did not know how many trees were on the land, but that he would get that data. He said further that his father was a good judge of land, and that the father had selected this particular tract of land for his heirs. He said further: "You can depend upon my word; it is true what I am telling you."

Thereafter Hundeby called upon plaintiff, bringing with him a written description of the Minnesota property. The written description is as follows: "Copy of Martin's description to me. S. W. ¼ Sec. 23, Twp. 42, Range 17, 160 acres, Pine Co. Six miles west of Marksville, Minn. (Pine county) on the Soo Ry. Fifty miles south of Duluth and about 100 miles north of Minneapolis. Main road along west side connects 1½ miles north with State Highway-Marksville to Sandstone. Rich black soil about a foot deep, and clay sub-soil about 3 feet. Gently rolling land, mostly fairly easily cleared. About 15,000 standing White Pine—10,000 Basswood and 8,000 Red Oak; also considerable Birch and Hard Maple cord-wood. Some rocks on surface only. Small river runs through northwest corner. Similar unimproved land in this section selling at about $30.00 per acre." After further discussions, plaintiff stated to defendant Hundeby that the trade would be made providing everything was as represented, whereupon Hundeby again assured him: "You can depend upon my word—my father was an expert on land, and he picked this land out for his heirs." Hundeby stated the land was worth $30 per acre. He explained the written description of the land, and stated that it was a true description, and that he used to live back in Minnesota, many times assuring plaintiff that he could rely upon his word. Thereafter the trade was made, and relying upon the representations made by Hundeby, plaintiff exchanged his property for the Minnesota land.

[1] Appellant first contends that, if it is held that all of these statements were made, yet they cannot be held to be representations, the truth or falsity of which could in any wise affect the transaction; in other words, that they were merely matters of opinion. The case of Herdan v. Hanson, 182 Cal. 540, 189 P. 440, 444, furnishes a complete answer to this contention. There the general rule is stated as follows: "When a statement concerning a subject-matter of a transaction, which might otherwise be only an expression of opinion, is affirmed as an existing fact material to the transaction and reasonably induces the other party to consider and rely upon it as a fact, the statement then becomes an affirmation of fact within the meaning of the general rule as to fraudulent representations. * * * This rule is frequently, and properly, applied to statements concerning the value of land at a distance when the party to whom the statements are made possesses no other information and is not in a position to investigate. * * * Whether the statements as to value in this case were affirmed in such a manner as to permit reliance upon them by plaintiff as statements of actual facts within the knowledge of defendant, * * * were questions of fact for the determination of the trial court." The rule is affirmed in the following cases: Harris v. Miller, 196 Cal. 13, 235 P. 981; Cole Bros. v. Dimmick, 89 Cal. App. 525, 264 P. 1112; Colt v. Freitas, 76 Cal. App. 286, 244 P. 916. In Haserot v. Keller, 67 Cal. App. 659–670, 228 P. 383, 388, it is said: "When one of the parties possesses, or assumes to possess, superior knowledge or special information regarding the subject-matter of the representation, and the other party is so situated that he may reasonably rely upon such supposed superior knowledge or special information, a representation made by the party possessing or assuming to possess such knowledge or information, though it might be regarded as but the expression of an opinion if made by any other person, is not excused if it be false." These authorities, so uniform and clear, leave no room for speculation. We conclude that appellants' first contention is without merit.

[2] Next, appellants contend that, if the statements are classed as material representations, then plaintiff has failed to prove wherein these statements are untrue. This contention is necessarily argumentative, and leads us directly into the field of disputed fact. The trial court found that the representations made by defendants that the land was situated six miles from Marksville was not true, but that it was situated eight miles therefrom. The court further found that the representations were untrue in that, as a matter of fact and in truth, the majority of all timber had been cut and removed from the land, and that said land was not rich, black soil, but was sandy, covered with rocks, and untillable, that said representations were known to defendants to be untrue, and made for the purpose of deceiving and defrauding plaintiff, and that said plaintiff relied thereon, and was deceived and defrauded. The court's findings are amply supported by competent evidence. True, there was evidence from which the court might have reached a different conclusion. This however, is not our concern here. Hotaling v. Hotaling, 187 Cal. 699, 203 P. 745. Therefore, we see no merit in this second contention of the appellants.

[3] The next argument of appellants merits little consideration for many reasons. It is argued that the court erred in permitting a witness to give his opinion as to the value of certain lands in question. There is nothing in the record before us to indicate the error complained of. All that appears is the single question and answer, and appellants' objection, that no proper foundation had been laid. The transcript of evidence, no portion of which appears in or as an appendix to the brief, discloses that much other testimony was before the court, and, even if we assume that the evidence objected to was inadmissible, we can discover no resulting injury to have followed the error.

[4-6] Lastly, appellants contend that the findings of fact are insufficient to support the judgment, and that the court below failed to find in response to the material issues. It is claimed that there is no finding of fact as to the amount of damages. The findings of fact and conclusions of law are prepared as one document. The court finds on all of the facts up to the fact of damages, and the sole finding thereon which is embraced within that category labeled "Findings of Fact," is finding XII, which reads thus: "That plaintiff has been damaged by reason of the fraud and deceit practiced upon him by said defendants." Then follows certain paragraphs under the heading, "Conclusions of Law," and the first so-called conclusion is: "That plaintiff is entitled to receive of and from said defendants the sum of Eight Hundred Eighty-one and 50/100 ($881.50) Dollars." This is all we find on the question of damages or the amount thereof.

The matter of findings has always presented difficulties to the courts and to the profession. Formerly the requirements were strict, and the decisions held the parties to strict compliance therewith. Much apparent injustice resulted until there was a somewhat well-reasoned and well-supported effort to secure legislation which would dispense with findings entirely. However, it was determined that much harm could result from the absence of findings on the issues. Yet the potential evils of a too strict construction having become manifest, the policy of courts of review became one of reasonable

interpretation of the findings as a whole, and that policy continues to the present day. Likewise it is true that the matter of findings became of such importance that it was incorporated with our organic law. Const. of Cal., art. 6, § 4¾. The mechanical features of the findings are of little importance. If the court inaccurately describes a finding of fact as a conclusion of law, it still stands only as a finding of fact. The case of Jessen v. Peterson Co., 18 Cal. App. 352, 123 P. 219, is squarely in point, and the mere citation suffices, without attempting quotation therefrom. Pursuant to the rule there announced we may, and must, consider the so-called conclusion of law as in reality a finding of fact, and as such, coupled with the finding quoted, it makes a complete response to the issue of damages. See, also, Berry v. Crowell, 55 Cal. App. 537, 203 P. 835; Erskine v. Marchant, 37 Cal. App. 590, 174 P. 74; Krasky v. Wollpert, 134 Cal. 338, 66 P. 309; Hulen v. Stuart, 191 Cal. 571, 217 P. 750.

[7-9] It is finally contended there are no findings of fact as to the values of the different pieces of property, and therefore it cannot be determined in what manner the court arrived at the finding of plaintiff's damages in the sum of $881.50. Defendant's chief ground of complaint here seems to be that the court did not find the damage to be in a much larger amount. In fact, they claim that the proper amount that should have been awarded plaintiff was some $19,000. Appellants may be reminded that there still remains the "court of conscience," with themselves as judges. If they insist that the plaintiff has not been sufficiently compensated for the fraud perpetrated upon him, it is not unlawful for them to make voluntary payment of any additional sum. As a matter of review, however, a judgment will not be reversed merely because it appears therefrom that the appellants have been unduly advantaged thereby. Cal. Jur. 1928, Supp. p. 149, § 493, and authorities cited thereunder.

The evidence before the court, in values, covered a wide range. The plaintiff's land embraced some fifteen acres, the value of which, from the record, might be anywhere from $50 per acre to $165 per acre, making a gross range from $750 to $2,475. The value of the Minnesota lands, as the testimony discloses, might run from $5 per acre to $25 per acre, with the gross of 160 acres from $800 to $4,000. The trial court, in applying the measure of damages as the difference in values of the two pieces, arrived at the sum named, to wit, $881.50. Doubtless the court had in mind the fact that defendants realized from the sale of plaintiff's land the sum of $2,475, and, placing the highest value of $1,600 on defendants' lands, as testified to by reliable witnesses, found the sum indicated.

It is true that the difference in values is not the true measure of damages, but the Supreme Court has said in Wood v. Niemeyer, 185 Cal. 526, 197 P. 795: "It is a settled rule of law in this state applicable to actions for deceit in the sale or exchange of real estate that the plaintiff, as the party found to have been defrauded, is entitled to recover the difference between the actual value of the property which he received and the value which it would have had if the defendant's representations as to the value thereof had been true." In the same case, answering a contention that the wrong measure of damages had been applied, the court says that appellant has but little cause for complaint as to the amount of damages awarded, when, as a matter of law, upon the facts found, the trial court should have awarded the plaintiff much more, where the award was on a mistaken theory that the measure of damages was the difference between the actual value of the exchanged properties. Again, in the instant case, if we take the view that the court did adopt the true measure of damages, as stated, there is evidence that the land of appellants was actually worth from $20 to $25 per acre, as against a represented value of $30 per acre, which would make the amount of damage figure as awarded.

The views herein announced find ample support in the authorities cited, supra. In addition thereto it has been held that a trial court need not, in its findings, diagram its process of computation. Erskine v. Marchant, 37 Cal. App. 590, 174 P. 74; Klegman v. Moyer, 91 Cal. App. 346, 266 P. 1009. Let it not be understood that we approve this loose method of preparing findings upon which a judgment must rest. Far from it. While such looseness may, after scrutiny, be declared harmless or subject to an interpretation based upon the presumption of the validity of the judgment, yet in its general effect upon the law itself it is harmful and tends to disintegrate the rules of safe procedure. Questions of value are almost always matters of opinion, and evidence thereon usually goes no further than to give the court more or less general ideas on the subject. From the evidence thus received a trial court must draw its own conclusions of value by a process of balancing and reconciling, if possible, the varying opinions. Rarely, if ever, can the true rule of the measure of damages work out in these cases. Too often an anxious trader makes representations which, if true, would make his property worth millions of dollars in an exchange which, at most, involves only a small sum. Therefore the trial court, in an effort to attain an even justice, often exercises a wide discretion in awarding damages. We do not hold that the trial court may indulge this discretion against the plain mandates of the law, but we do hold that, where the only complaint arising from such a course is the claim of defendants that plaintiff has not been

awarded a sufficient sum as damages, the judgment will not be disturbed.

No other points are urged.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; THOMPSON, J.

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105 Cal. App. 632

STARR v. DAVIS.

Civ. 3618.

District Court of Appeal, Third District, California.

May 14, 1930.

1. Sales ⟹65.

Buyer's liability on note did not cease on proof of seller's violation of covenant to refrain from competition.

Buyer contended that agreement of seller to refrain from entering into similar business in territory named was a component and indivisible part of agreement of sale, and that upon violation of that covenant the entire agreement fell, and that buyer was under no liability on notes sued on.

2. Reformation of instruments ⟹17(1).

Contract to sell business should be reformed to state correct name of firm having contract with seller which buyer, knowing name inserted was incorrect, agreed to accept (Civ. Code § 3399).

Civ. Code, § 3399, provides that contract may be revised to express intention of parties, where through mistake of one party, which the other knew or suspected, written contract does not truly express intention of parties. When details of the proposed trade were discussed, buyer was informed there was an outstanding contract obligating seller, and it was understood that unless buyer accepted such obligation there would be no deal, but when provision was inserted in contract, seller mistakenly insisted that contract was with certain firm when as matter of fact it was with another organization, and buyer knew that contract was not with company whose name was inserted.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by George H. Starr against C. J. Davis on a promissory note. From a judgment for plaintiff, defendant appeals.

Affirmed.

Samuel V. Cornell, of Turlock, for appellant.

W. Coburn Cook, of Turlock, for respondent.

PARKER, Justice pro tem.

Plaintiff sued to recover a balance due upon a promissory note executed and delivered by defendant. Defendant, answering, admitted the execution of the note and the nonpayment of the balance sued for. Defendant alleged, however, that the consideration for the note arose out of a certain transaction involving the sale to him by plaintiff of a retail florist business in the city of Turlock. Defendant then further alleged that in the sale aforesaid plaintiff had, by written agreement, bound himself to refrain from engaging in any similar business within the city of Turlock, for a specified period ending in August, 1927, and that plaintiff had violated the terms of said agreement, to the damage of defendant. By cross-complaint defendant further sought recovery of the amount of damage accruing from the said violation of the agreement to refrain from such business. By stipulation of counsel, plaintiff was then permitted to amend his complaint by adding thereto another cause of action, wherein plaintiff sought to have the agreement of sale reformed in certain particulars. In this connection plaintiff averred that at the time of the sale he had obligated himself by an advertising contract with the Society of American Florists and Ornamental Horticulturists, which contract called for the payment by plaintiff of certain installments running into a period subsequent to the date of sale. He alleges that this was explained to defendant at the time of sale and before, and thoroughly understood by all parties, defendant having been formerly in the same line of retailing flowers. That it was mutually agreed that this liability of plaintiff should be assumed by defendant, but that in the preparation of the contract, by mutual mistake, the name of the advertising company was therein inserted as "Florists Telegraph Delivery Association," a concern with whom the plaintiff had no outstanding liabilities or contract. Plaintiff asked the reformation of the agreement and prayed that when so reformed he have judgment against defendant for the moneys paid on the advertising contract by plaintiff for the use and benefit of defendant.

By further pleading, defendant set up that the agreement of plaintiff to refrain from entering into a similar business in the territory named was a component and indivisible part of the agreement of sale, and that upon a violation of that covenant the entire agreement fell, and defendant was under no liability on the note sued upon. After trial of the issues thus raised, the trial court determined that the original agreement should be reformed as

prayed by plaintiff, and that in addition to the balance found due on the note, plaintiff was entitled to recover the amount expended for the benefit of defendant under the advertising contract assumed by defendant. As a set-off the court allowed defendant the sum of $400 as damages resulting to defendant from plaintiff's covenant to refrain from competition. Injunctive relief against a further violation by plaintiff was out of the case by reason of the fact that the time limit restricting plaintiff had expired. Judgment was entered accordingly, and defendant appeals.

[1] Appellant's first contention is that upon proof of the violation by plaintiff of the covenant to refrain from competition, the liability of defendant upon the note then and there ceased. Appellant's theory is that the agreement of sale and the note given as the balance of the purchase price was a single and inseparable transaction, and that they were mutual dependent covenants, forming one contract, the consideration of which went to the whole thereof, and the breach of the material covenant by plaintiff in hindering the good will of the business bought, was such a failure of consideration as to excuse the performance of payment of the note by appellant. Appellant contents himself with the bare statement of his contention without citation of applicable authority, but when he comes to another point concerning the relationship of the covenant to assume the advertising contract, he then cites general principles that he contends should control, and then argues both ways. It is our holding that this contention is not well grounded.

Taking up the contention of appellant at the outset, in a broad general way, the effect of upholding it would be to say that as a penalty for plaintiff's breach, defendant might keep the business without paying therefor. In other words, that if "A" purchased a business from "B," agreeing to pay therefor $10,000, and paying at the time of agreement merely $100 with promissory notes for the balance, and "B" had agreed not to carry on a similar business within legally permissible limits, then upon "B's" slightest breach of this covenant "A" should retain the business and be absolved from the obligation evidenced by the notes. Such is not the law.

While this mere declaration suffices the needs hereof, yet in our own jurisdiction is abundant authority sustaining the conclusion, and but a few citations need be given. In Ernst v. Cummings, 55 Cal. 179–183, 184, we find the following: "The question, whether acts stipulated for are such as that the performance of them is a condition precedent to the right to enforce performance by the other party to a contract, is to be solved, not by any technical rules, but by ascertaining, if possible, the intention of the parties. When a covenant or promise goes only to a part of the consideration, and a breach thereof may be paid for in damages, it is an independent covenant or promise. * * * The intention of the parties is to be discovered rather from the order of time in which the acts are to be done, than from the structure of the instrument, or the arrangement of the covenants." In Fresno Canal Co. v. Perrin, 170 Cal. page 416, 149 P. 805, 807, the court says: "Where the covenants of the respective parties are to be performed at different times they are held to be independent." Also, in Front St. M. & O. R. Co. v. Butler, 50 Cal. 574, it is said: "The payment of money cannot be made dependent on the performance by the other party of a condition, which, by the very terms of the contract, is not to be performed, or may not be performed until after the date at which the money is to be paid. Courts are disinclined, as was observed by the Court of Appeals of New York ([Tipton v. Feitner], 20 N. Y. 432), to construe the stipulations of a contract as conditions precedent, unless compelled by the language of the contract plainly expressed. The reason of this disinclination is that such a construction prevents the court from dealing out justice to the parties according to the equities of the case."

Applying the law of the cited cases, it must be manifest that it would be only through a process of forced reasoning and strained conclusions that it could be said that a promise to pay money in one year from date should be concurrent with a covenant to refrain from competitive business for a period of two years. Such a holding would entirely nullify the note and contradict its terms, inasmuch as the promise to pay in one year would mean that such payment was not due until the expiration of the two-year period of restraint. If the principle contended for by appellant were sound, it might and could result in a situation where a purchaser on deferred payments would receive a large business with the profits of years as a penalty, from a violation of such a covenant which actually damaged him in the amount of $100. By the same reasoning, it might easily happen that the buyer, prior to the due date of the note, might sell the business at a profit and retain the fruits of the sale, and then resist payment of the note on the same defense as here presented.

It is our view that where, as here, law, justice, and common sense combine to combat appellant's argument, no fanciful or imaginary theories can prevail. We might add, however, that we are not dealing with a case of attempted rescission; nor is there any question of fraud or misrepresentation involved in this issue.

[2] As to appellant's second ground of appeal, a mere recital of the facts is almost sufficient. At the time of the transaction under discussion, defendant was employed by plaintiff. Defendant was experienced as a florist and a retailer of flowers, he having formerly been engaged in the business on his own ac-

count. When the details of the proposed trade were being discussed, the subject of outstanding advertising contracts was brought up. Defendant was informed over and over that there was an outstanding contract obligating plaintiff in the sum of $360, accruing at stated periods in the future. It was definitely determined, understood, and agreed that unless defendant accepted this obligation there would be no deal. Then, when it came to inserting this provision in the contract, plaintiff mistakenly insisted that the contract was with the Florists Telegraph Delivery, when as a matter of fact it was with the Ornamental Florists, etc., organization. There were several discussions on this matter; defendant always insisting that he thoroughly understood the nature of the Telegraph Delivery concern, and that he knew that the contract was not with such company. Finally, defendant, knowing what he did, consented that the Telegraph Delivery be inserted as the name of the advertising concern, assured that such an insertion was meaningless. Mindful of the fact that defendant did agree to accept the obligations of the advertising contract, with knowledge of its terms and amount, it follows that the name of the creditor was but an incident. Plaintiff's right to reformation is apparent from a mere reading of the code section. Civil Code, § 3399, reads: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." This section has been frequently construed. Schirmer v. Union Co., 26 Cal. App. 169, 146 P. 194; Higgins v. Parsons, 65 Cal. 280, 3 P. 881; Merkle v. Merkle, 85 Cal. App. 87–105, 258 P. 969; Dunham v. McDonald, 34 Cal. App. 744–747, 168 P. 1063; L. A. & R. R. Co. v. New Liverpool Co., 150 Cal. 21, 87 P. 1029.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

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105 Cal. App. 714

Ex parte HORIUCHI et al.

Cr. 202.

District Court of Appeal, Fourth District, California.

May 19, 1930.

1. Criminal law ⟹1148.

Discretion of court in fixing bail will not be interfered with, unless it appears per se that amount is unreasonably great or clearly disproportionate to offense involved.

2. Bail ⟹49.

For purpose of fixing bail, reviewing court will assume guilt of accused.

3. Bail ⟹51.

Court, in considering the amount of bail, must consider character of crimes, moral turpitude involved, dangerous results to public from their commission, and punishment authorized by law.

4. Bail ⟹52.

$15,000 bail for each defendant indicted for crime of criminal syndicalism *held* not excessive (Criminal Syndicalism Act, § 2, subds. 1, 2, 4).

> The indictment charged that defendants did unlawfully and feloniously publish, issue, circulate, and publicly display certain books, papers, pamphlets, documents, posters, and written and printed matter carrying written and printed advocacy of teaching and aid and abetment of, and advising, criminal syndicalism, to wit, by spoken words and personal conduct advocating terrorism and advising commission of crime, sabotage, and other willful and malicious damage and injury to property, and particularly advocating the overthrow of the United States government by means of force and violence.

Original application of Tsuji Horiuchi and others for a writ of habeas corpus prayed to be directed to the Sheriff of Imperial County to secure reduction of petitioners' bail.

Writ discharged, and petitioners remanded.

David Sokol and Leo Gallagher, both of Los Angeles, for petitioners.

Elmer W. Heald, Dist. Atty., and Clarence B. Smith, Deputy Dist. Atty., both of El Centro, for respondent.

AMES, Justice pro tem.

The petitioners, fourteen in number, were indicted by the grand jury of the county of Imperial for the crime of criminal syndicalism, as defined by an act of the Legislature known as the "Criminal Syndicalism Act," approved April 30, 1919 (St. 1919, p. 281). Upon their arraignment the superior court fixed their bail at $15,000 each. They thereupon sued out a writ of habeas corpus from this court, and the sole question to be determined is whether or not the amount of bail fixed by the superior court is excessive.

[1] It is well settled by the decisions in this state that the Supreme and appellate courts will not interfere with the discretion exercised by the court in which the indictment was

found, in the matter of fixing the amount of bail, unless it should appear per se that the amount so fixed is unreasonably great and clearly disproportionate to the offense involved. In re Williams, 82 Cal. 183, 23 P. 118. It is said in the case of Ex parte Ruef, 7 Cal. App. 750, 96 P. 24, 25, that "it is not sufficient that this court might originally have deemed a lesser amount sufficient. It must clearly appear that the trial court has abused its discretion before this court will reduce the amount." Ex parte Duncan, 54 Cal. 75; Ex parte Duncan, 53 Cal. 410.

[2] For the purpose of fixing the amount of bail this court will assume the guilt of the accused. In Ex parte Duncan, 53 Cal. 410, the Supreme Court said: "We must assume in this proceeding that the petitioner is guilty of the ten distinct felonies of which he is indicted. We must assume his guilt, though when he shall be tried it may be made to appear that he is wholly innocent of all the charges." Ex parte Ryan, 44 Cal. 558; Ex parte Ruef, 7 Cal. App. 750, 96 P. 24.

[3] Another question to be weighed by this court in reviewing the order by the superior court is the character of the crimes with which the petitioners are charged, the moral turpitude involved, and the dangerous results to the public from their commission, as well as the punishment imposed or authorized by law. In re Williams, 82 Cal. 183, 23 P. 118.

[4] In the light of the principles announced in the foregoing decisions, an examination of the indictment found in this case will be enlightening. It contains three counts, the first one of which was drawn under subdivision 4 of section 2 of the act of the Legislature above cited. The second count charges the commission of the crime of criminal syndicalism in the language of subdivisions 1 and 2 of section 2 of said act, and further amplifies the charges against said petitioners in the following language: "Did then and there willfully, unlawfully and feloniously publish, issue, circulate, and publicly display certain books, papers, pamphlets, documents, posters and written and printed matter in other forms containing and carrying written and printed advocacy of teaching and aid and abetment of, and advising criminal syndicalism, to-wit, by spoken words and personal conduct advocating terrorism and advising the commission of crime, sabotage and other willful and malicious damage and injury to property and particularly advocating the overthrow of the United States Government by means of force and violence, and advocating unlawful destruction of cantaloupe shipping sheds in Imperial County, cantaloupe crops and railroad property in Imperial County, and by advocating unlawful picketing of sheds and fields in Imperial County, and by advocating personal violence to all peace officers, militia and all other law enforcement officers and persons who might attempt to intercede against them and other unlawful acts of force and violence and unlawful methods of terrorism as a means of accomplishing a change in industrial ownership and control or to effect political changes." This allegation is followed by a list of titles of twenty-seven pamphlets, circulars, and publications which from the allegations in the indictment would appear to be of an extremely incendiary character, and which it is alleged were published and circulated by petitioners for the purpose of promoting their unlawful objects.

The third count in the indictment alleges a conspiracy on the part of petitioners to use force and violence and unlawful methods, sabotage, strikes, and boycotts to bring about a change in industrial ownership and control, and as a part of such plan, scheme, and agreement to teach, advocate, and overthrow the United States government, and the unlawful use of force and violence and the unlawful destruction of property, and the unlawful picketing of sheds and fields in Imperial county, and the aiding and abetting, committing and attempting to commit, criminal syndicalism, sabotage, violence, unlawful methods of terrorism, strikes, and boycotts as a means of accomplishing a change in industrial ownership and control.

In determining whether or not the amount of bail fixed by the superior court is excessive, it must be further borne in mind that each of the offenses with which petitioners are charged is defined by the statutes as a felony, for which the punishment prescribed is imprisonment in the state prison for not less than one nor more than fourteen years.

At the oral argument upon the return of the writ counsel for the petitioners stated that "it is true that these defendants tried to promote a strike down in Imperial Valley but a strike is not illegal as far as I know." While this statement of counsel, standing by itself, may not be important, yet, when viewed in the light of the allegations in the indictment, it becomes significant. After taking into consideration the gravity of the offenses charged, and accepting the same as true, which we are bound to do, together with the severe penalties which may be imposed by law as punishment for the crimes charged, we are not prepared to say that the amount of bail fixed by the superior court is per se unreasonably great nor clearly disproportionate to the offenses involved.

It is therefore ordered that the writ be discharged, and the petitioners remanded to the custody of the sheriff of Imperial county.

We concur: MARKS, Acting P. J.; BARNARD, J.

105 Cal. App. 777

DAVIS v. FANNY BRIGGS CARR, Inc.

Civ. 5935.

District Court of Appeal, Second District. Division 2, California.

May 21, 1930.

1. Corporations ⟹308(11).

Evidence *held* to support judgment against corporation for services under oral agreement with sole owner of business.

The full board was present when plaintiff presented his statement and consented to a reduction in salary, and such statement was presented to sole owner of business as president, and he made no objection. Plaintiff assisted in the incorporation of the business and became one of the three directors.

2. Evidence ⟹271(18).

In action against corporation for salary, books *held* not inadmissible as self-serving, though plaintiff had made entries therein.

The entries were part of the general bookkeeping system of which plaintiff had entire charge. It was not contended that they were private memoranda, that they were inaccurate, or made otherwise than in plaintiff's regular line of duty and course of business.

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by Guy S. Davis against Fanny Briggs Carr, Inc. Judgment for plaintiff, and defendant appeals.

Affirmed.

L. V. Beaulieu, of Los Angeles, for appellant.

Warner I. Praul, of Los Angeles, for respondent.

CRAIG, Acting P. J.

In an action for salary alleged to have been earned by the plaintiff in the defendant's employment, judgment was rendered in his favor, and this is an appeal therefrom.

It appears that the respondent, while in the service of one Fanny Briggs Carr, assisted in the incorporation of her business, and became one of its three directors, and thereafter until March 1, 1926, performed the duties of general manager, secretary and treasurer, and bookkeeper. He testified that up until December 31, 1925, he was employed at an agreed salary of $300 per month, and that thereafter his compensation was $200 per month, which he personally entered upon the books, but that he received only portions of his earnings, as needed, leaving at the time suit was filed an aggregate unpaid balance which the trial court found to be the sum of $1,334.60.

[1] The minutes of directors' meetings are silent as to respondent's employment, and the appellant assigns this fact as a ground for the claim that evidence thereof was inadmissible, and that it was error upon the part of the trial court to find that a legal contract of such employment existed for which compensation could be allowed. It is incidentally asserted that he was a member of the firm, and that there had at first been an understanding that he should receive corporate stock for services rendered. However, it is admitted that the stock was canceled, and that all of the business, good will, and capital stock was owned by Fanny Briggs Carr is not denied. It appears that the sole purpose of incorporating was for the continuance and expansion of her business. She and respondent discussed the subject of salary prior to and succeeding the date of incorporation. At a directors' meeting in January, 1926, he presented a stated account of the items of unpaid salary, at the rate of $300 per month, and it was then agreed that for services to be rendered in the future he should receive but $200 per month. Appellant seeks to rely upon provisions of the Civil Code requiring the affirmance of contracts with corporations by action of the directors, and insists that a vote of that body was requisite to legal employment of the respondent. But it was positively testified that all of the business, including his services, was following incorporation maintained as before, and in accordance with an express oral agreement with Mrs. Carr in person; that the full board were present when he presented his statement and consented to a reduction in salary; and that said statement was so presented to her as president, to which she made no objection. Since the president of the corporation was sole owner of the business whose corporate form constituted a difference in name only of a continuing enterprise, we think the evidence ample to justify rendition of the judgment against the corporation. Reardon v. Richmond Land Co., 21 Cal. App. 357, 131 P. 894; Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 227 P. 723.

[2] The only remaining point urged requiring serious attention is that the books were inadmissible for the reason that respondent had made the entries therein, and hence that they were self-serving. It is not contended that they were private memoranda, that they were inaccurate, or made otherwise than in respondent's regular line of duty, in the course of business. That such entries were but a part of the general bookkeeping system of which respondent had entire charge, and represented debits and credits among numerous similar transactions involving services of all employees, is apparent from portions of the books embraced in the record before us. It

was also testified that Mrs. Carr had inspected the books at various times, and that she had never questioned them in this respect. There is no merit in this contention.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; GATES, Justice pro tem.

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105 Cal. App. 689

SAMMON v. WING et al.

Civ. 4098.

District Court of Appeal, Third District, California.

May 16, 1930.

1. Municipal corporations ⚷572.

Statute regulating foreclosure of lien of street improvement bond *held* to require, prior to 1927 amendment, personal demand as prerequisite to recovering attorney's fee (Improvement Act 1911, §§ 59, 78, and § 27, as amended by St. 1923, p. 117, § 6, and by St. 1927, p. 1408, § 4; § 76, as amended by St. 1921, p. 297, § 10).

Improvement Act 1911 (St. 1911, p. 730) § 27, as amended by St. 1923, p. 117, § 6, and by St. 1927, p. 1408, § 4, which relate to the foreclosure of the lien of delinquent assessments, originally provided that, where personal demand had been made upon the property owner or his agent, but not otherwise, plaintiff could recover attorney's fee. Section 59 (St. 1911, p. 758) authorizes bonds to represent assessments for improvements, and section 76, as amended by St. 1921, p. 297, § 10, declares that a suit to foreclose the lien of a bond may be maintained in the same manner as provided for the foreclosure of the lien of delinquent assessments.

2. Constitutional law ⚷185.

If amendment eliminating personal demand theretofore prerequisite to recovering attorney's fee when foreclosing lien of street improvement bond operated retroactively, contract obligation would be unconstitutionally impaired (Improvement Act 1911, §§ 59, 78, and § 27, as amended by St. 1923, p. 117, § 6, and by St. 1927, p. 1408, § 4; § 76, as amended by St. 1921, p. 297, § 10).

Appeal from Superior Court, Los Angeles County; Edward W. Engs, Judge.

Action by J. H. Sammon against Chas. A. Wing and others. From a judgment granting partial relief to plaintiff, he appeals.

Affirmed.

Geo. W. Wright, of Los Angeles, for appellant.

Marshall Stimson, of Los Angeles, for respondents.

FINCH, P. J.

[1] This is an action to foreclose the lien of a street improvement bond issued by the city of Santa Monica in the year 1926 under the Improvement Act of 1911 (St. 1911, p. 730, as amended). The action was commenced September 6, 1927. Judgment was entered in favor of the plaintiff for the relief demanded, except that nothing was allowed as attorney's fee for the prosecution of the action, the plaintiff having made no demand for payment of the bond upon the owner or his agent prior to the commencement of the action. The plaintiff has appealed from the judgment. There is no dispute as to the facts, and the sole question presented by the appeal is whether, under the conceded facts, the plaintiff is entitled to recover any attorney's fee. At the time the bond was issued section 27, included in part 1 of the act, provided for a suit by the contractor or his assignee against the owner of land assessed for an improvement to recover the amount of any delinquent assessment. That section further provided: "And in all cases of recovery under the provisions of this act, where personal demand has been made upon the owner or his agent, but not otherwise, the plaintiff shall recover such sum as the court may fix, in addition to the taxable cost as attorney's fees. * * * And when suit has been brought, after a personal demand has been made, and refusal to pay such assessment so demanded, the plaintiff shall be entitled to have and recover such attorney's fees as the court may deem reasonable, in addition to all taxable costs, notwithstanding that the suit may be settled or a tender may be made before a recovery in said action." St. 1923, p. 117, § 6.

Part 3 of the act (section 59) authorizes the city council of a municipality to provide for the issuance of serial bonds "to represent assessments of twenty-five dollars or over for the cost of any work or improvement authorized in part 1 of this act," and provides for the payment of any such bond by the property owner to the city treasurer and for the sale by the treasurer of the land upon which the bond is a lien, in case of default in payment thereof, upon the demand of the holder of the bond. Section 76, in part 3, then read as follows: "In the event of the nonpayment of any installment of the interest or principal and by way of a separate, distinct and cumulative remedy, the holder of any bond upon which any payment either upon the principal or of the interest has not, or shall not be made when due, may file and maintain a suit to foreclose the lien of the bond in the same manner pro-

vided in this act for the foreclosure of the lien of delinquent assessments. * * * The court shall also fix and allow a reasonable attorney's fee for the prosecution of said suit. * * * Such action shall be governed and regulated by the provisions hereof, and also when not in conflict herewith, by the codes of this state." St. 1921, p. 297, § 10.

Section 78, also in part 3, has remained unchanged since the enactment of the statute. It provides: "All provisions of part 1 of this act not inconsistent with the provisions hereof shall apply hereto."

It may be conceded that the foregoing language of section 78 is of uncertain meaning. By the express language of section 27, however, the provision thereof that attorney's fees can be allowed only in cases "where personal demand has been made upon the owner or his agent" is made applicable "in all cases of recovery under the provisions of this act." The conclusion that the provision last quoted is applicable to all cases is fortified by the provision of section 76 that a suit to foreclose the lien of a bond is to be maintained "in the same manner provided in this act for the foreclosure of the lien of delinquent assessments." It follows that, if the case is to be governed by the law as it stood at the time the bond in suit was issued, the judgment must be affirmed.

[2] Section 27 was amended in 1927 (St. 1927, p. 1408, § 4), and the amendment eliminates the provision that personal demand upon the owner or his agent is a necessary prerequisite to the plaintiff's right to an attorney's fee. Appellant contends that the amended law is controlling in this case, that the amendment affects the remedy only and does not impair the obligation of the contract on which the suit is based.

"It is immaterial whether the obligation of a contract is impaired by acting on the remedy or directly upon the contract. Impairment in either case is prohibited by the Constitution. * * * Any law which enlarges, abridges, or in any manner changes the intention of the parties, resulting from the stipulations in the contract, necessarily impairs it; whether the law professes to apply to the contract itself, or to regulate the remedy, it is equally within the true meaning of the Constitution if it in effect impairs the obligation of existing contracts." 6 R. C. L. 356.

"A street assessment is a contract, and the provisions of the statute in force at the time prescribing the manner of its enforcement are a part of such contract. * * * The bond issued upon such assessment * * * must therefore also constitute a contract. * * * Not only is the bond and the statute a contract, but it is a contract forced upon the parties by the compulsion of law enacted in pursuance of the taxing power of the state." Chapman v. Jocelyn, 182 Cal. 294, 297, 187 P. 962, 963.

Prior to the amendment of section 76 in 1921 (St. 1921, p. 297, § 10), the holder of a street improvement bond under the act of 1911 could not maintain a suit to foreclose the lien of his bond. In Jeffreys v. Point Richmond Canal, etc., Co., 202 Cal. 290, 260 P. 548, 549, the plaintiff, after the amendment of 1921, sued to foreclose the lien of improvement bonds issued in 1917. In reversing the judgment in favor of the plaintiff, the court said: "The rights of property owners against whose property assessments were levied and bonds issued under the 'Improvement Act of 1911' prior to the amendment of 1921 became vested under a statute which did not render them subject to any suit whatever in any court at the hands of a bondholder. While the Legislature had power to make retroactive a law relating purely to a remedy, it could not alter the substantive rights of the property owners or their successors in interest. The amendment we are considering, although nominally aimed solely at providing a remedy, in fact, changes a substantive right of the property owner, and therefore impairs, to the detriment of the property owner, the contract rights which became fixed when the street proceedings were taken and the bonds issued."

The requirement that the bondholder make personal demand upon the owner before bringing suit, if an attorney's fee is to be exacted, is a material part of the contract in cases such as this. It affords the owner the opportunity to avoid the payment of an attorney's fee by discharging the lien without suit. Since an assessment for improvements may be imposed upon the property and a bond issued without the personal knowledge of the owner, in many cases the demand before suit or the services of summons after suit is commenced is the first information the owner acquires of the lien on his property. Statutes allowing an attorney's fee in a suit to foreclose the lien of such an assessment or bond are upheld on the ground that the state may impose a penalty for the failure of the property owner to discharge the lien without suit, the lien being one "laid by virtue of the power of the state to tax." Engebretsen v. Gay, 158 Cal. 30, 35, 109 P. 880, 883, 28 L. R. A. (N. S.) 1067, Ann. Cas. 1912A, 690. "The statute permitting the collection of the attorney's fee as a penalty * * * must be strictly construed." Stokes v. Watkinson, 189 Cal. 79, 84, 207 P. 689, 692. Section 27, as it stood at the time of the improvement, is a part of the contract sought to be enforced, and a subsequent amendment authorizing the recovery of an attorney's fee without a previous demand would certainly add to the burden of the owner and thereby impair the obligation of the contract. It must be held that the amendment of 1927 is not retroactive.

There are many cases holding that a subsequent amendment requiring notice and demand before bringing suit, where not required at the time the contract was executed, or dispensing with such notice or demand, where previously required, does not impair the obligation of the contract. In none of those cases, however, was the amount to be recovered dependent upon the giving of such notice or demand. In this case, by making the required demand the plaintiff could have increased the amount of his recovery by the allowance of an attorney's fee. To allow an attorney's fee without such demand would clearly increase the burden of the owner and impair the obligation of the contract.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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105 Cal. App. 753

PEOPLE v. MILLER.

Cr. 29.

District Court of Appeal, Fourth District, California.

May 20, 1930.

Criminal law ⟹1130(4).

Where time for filing appellant's brief expired and no further appearance was made nor extension sought, appeal will be assumed abandoned (Pen. Code, § 1253).

Case was placed on calendar of Court of Appeal, but no brief on behalf of appellant was filed, and, on calling of calendar, Attorney General moved for affirmance of judgment for appellant's failure to appear. Appellant's counsel filed letter advising clerk that he was withdrawing from case. Pen. Code, § 1253, provided for affirmance of judgment on appellant's failure to appear.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Earl Miller was convicted of maintaining and operating a still, and he appeals.

Affirmed.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

AMES, Justice pro tem.

The defendant was convicted of a violation of the provisions of an act of the Legislature entitled "An act relating to stills and other devices for the manufacture or production of intoxicating liquor for beverage purposes, providing a penalty for the violation thereof and repealing all inconsistent acts," approved April 29, 1927 (St. 1927, p. 497), and was sentenced to imprisonment in the state prison at San Quentin for the term provided by law. He appealed from the judgment of conviction.

The reporter's transcript from the Superior Court was filed in this court on the 5th day of April, 1930, and the clerk's transcript on April 22, 1930. No brief on behalf of appellant has been filed, but the cause was placed on the May calendar of this court, and, upon the call of the calendar on May 13, 1930, the Attorney General moved that the judgment be affirmed on the ground that the appellant had failed to appear. At that time the court's attention was called to a letter from counsel for the appellant, dated at Santa Ana, California, April 14, 1930, and filed in the office of the clerk of this court on April 22, 1930, in which counsel advised the clerk of this court that he was withdrawing from the case. No other appearance has been made on behalf of appellant.

Section 1253 of the Penal Code is as follows: "The judgment may be affirmed if the appellant fail to appear, but can be reversed only after argument, though the respondent fail to appear."

The time prescribed by the rules of this court for filing the opening brief of the appellant having expired, and no further appearance having been made on his behalf or extension of time within which to file his brief applied for, we must assume that the appeal has been abandoned, and the judgment will be affirmed in accordance with section 1253 of the Penal Code above quoted. We have, however, examined the record in this case, and find the same free from prejudicial error and the evidence ample to support the verdict.

The judgment is affirmed.

We concur: CARY, P. J.; BARNARD, J.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

105 Cal. App. 747

PACIFIC STATES CORPORATION v. SHEPARDSON et al.

Civ. 116.

District Court of Appeal, Fourth District, California.

May 20, 1930.

1. Venue ⚷68.

Affidavit based on information and belief that witnesses for whose convenience plaintiff objected to change of venue were employees may be disregarded as hearsay.

The defendants moved for a change of place of trial to county of their residence, and the plaintiff made a motion objecting thereto on the ground that convenience of witnesses would best be served by trial in county where action was commenced.

2. Appeal and error ⚷888(2).

Reviewing court, on appeal from refusal to change venue, may anticipate that trial court will authorize amendments conforming pleadings to proof.

3. Venue ⚷68.

In reviewing conflicting affidavits relating to change of venue, those favoring prevailing party are considered true.

4. Appeal and error ⚷965.

Order refusing change of venue because of convenience of witnesses will be disturbed only for abuse of discretion.

5. Venue ⚷52(1).

Refusing change of venue to county of defendant's residence *held* not error, where eight witnesses resided within county where action was commenced and only one of defendants' witnesses resided elsewhere.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by the Pacific States Corporation against J. F. Shepardson and Zora Shepardson, individually and as copartners doing business under the firm name and style of the Shepardson Construction Company. From an order refusing to change the place of trial, defendants appeal.

Affirmed.

Osborn & Burum, of Bakersfield, for appellants.

Russell & Heid, of Tulare, for respondent.

AMES, Justice pro tem.

The plaintiff brought this action in the county of Tulare against J. F. Shephardson and Zora Shepardson, individually and as copartners doing business under the firm name and style of Shepardson Construction Company, defendants, who are the only defendants named in the complaint.

The complaint is in the form of a common count by which plaintiff seeks to recover a sum of $1,509.94, alleged to be due and unpaid upon an open account for goods, wares, and merchandise sold and delivered by plaintiff to the defendant and for money advanced by plaintiff for defendants, all at defendants' special instance and request. The plaintiff further alleges that the plaintiff is a corporation organized and existing under and by virtue of the laws of the state of California, and that the defendants are copartners doing business under the firm name and style of Shepardson Construction Company. The answer admits the existence of the plaintiff as a California corporation, but denies generally each and all of the other allegations of plaintiff's complaint.

Simultaneously with the filing of their answer, the defendants served and filed a demand for a change of place of trial to the county of Kern, on the ground that the county of Tulare was not a proper county for the trial of said action, and that both defendants, who are husband and wife, were residents of the county of Kern. Said demand was accompanied by a notice and affidavits, and the sufficiency of this proceeding is not attacked by respondent, but at the time of the hearing of said motion a counter motion was made by respondent to retain the cause for trial in the county of Tulare on the ground of the convenience of witnesses, and, after a hearing of both of said motions, the court denied appellants' motion and ordered the case retained in the county of Tulare, and from that order this appeal is taken.

Respondent's motion is supported by an affidavit of J. A. Thomas, Jr., the assistant manager of the Tagus ranch property of the respondent. It is alleged in said affidavit that Thomas was a resident of the county of Tulare and had direct charge of the transactions between the parties to this litigation out of which the cause of action set forth in plaintiff's complaint arose, and that he will testify that plaintiff and defendants entered into an agreement whereby the defendants were to construct on said Tagus ranch in the county of Tulare three concrete well pits, and that, in connection with such construction work, the defendants agreed to purchase from the plaintiff certain materials needed by them in the doing of said work, and that said defendants would pay the plaintiff for the transportation thereof and for certain other services to be rendered by it, and that defendants agreed to pay the plaintiff such moneys as might be paid by plaintiff to defendants for work which should not prove

satisfactory, and which would not be in full accordance and compliance with the plans and specifications for the doing of said work. It is further alleged in said affidavit that affiant would testify that the articles theretofore mentioned in his affidavit were delivered to defendants; that certain moneys were paid out and expended by plaintiff for the account of defendants in connection with the labor performed by them, and that other items accrued in favor of the plaintiff on account thereof, and that certain moneys were paid to defendants by plaintiff for the services rendered by them which were not in accordance with the plans and specifications for said work, and that the same were duly and regularly entered upon the books of account of said plaintiff, and that there remained due plaintiff the sum of $1,509.94, also that affiant would further testify that defendants entered upon the construction of said well pits and completed the same; that thereafter two of said well pits caved in and were not constructed in accordance with the plans and specifications agreed upon for the doing of said work; that, in addition to affiant, seven other witnesses whose testimony would be material to the issues in the case would be called by plaintiff; that all of said seven witnesses were residents of the county of Tulare, two of whom were the county surveyor of Tulare county and an employee in his office, both of whom inspected the work of construction of said well pits, and both of whom would testify that the same was defective and not in accordance with the requirements of the contract; that four other witnesses will testify that they delivered materials to, or performed labor for, defendants, charges for which are entered in the books of account of the plaintiff, and one of which witnesses was the bookkeeper of the plaintiff who had charge of the entries made therein, and would testify that the same were correct and kept in the ordinary course of business of the plaintiff.

A counter affidavit of appellant J. F. Shepardson, which was filed at the hearing of the motion, admitted the execution of the contract for the construction of said well pits, and alleged that the same was in writing, and also that a certain material witness residing in the county of Kern would testify to the effect that said work was done under the direct supervision of the plaintiff's engineer, and contained the further allegation upon information and belief that the witnesses mentioned in the affidavit of Thomas are either employees of plaintiff or were employed by it at the time of the construction of the pits or are expert witnesses.

Appellants contend that the affidavit of Thomas discloses the fact that all of respondent's witnesses are either employees of plaintiff or expert witnesses, and for that reason the evidence which it is claimed they will offer at the trial should be disregarded (citing Security Investment Co. v. Gifford, 179 Cal. 277, 176 P. 444, 445), but it further appears from said affidavit that the evidence to be offered by the experts will be based, not only upon their technical knowledge, but upon information which they obtained from a personal inspection of the well pits, after they are alleged to have collapsed.

It was said in Security Investment Co. v. Gifford, supra, "neither the convenience of experts nor of employees should be considered in determining the question of the convenience of witnesses, except where the experts also have personal knowledge of the facts upon which their testimony is to be based."

[1] Nor does it appear either from the affidavit of Thomas or that of appellant Shepardson that any of respondent's witnesses other than Thomas and the bookkeeper are present employees of respondent, or were so employed at the time the affidavits were made. Four of said persons, it is averred, "will testify that they delivered materials to or performed labor for defendants, charges for which are entered in the books of account of the plaintiff." Obviously this allegation has reference to services rendered at the time of the construction of the well pits, but it nowhere appears in the affidavit of Thomas that they were, at the time of making the affidavit, still in the employ of respondent, nor can the contention of appellants be supported by the last clause of the affidavit of Shepardson, wherein it is alleged on information and belief that "all of the witnesses, mentioned in the affidavit of J. A. Thomas are either employees of plaintiff or were employed by it at the time of the construction of said pits"; this allegation being based on information and belief. It is hearsay in character, and may be disregarded by the court. 1 Cal. Jur. p. 671.

[2] Appellants contend that the affidavit of Thomas, upon which appellants' motion is based, is replete with conclusions and matters immaterial to the issues as framed by the pleadings. It may be true that neither the affidavit of Thomas nor that of appellant Shepardson is free from conclusions, but the agreement for the construction of said well pits is admitted in the counter affidavit of Shepardson, and there are sufficient allegations of probative fact in the affidavit of Thomas, aside from the conclusions contained therein, from which the court can infer what facts are or may be material to the issues and which the plaintiff expects to prove at the trial. If this is not material or competent to the issues as framed by the pleadings, this court, in passing upon an appeal from the order refusing to change the place of trial, may anticipate that the trial court, upon being so advised, will authorize whatever

amendment to the pleadings may be proper, that the same may conform to the proof to be offered at the trial. Security Investment Co. v. Gifford, 179 Cal. 277, 176 P. 444.

[3] Certain allegations in the counter affidavit filed by the appellants are in conflict with the allegations contained in the affidavit of respondent, but, in considering the affidavits upon which said motion was based, this court is bound by the same rule that controls where oral testimony is presented for review, and, if there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered established. Sourbis v. Rhoads, 50 Cal. App. 98, 194 P. 521; Marston v. Watson, 20 Cal. App. 465, 129 P. 611.

[4, 5] In reviewing an order made on a motion of this character, the trial court is vested with a broad discretion, and the order will not be disturbed unless it appears that such discretion has been abused. It was said, in Pascoe v. Baker, 158 Cal. 232, 110 P. 815, 816: "Much is necessarily confided to the discretion of the trial court on motions for a change of place of trial on the ground of convenience of witnesses, and it is only where it is clear that there has been an abuse of such discretion that this court will interfere."

In view of the fact that it appears from the affidavit upon which the motion was granted that seven witnesses in addition to the manager of plaintiff are residents of the county of Tulare, and disregarding the conflict presented by the counter affidavit of appellants, only one of their witnesses resides in the county of Kern, or elsewhere than in the county of Tulare, we are not prepared to say that the trial court abused its discretion.

The order appealed from is affirmed.

We concur: MARKS, Acting P. J.; BARNARD, J.

BARHAM et ux. v. WIDING.*

Civ. 3998.

District Court of Appeal, Third District, California.

May 20, 1930.

Rehearing Denied June 20, 1930. Hearing Granted by Supreme Court July 17, 1930.

1. Evidence ⚷20(1).

It is matter of common knowledge that dentist, as part of professional duty, when extracting tooth should treat bruised and bleeding socket.

2. Physicians and surgeons ⚷15.

Dentist failing to exercise ordinary precaution in protecting socket after extracting tooth against infection and stop unusual bleeding constitutes negligence in operation.

3. Physicians and surgeons ⚷15.

Dentist's failure to reasonably sterilize and treat socket after extracting tooth to prevent infection renders him liable for malpractice if injury results.

4. Physicians and surgeons ⚷15.

If, notwithstanding dentist's exercise of ordinary precaution, infection develops from cause independent of extracting tooth, he cannot be held liable for negligence in performing operation.

5. Physicians and surgeons ⚷15.

Dentist's subsequent treatment of infection in socket from which tooth has been extracted may constitute different cause of action from one for negligence in performing operation.

6. Physicians and surgeons ⚷18(5).

Evidence, in action against dentist for malpractice in extracting tooth, showing treatment subsequent to operation, *held* admissible under original complaint, absent demurrer.

Original complaint in action against dentist for malpractice in extracting tooth specified two distinct charges of negligence, namely, that dentist was negligent in operation of extracting tooth, and that he was negligent in using hypodermic needle by means of which he administered local anesthetic.

7. Physicians and surgeons ⚷14(4).

Dentist is required to exercise only degree of learning and skill ordinarily possessed by dentists of good professional reputation in same locality.

8. Evidence ⚷512.

Cases dependent upon knowledge of scientific effect of medicine or result of surgery must ordinarily be established by expert testimony.

9. Evidence ⚷507.

Rule requiring expert testimony applies only to facts peculiarly within knowledge of professional experts, and not to facts which may be ascertained by ordinary use of senses of nonexpert.

10. Appeal and error ⚷930(1).

After verdict fairly rendered, all circumstances, together with every reasonable inference, will be marshaled in support of judgment.

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*Hearing granted 291 P. 173.

11. Evidence ⚷571(1).

Because of very subtleness of origin and development of disease, less certainty is required in proof thereof.

12. Negligence ⚷134(2).

In civil cases, it is not necessary that circumstances establish negligence as proximate cause with such certainty as to exclude every other conclusion.

13. Evidence ⚷597.

Judgment in civil case need only be reasonably supported by substantial evidence.

14. Evidence ⚷20(1).

Court judicially knows that dentist administering local anesthetic for purpose of extracting tooth should use ordinary care to procure sterilization of hypodermic needle.

Consequently, it was not necessary for any physician or dentist to testify that conduct of dentist was negligent or in conflict with usual established practice of profession in that vicinity to administer a local anesthetic for purpose of extracting a tooth without sterilizing hypodermic needle or flesh into which it was inserted.

15. Trial ⚷296(3).

Instruction, in action against dentist for malpractice, on liability for using unsterile hypodermic needle or solution in injecting local anesthetic, *held* prejudicial error, notwithstanding other instructions.

Instruction complained of and given at plaintiff's request authorized verdict for plaintiff if jury believed from evidence that defendant used either unsterile hypodermic needle or solution in injecting a local anesthetic into mouth of plaintiff, and that thereby, and as proximate result thereof, infection was caused, resulting in injuries complained of. Instruction was not based on defendant's negligence, if any, but jury in other general instructions were correctly charged as to degree of care required by dentist in performing operation of extracting tooth. Instruction complained of was not in any way connected with other general instructions so as to base defendant's liability upon proof of negligence.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by W. D. Barham and wife against C. E. Widing. Judgment for plaintiffs, and defendant appeals.

Reversed.

Brown & Chamberlain, of Modesto, for appellant.

Joseph A. Brown, of San Francisco, and Hugo McKinley, of Modesto, for respondents.

R. L. THOMPSON, J.

This is an appeal from a judgment against the defendant for damages resulting from malpractice in the extracting of a tooth.

The defendant was a licensed dentist practicing his profession at Modesto. At the request of the plaintiff W. D. Barham, he extracted the left lower first molar tooth of said plaintiff. For the purpose of the operation a local anesthetic was administered by means of a hypodermic injection of novocaine. The needle was twice inserted in the gum of the patient at a point over the ramus or ascending prong of the left lower jawbone near the diseased tooth. After the tooth had been extracted a pyorrhea pus pocket was discovered on the distal root. The patient bled quite profusely from the socket from which the tooth had been removed. He subsequently became so weakened from the loss of blood that he was confined to his bed. The dentist was unable to control this hemorrhage, and after a few days of ineffectual treatment turned the patient over to a physician by the name of R. Stewart Hiatt. For the first day after the extracting of the tooth the dentist failed to pack with medicated gauze the socket from which the molar had been removed. Later this was done and the socket was periodically cleansed with iodoform. After five or six days an infection of the gum and jaw developed. This was indicated by a swollen and inflamed jaw in the vicinity of the socket from which the tooth had been removed and by increased temperature. When Dr. Hiatt took charge of the case ten days after the tooth had been extracted, he made a careful examination and found the patient weak, with an abnormally rapid pulse, temperature 104 degrees, and a large abscess on the lower left jaw. The doctor testified in this regard that the abscess "filled the whole side of the throat and up into the soft palate. * * * (There was) apparently a lot of pus." He then designated the locality of the primary infection as the point where the hypodermic needle had been inserted in the gum.

"Q. And the infection surrounded the area which you have encircled (on the diagram)? A. Yes, right around here. * * * That was the center of the abscess; it was deep, very deep, so that it must have been necessary that the infection was introduced * * * on a needle, or perhaps an unsterile solution, because the pus was found very, very deep.

"Q. So that, Doctor, your opinion then is that the infection was introduced either by the hypodermic needle inserted at that point

by the defendant, Widing, or by the solution that he employed in that needle? A. That is correct."

Dr. Hiatt also testified from his examination of the socket from which the tooth had been removed that this socket was not the seat of the infection. From the result of this infection the patient lost seven lower teeth and a portion of his lower jawbone. A necessary operation resulting therefrom left an unsightly permanent scar on the left side of his face. It appears that it may be impossible to replace with a serviceable plate the teeth which were thus lost. He was ill, confined to a hospital, suffered severe pain, and his life was despaired of. He also incurred great expense on this account. The plaintiff, however, recovered, but for many months was impaired in health and body. The jury rendered a verdict of $8,000 in his favor. From the judgment, which was accordingly entered, the defendant has appealed.

The complaint charged the defendant with negligence in extracting the tooth and in the use of the hypodermic needle which was employed in that operation resulting in an infected jaw and the sustaining of the injuries above referred to. No demurrer to the complaint was filed. Subsequently, upon motion of the plaintiff, and before the trial, over the objection of the defendant, an amendment to the complaint was permitted to be filed charging the defendant with negligence in connection with the extracting of the tooth in "thereafter treating and caring for the same." This amendment was filed more than a year after the operation had been performed and the defendant pleaded the statute of limitations to this last specific charge of negligence. During the trial evidence respecting the treatment of the jaw, on the part of the defendant, after the tooth had been removed, was adduced over the objection of appellant. Before the conclusion of the trial the court struck this evidence from the record and instructed the jury to disregard it.

The appellant contends that: (1) The admission of evidence regarding improper treatment of the patient after the operation of extracting the tooth had been completed, was prejudicial error in spite of its subsequent elimination from the record, since it constituted a separate cause of action which was barred by the statute of limitations; (2) the judgment is not supported by the evidence, since there is a total absence of medical expert testimony to the effect that the operation and treatment of the patient in the extracting of the tooth did not conform to the standard accepted method of the profession in that vicinity; (3) the court erred in giving and refusing certain instructions to the jury.

[1-6] Under the original pleadings in this case, there was no error in admitting evidence of the defendant's treatment of the patient immediately after the removal of the tooth. All the evidence which was adduced with respect to the treatment subsequent to the operation of extracting the tooth was competent under the original complaint. In our opinion the amendment to the complaint did not alter or add to the issues. It will be observed the original complaint specifies two distinct charges of negligence: First, that the defendant was negligent in the operation of extracting the tooth; second, that he was negligent in using the hypodermic needle by means of which he administered a local anesthetic. In the absence of a demurrer these allegations were specific enough upon which to admit evidence of negligence in the treatment of the patient incident to the operation. This case was tried on the theory that it is a part of a dentist's professional duty to treat the bruised and bleeding socket from which a tooth has been removed. It is only common knowledge to declare this is a necessary part of the professional operation of extracting a tooth. If a dentist fails to use ordinary precaution in subsequently protecting the bruised and sensitive socket against infection from foreign matter, or fails to use reasonable care to stop unusual and profuse bleeding from the socket as the result of extracting the tooth, he will be guilty of negligence in the operation. These incidents to the operation of extracting a tooth are just as essential as sterilizing the parts and sewing up the abdominal incision after performing an operation for appendicitis. The restoring of a healthy condition to the parts which are injured in the performance of an operation is just as necessary as the removal of the diseased portion. Both proceedings are necessary parts of the same professional operation. A failure to reasonably sterilize and treat the socket from which a tooth has been removed, to prevent infection, will ordinarily render a dentist liable for malpractice if the omission results in injury to the patient. If, in spite of reasonable care on the part of the dentist to prevent infection, it nevertheless, develops, or infection appears from a cause independent of the operation of extracting the tooth, the dentist will not become liable for negligence in performing the operation, except that the subsequent treatment of the disease may constitute a different cause of action. There is a clear distinction between a liability which results from the careless performance of an operation or an omission to use reasonable care in the exercise of professional acts connected with the extracting of a tooth which causes infection, and the improper treatment of an infection which subsequently develops without being attributable to the negligent operation of the dentist in extracting the tooth.

In this case it is apparently the theory of the appellant that the fatal infection did not occur from the use of an unsterile needle or from contaminated fluid used in administer-

ing the anesthetic, but that it developed on account of the patient's tendency to bleed profusely as a result of extracting a tooth. It is claimed he is what the profession commonly terms "a bleeder," and that the dentist was therefore unable to control the hemorrhage. Evidence was adduced to show that during the first day following the operation the socket from which the molar had been removed was not sterilized or packed with gauze, and that this omission left the inflamed and sensitive socket subject to infection from food or foreign matter. Certainly this evidence was competent to rebut the appellant's theory of a defense. The evidence is uncontradicted that the defendant did not pretend to treat the patient for a period of time longer than five or six days after the operation was performed. Moreover, he consulted Dr. Morgan regarding the hemorrhage on the day following the operation, and Dr. Morgan promptly took charge of this feature of the case. Aside from the evidence of failure during the first day to pack the socket with sterilized gauze, our attention is called to no evidence of improper treatment on the part of the dentist following the operation. It was therefore unnecessary for the court to have stricken this evidence from the record. Moreover, the jury were clearly instructed that they were not permitted to render a verdict against the defendant based upon alleged improper treatment subsequent to the operation of extracting the tooth. The facts of the case of Wetzel v. Pius, 78 Cal. App. 104, 248 P. 288, upon which the appellant relies, are readily distinguishable from those of the present case. That case contains nothing which we deem to be in conflict with the foregoing statement of the law.

[7-9] The appellant asserts that the evidence is not sufficient to establish negligence on his part because there is no direct testimony that the needle or solution which was used in administering the anesthetic was unsterile; that a dentist, like a physician, is required to have and use only the degree of learning and skill which is ordinarily possessed by dentists of good professional reputation in that locality. This is the rule with respect to physicians. Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654. Undoubtedly the same rule applies to dentists. The jury was clearly instructed to this effect. It is equally true that cases which depend upon knowledge of the scientific effect of medicine, or the result of surgery, must ordinarily be established by expert testimony of physicians and surgeons. Perkins v. Trueblood, 180 Cal. 437, 181 P. 642. This rule, however, applies only to such facts as are peculiarly within the knowledge of such professional experts, and not to facts which may be ascertained by the ordinary use of the senses of a nonexpert.

In the present case the record will not support a theory that the infection which caused the injury to Mr. Barham's jaw, teeth, and health originated in the socket from which the tooth was removed. It is almost uncontradicted that this was not the seat of the infection. This socket and the suppressing of the hemorrhage from that source were the only objects to which the testimony of appellant's subsequent treatment was directed. The evidence is conclusive of the fact that this socket was not the source of the infection. We must therefore assume the dentist was not guilty of negligence in his subsequent treatment of the case. It is true than an unusual loss of blood might so weaken a patient that his lack of resistance would make him more susceptible to infection than one who was in normal condition. A great loss of blood might, therefore, become a remote contributing cause of the infection. But it may not be said the hemorrhage was the proximate cause of the infection. The judgment in this case must be supported, if at all, upon the theory of appellant's negligence in failing to sterilize his hypodermic needle and the mouth and gum of the patient before performing the operation of extracting the tooth. It is true that both the dentist and his nurse testified that the usual process of sterilization was followed. It is equally true that there is no direct evidence that he failed to sterilize either the needle or the surface of the flesh where it was inserted. Barham does state that he did not remember that the dentist sterilized his mouth or gum.

[10, 11] Under the circumstances of this case there is a remote possibility that the infection developed from some cause other than the defendant's failure to sterilize the needle or the gum into which it was inserted, but the evidence is sufficient upon which to warrant the jury in finding that it was caused by his negligence in failing to follow these reasonable precautions in spite of his testimony to the contrary. The jurors were entitled to accept the solution to which these circumstances led them in preference, even, to the positive statements of the defendant and his nurse to the contrary. After the verdict of a jury has been fairly rendered, all the circumstances of the case, together with every reasonable inference which may be drawn therefrom, will be marshaled in support of the judgment. Because of the very subtleness of the origin and development of disease, less certainty is required in proof thereof. As the court says in the case of Dimock v. Miller, 202 Cal. 668, 671, 262 P. 311, 312:

"If * * * it is necessary to demonstrate conclusively and beyond the possibility of a doubt that the negligence resulted in the injury, it would never be possible to recover in a case of negligence in the practice of a profession which is not an exact science."

[12, 13] It is not necessary in the trial of civil cases that the circumstances shall establish the negligence of the defendant as the

proximate cause of injury with such absolute certainty as to exclude every other conclusion. It is sufficient if there is substantial evidence upon which to reasonably support the judgment. Ley v. Bishopp, 88 Cal. App. 313, 316, 263 P. 369.

In this case no question is raised regarding the professional skill of the dentist. It is conceded that he was reasonably learned and skillful in his profession. But it is asserted that he was negligent in failing to sterilize the hypodermic needle and the gum into which he inserted the instrument. There is no conflict regarding the fact that infection of the jaw caused the injuries to Barham. It is conclusive that this infection developed within a few days after the operation on the ramus of the jaw at just the point where the needle was inserted, and not in the socket from which the tooth had been removed. Dr. Hiatt, the expert physician who personally examined the condition of the patient ten days after the operation, testified, as heretofore related, that the seat of the infection was the very point where the needle was inserted, and that in his opinion the infection was caused by the use of an unsterile needle, the solution, or a failure to sterilize the gum where the needle was inserted. With respect to the origin of the infection, the doctor further testified:

"You found, did you doctor, that was the primary place of infection, around the ramus? A. That was the place of infection.

"Q. Therefore, you got drainage at that point? A. Yes sir.

"Q. Did you form any opinion as to whether or not any infection that came to the socket of the tooth was merely secondary to the infection of the ramus? A. When I examined him, there was no pus around the socket of the tooth, the pus was all back around the ramus of the jaw, so I would say that the primary infection was around the ramus of the jaw."

[14] It was not necessary for any dentist or physician to state that the conduct of the defendant was negligent or in conflict with the usual established practice of the profession in that vicinity to administer a local anesthetic for the purpose of extracting a tooth without sterilizing the needle or the flesh into which it is inserted. The court will take judicial knowledge of the necessity to use ordinary care to procure sterilization under such circumstances. This case was tried upon the theory that every one concerned recognized this duty. We are therefore of the opinion that the evidence will support the judgment in this regard.

[15] The giving and refusing of certain instructions is complained of. At the request of the plaintiffs the following instruction was given: "I instruct you that if you believe from the evidence that Doctor Widing, the defendant, used or employed either an unsterile hypodermic needle or solution in injecting a local anesthetic into the mouth of plaintiff, W. D. Barham, and that thereby and as the proximate result thereof and proximately caused thereby, infection was introduced in the mouth, plaintiffs are then entitled to recover. * * *"

The foregoing is a formula instruction which has been repeatedly condemned as prejudicially erroneous, and incapable of being remedied by other portions of the charge. Douglas v. Southern Pac. Co., 203 Cal. 390, 264 P. 237, 238; Sinan v. A., T. & S. F. Ry. Co. (Cal. App.) 284 P. 1041. It contains no saving clause. It definitely charges the jury that the plaintiffs are entitled to recover a judgment for damages if it is found that the defendant "used or employed either an unsterile hypodermic needle or solution in injecting a local anesthetic into the mouth," which proximately caused the infection from which the injuries resulted. Obviously, the fluid used as an anesthetic might have been contaminated or unsanitary in spite of reasonable care on the part of the dentist and his nurse. Possibly the needle may have communicated bacteria or germs of disease to the jaw, after the usual precautions had been taken to sterilize it. The jury was correctly instructed that a dentist, like a physician, is not an insurer of perfect results of a dental operation or freedom from injurious consequences thereof, but, upon the contrary, is liable only for a lack of that reasonable degree of skill and learning possessed by dentists of good professional reputation or a failure to use such ordinary care in the performance of the operation and treatment of the patient incident thereto as is commonly used by reputable dentists in that vicinity. The challenged instruction made no reference to the limitation of liability which is governed by the principles expressed in the preceding instruction referred to. It made no reference to negligence whatever. It contained no condition whatever. It based the liability of the defendant solely and absolutely upon his use of an unsterile needle or unsanitary solution, regardless of his knowledge of the condition, or the exercise of due care or the use of the ordinary methods of precaution employed by the profession. If this instruction had referred to the balance of the charge so that it might be inferred that the attention of the jury was fairly called to the omitted principles, a reversal of the judgment might be avoided. Robinet v. Hawks, 200 Cal. 265, 272, 252 P. 1045. No such reference, however, occurs. General instructions were given elsewhere informing the jury: "You are to determine * * * the proximate cause of such damage or injury, and unless * * * the testimony shows that such damage or injury was caused by the negligence or carelessness of the defendant, * * *" he cannot re-

cover. The jury was also instructed that, "You cannot find any verdict whatever against the defendant * * * unless you find * * * that the defendant did negligently or carelessly insert a needle into the gums or jaw of plaintiff, W. D. Barham, or that he did carelessly or negligently extract a tooth. * * *" Neither of these instructions, however, cures the omission of the element of negligence which is lacking in the challenged instruction. The charge fails to anywhere inform the jury that liability of the defendant depended upon proof that he had *negligently* used an unsterile needle or solution in administering the anesthetic. The preceding instruction merely referred to carelessly "inserting the needle into the gums." Even if this language may be held to infer that it covers the feature of negligently using an *unsterile* needle or solution, it is still fatally defective under the case of Douglas v. Southern Pac. Co., supra, and the uniform authorities of this state upon the effect of formula instructions. In the last-mentioned case it is said:

"The court gave other instructions on the subject of contributory negligence, the correctness of which is not challenged. But this is not sufficient to overcome the prejudicial character of the erroneous instructions. 'It is true that other instructions were given at the request of defendant that stated the law in these respects as favorably to defendant as was warranted, if not more favorably. But the giving of these other instructions simply produced a clear conflict in the instructions given the jury by the court, and it is impossible for us to say which instruction the jury followed in arriving at a verdict in favor of plaintiff.'"

On account of the fatal defect in the challenged formula instruction, it becomes necessary to reverse the judgment. It is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

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105 Cal. App. 737

MERRILL v. CALIFORNIA PETROLEUM CORPORATION.

Civ. 4104.

District Court of Appeal, Third District, California.

May 20, 1930.

Rehearing Denied June 20, 1930. Hearing Denied by Supreme Court July 17, 1930.

1. Mines and minerals ⟹74.

Reference to property as "royalty interest" in title and recital of assignment may be disregarded, where granting clause expressly describes property as percentage of oil, etc., produced.

2. Sales ⟹11.

Property potentially existing as product or increase of existing thing may be sold.

3. Mines and minerals ⟹74.

Oil from leased premises *held* not mere possibility, which could not be sold, but potentially personal property.

4. Mines and minerals ⟹81.

Lessee assigning percentage of oil, gas, etc., produced from leased premises *held* not necessary party plaintiff in assignee's action for price of oil previously sold to defendant by lessee (Code Civ. Proc. § 384).

Code Civ. Proc. § 384, provides that tenants in common may jointly or severally commence or defend any civil action or proceeding for enforcement or protection of their rights.

5. Appeal and error ⟹1071(5).

Where findings on one count of complaint are supported by evidence and sustain judgment, it is immaterial whether findings on other counts are warranted.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by George E. Merrill against the California Petroleum Corporation. Judgment for plaintiff, and defendant appeals.

Affirmed.

Charles C. Stanley and R. K. Barrows, both of Los Angeles, for appellant.

Fredericks, Hanna & Morton, of Los Angeles, for respondent.

FINCH, P. J.

This is an appeal by the defendant from a judgment in favor of the plaintiff for the price of oil purchased by the defendant. The facts are undisputed.

On January 13, 1926, W. Irving Lake, who was the owner of an oil and gas lease on a royalty basis, entered into an agreement to sell to the defendant all the oil to be produced under the lease, to be paid for at the market price. The agreement provides "that if he (Lake) sells, conveys, assigns, transfers, sublets or incumbers said lease or the leasehold estate created thereby, or any interest in said lease or leasehold estate, or the oil to be produced from said premises, he will make such sale, conveyance, assignment, transfer, sublease, or incumbrance expressly subject to and subordinate to this agreement."

[1] On January 15, 1926, Lake entered into an agreement with the plaintiff, entitled "Assignment of Royalty Interest Under Oil and Gas Lease," relating to the lease mentioned, and containing the following:

"Whereas, the assignee hereunder is purchasing from the assignor (Lake) a twelve and one-half per cent. royalty interest in and to the premises under said lease;

"Now, therefore, for and in consideration of the sum of $10 and other good and valuable consideration * * * the above named assignor does hereby assign, transfer, grant, set over and convey unto the above named assignee twelve and one-half per cent. of all oil, gas and kindred substances produced, saved and marketed from said premises under said lease. * * * It is understood that the assignor has sold all of the oil that may be produced from said lease to California Petroleum Corporation, at market price."

The reference in the title of the instrument and in the recital to the property transferred as a "royalty interest" may be disregarded; the granting clause being express and certain in the description of the property intended to be conveyed. 13 C. J. 538; Monks v. Provident Inst. for Sav. in Jersey City, 64 N. J. Law, 86, 44 A. 968; Clark v. Post, 113 N. Y. 17, 20 N. E. 573.

Lake drilled a well as required by the terms of the lease and by the terms of his contract with the defendant and his assignment to the plaintiff, and the well produced oil in large quantities. The defendant received and paid for all of the oil so produced up to August 1, 1926.

The agreement between Lake and the defendant provided that the defendant, if it deemed such action necessary for the protection of its interest, should have the right to take possession of the leased premises, and the wells, tools, equipment, and property of Lake thereon, and operate the same, and, "after paying lessor's royalties from the amount due for seller's oil, deduct and keep all costs and expenses paid out or incurred by it," and out of the balance, if any, "apply upon seller's indebtedness to it a sum equal to the value of thirty per cent. of the total production from said lease," paying the balance, if any, to Lake.

It was stipulated at the trial "that the defendant had charge of the operations of the well on the property in question" during the period from August 1, 1926, to April 30, 1927, and "during that time defendant had paid out certain monies in operating the well and * * * the defendant had not paid anyone for any crude oil received" during that period, "except to pay the lessors under the lease * * * their twenty per cent. royalty reserved under such lease."

It was stipulated, subject to the plaintiff's objection "on the ground of immateriality, irrelevancy and incompetency," that Lake was adjudged a bankrupt on September 14, 1926, and that "on December 28, 1926, the oil lease referred to in the complaint, and all personal property belonging to the bankrupt estate, situated on the premises described in said lease, were sold * * * to A. P. Wallace, pursuant to an order of sale * * * in said bankruptcy proceedings." The answer contained a paragraph alleging the facts so stipulated, but the plaintiff made a motion to strike out that paragraph, and the same was ordered stricken out on the written stipulation of the parties. It does not appear that the proceedings in the bankruptcy court are material to any issue in the case. Wallace is not a party to this action, and it does not appear that he, or any other person, ever made any adverse claim to the oil in controversy or the proceeds thereof. Neither does the appellant claim ownership of such proceeds. If some other person claimed ownership of such property, section 386 of the Code of Civil Procedure provides a simple and inexpensive procedure for the substitution of such person as defendant in the action.

[2, 3] Appellant contends that "the oil attempted to be transferred was a mere possibility" which could not be sold, citing Graciosa Oil Co. v. Santa Barbara County, 155 Cal. 140, 99 P. 483, 486, 20 L. R. A. (N. S.) 211. That case, however, does not support the appellant's contention. The plaintiff therein was the owner of an oil lease on a royalty basis. The court said:

"The plaintiff, it is true, does not own an absolute present title to the oil strata in place. * * * The right vested in plaintiff is an estate for years, so far as necessary for the purpose of taking oil therefrom, and it carries with it the right to extract the oil and remove it from the premises. This right constitutes, for the term prescribed, a servitude on the land and a chattel real at common law. * * * His [lessee's] right extends to the extraction of a certain part of the substance of the land itself, to its permanent separation and removal and its conversion to his own use. The whole object of the contract is to effect, if not technically a sale and conveyance of a substantial and specific part of the land, at least a disposition and transfer thereof to another. * * * The rights and privileges of the plaintiff under this lease are private property. * * * The strata of oil or oil-bearing sand constitute * * * a part of the land which may be the subject of separate ownership. There may be a separate 'claim to' this part of the land, as well as a separate 'claim to' a portion of the surface. A 'claim to' take this stratum from its place and then convert it to one's own use may well be termed a claim to land, although not accompanied by actual physical possession of the subterranean deposit."

In Chandler v. Hart, 161 Cal. 405, 414, 119 P. 516, 520, Ann. Cas. 1913B, 1094, the court had under consideration a lease which was similar in terms to the one involved in this case, except that the consideration for the execution of the lease by the landowner consisted of an agreed number of shares of the capital stock of the lessee instead of a share of the oil to be produced. The court said:

"The estate of the lessee is not a mere possibility, not coupled with an interest, which, by section 1045 of the Civil Code, is not transferable, but is a present, subsisting estate for years, which may be transferred, the same as any other species of property."

"Property may be the subject of a sale if it has a potential or possible existence, as the product or increase of that which is in existence, and the right to it when it shall come into existence is a present vested right. In such case, the sale is absolute and perfect when made, vesting the property in the purchaser the moment it comes into existence. In all such cases, the thing sold has a potential existence, and the hopes or expectations of means founded on a right in esse is the object of sale. A mere possibility or contingency not founded on a right, or coupled with an interest, cannot be the subject of a present sale, though it may often be of an executory contract to sell. A mere possibility or expectancy of acquiring property, not coupled with any interest, does not constitute a potential interest in it, within the meaning of the rule allowing a valid sale of such potential interest." 23 R. C. L. 1244; Hamilton v. Klinke, 42 Cal. App. 426, 431, 433, 183 P. 675.

From the foregoing authorities it appears that the deposit of oil involved was a part of the land in which it was found; that Lake's right to extract the oil was "private property," a "claim to land, although not accompanied by actual physical possession of the subterranean deposit"; that such claim was "founded on a right" vested in him by the terms of the lease, a right "coupled with an interest." While the oil in its natural deposit was a part of the land, it was in actual existence as part of the land, and was potentially personal property under the terms of the lease, and actually became personal property to the extent of the amount thereof involved in this action when the lessee exercised his right to extract it.

[4] The defendant demurred to the complaint "on the ground that there is a defect of parties plaintiff therein in this: that it appears therefrom that W. Irving Lake is a necessary party plaintiff." By the sale to the plaintiff, he and Lake became tenants in common in the oil produced. The agreement between the defendant and Lake implies that he retained the right to sell a part of the oil to be produced, subject to the defendant's rights under the agreement.

"All persons holding as tenants in common, * * * or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party." Code Civ. Proc. § 384. See, also, Lee Chuck v. Quan Wo Chong & Co., 91 Cal. 593, 599, 28 P. 45; Muller v. Boggs, 25 Cal. 175, 187; Messersmith v. Smith, 62 Cal. App. 446, 447, 217 P. 105.

[5] The complaint states the same cause of action in various forms in four different counts. Appellant contends that the evidence does not support the findings on the issues tendered by the second, third, and fourth counts. The findings on the first count are fully supported by the evidence, and such findings are sufficient to sustain the judgment. It is immaterial, therefore, whether the other findings are warranted.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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105 Cal. App. 754

ENGLEMAN et ux. v. SUPERIOR COURT IN AND FOR FRESNO COUNTY et al.

Civ. 313.

District Court of Appeal, Fourth District, California.

May 20, 1930.

1. Set-off and counterclaim ⟹29(3).

Claims arising out of automobile collision arose out of same transaction and same accident within statutes relating to counterclaims and cross-complaints (Code Civ. Proc. §§ 438, 442).

J. began action in superior court against E. and M. claiming damages in excess of $10,000 on account of injuries to himself and his property resulting from automobile collision, and, after summons in such action had been served upon E., he and his wife began action in justice's court against J., claiming damages in sum of $966.50, on account of damages sustained, arising from injuries received by their minor son in same collision.

2. Injunction ⟹32.

Where one party in automobile collision sued in superior court for $10,000 damages, court could enjoin action by the other parties in justice court for $966.50 (Code Civ. Proc. § 442).

3. Injunction ⚷32.

Parties in automobile collision commencing separate actions were entitled to have entire issue determined on one trial.

4. Injunction ⚷32.

Where court having power to administer complete justice acquires jurisdiction, attempts to divert litigation to another court will be enjoined.

Petition by H. B. Engleman and wife against the Superior Court in and for Fresno County and S. L. Strother, Judge thereof, for a writ of prohibition to prevent the enforcement of an injunction.

Writ denied.

Strother P. Walton, of Fresno, for petitioners.

George R. Lovejoy, of Fresno, for respondents.

BARNARD, Acting P. J.

This is an application for a writ of prohibition, based upon the following facts:

On December 29, 1929, there occurred in the city of Fresno an automobile collision between an automobile driven by petitioner, H. B. Engleman, and another automobile driven by Wm. H. Johnson. On March 11, 1930, the said Wm. H. Johnson began an action in the superior court of Fresno county against H. B. Engleman and one E. V. Moore, claiming damages in excess of $10,000 on account of injuries to himself and his property, resulting from said collision. After summons in said action had been served on the said H. B. Engleman, and on the 14th day of March, 1930, petitioners herein began an action in the justice's court of the Third township of the county of Fresno, against the said Wm. H. Johnson, claiming damages in the sum of $966.50 on account of damages sustained by petitioners arising from injuries received by their minor child, in the same collision. On April 4, 1930, the said Wm. H. Johnson filed in said action in the superior court a supplemental complaint asking that petitioners be restrained from prosecuting the above-mentioned action in the justice's court. In this supplemental complaint it was alleged that the collision described in the complaint filed in the justice's court was the same identical collision, transaction, and event described in the original complaint in the superior court; that the justice's court had no jurisdiction of Johnson's claim because of the amount thereof; that the superior court did have jurisdiction to entertain the claim of Engleman by way of either cross-complaint or counterclaim; and that a failure to plead his cause of action in the justice's court might result in Johnson being barred because his claim grew out of the same transaction as the one set up by Engleman in the justice's court. An injunction was issued by the superior court restraining petitioners from taking any further steps or proceedings in said justice's court action, during the pendency of said action in the superior court, or until the further order of that court. Thereupon this petition was filed, asking that respondents be prohibited from taking further proceedings on said supplemental complaint, and from enforcing the above-mentioned injunction.

It is conceded by petitioners that Christine Engleman, as the wife of H. B. Engleman, was a proper but not a necessary party in said justice's court action, and that this matter should be determined on the real point in dispute, without pressing the claim that the parties are not the same.

[1] The claims of the respective parties hereto arise out of the same transaction and out of the same accident, within the meaning of sections 438 and 442 of the Code of Civil Procedure. Morris v. Warner (Cal. Sup.) 279 P. 152.

A somewhat similar controversy was passed upon by the Supreme Court in the case of Gregory v. Diggs, 113 Cal. 196, 45 P. 261. In that case the defendant therein had sued the plaintiff therein in a justice's court for a balance of $132 on the purchase price of certain goods. The plaintiff in that action had appeared in the justice's court setting up a counterclaim for $500 damages, for breach of warranty. This plea having been stricken out by the justice on the ground that he had no jurisdiction in an amount over $300, an action was filed in the superior court asking that the justice be enjoined from further proceeding with the case before him, but that the entire matter be litigated in the superior court. The court held that the jurisdiction of the justice's court was too limited to afford relief to the parties, and that the action should be tried in the superior court.

Petitioners contend that the case just cited has no application to the facts here under consideration, for the reason that the decision in that case refers only to a counterclaim and not to a cross-complaint. It is argued that the essential difference between a cross-complaint and a counterclaim consists in whether or not affirmative relief is demanded. It is further argued that under section 442 of the Code of Civil Procedure one entitled to set up a cross-complaint has the option either to file such a pleading or to file a separate suit, while the holder of a counterclaim has no such option. It is contended that this right to file a separate suit is an absolute one, that may not be taken from him. It is therefore argued that, since petitioners were demanding affirmative relief, they had the right to either file a cross-complaint or a

separate action, and that their right to file a separate action in the justice's court was one that the superior court was without power to interfere with. This is the only question presented on this application.

We are unable to follow petitioners in their conclusion that the fact that they are asking affirmative relief is determinative of this matter. As we read the case of Gregory v. Diggs, although a counterclaim is mentioned therein, the decision does not rest upon the proposition that affirmative relief was not asked for. As a matter of fact, the plaintiff therein appears to have been seeking some affirmative relief. If he had desired merely to offset his adversary's claim, the matter could have remained in the justice's court. He, however, demanded $525, which was beyond the jurisdiction of the lower court. Whether he could obtain the excess under the provisions of section 666 of the Code of Civil Procedure, or otherwise, was not the decisive point. The case was decided entirely on the ground that under the circumstances existing the jurisdiction of the justice's court was too limited to afford relief to the parties.

[2] The parties here are in the same position. While an earlier trial may be had in the justice's court, the claim of Johnson is not within the jurisdiction of that court, he should not be compelled to remit the greater part of his claim in order to appear there, and no part of his claim should be barred by his failure to there set it up. As the court said in Gregory v. Diggs, supra:

"If plaintiffs are entitled to this remedy, it is solely upon the ground that, under the peculiar circumstances of the case, the jurisdiction of the justice court is too limited to afford them relief. They cannot be required to remit a portion of their demand to enable them to put in a counterclaim of which the justice has jurisdiction; and a judgment entered in the justice court by default or consent would probably be a bar to the suit for damages in the superior court.

"But, whether this would be the case or not, the entire issue is one which the practice here authorizes the parties to have determined upon one trial, and evidently that cannot be done in the justice court.

"This is a well-known ground of equitable jurisdiction. It is not a case in which a party is entitled to some remedy which only a court of equity can give, and which, having obtained jurisdiction for one purpose, will proceed to adjudicate upon the whole controversy; nor is it a case where a court of equity will interfere to prevent a multiplicity of suits. The demand of the plaintiffs and that of the defendants only involve legal issues; but the defendant Diggs has brought his action in a court which has complete jurisdiction of his case, but has not jurisdiction sufficiently broad to enable it to entertain a counterclaim of the other party,—a counterclaim which grows out of the very transaction upon which Diggs' claim is founded; and neither can get relief without having the claim made by the adverse party passed upon.

"In such case, I think, plaintiffs are clearly entitled to the relief sought. If the counterclaim sought to be set up did not grow out of the same transaction, and did not involve a trial and determination of the same precise issue, so that the determination of one case could be pleaded as a bar to the other, the case would be different."

It appears to us that the position of respondents here is even stronger than that of the successful party in the case just referred to. In this case the action had already been started in the superior court, and petitioner H. B. Engleman had been served with summons. That court has full jurisdiction to afford all of the parties relief, and the action of Engleman in thereafter starting a suit in the justice's court is not only unnecessary, but its effect is to actually interfere with the proceedings pending in the superior court. He bases his action on the contention that under section 442 of the Code of Civil Procedure he has an absolute right to start a separate action, instead of setting up his claim in a cross-complaint in the existing action. The real purpose of section 442 is to enable all such matters as arise from the same transaction or accident to be determined in a single action and by a single judgment, which may also give to a defendant the affirmative relief to which he may be entitled. Lowe v. Superior Court, 165 Cal. 708, 134 P. 190. While section 442 has been amended since that case was decided, its purpose has not been changed. Even if the petitioner H. B. Engleman, has a right to start a separate suit, instead of setting up his claim by way of cross-complaint, no reason exists why this right is vested or why it is not subject to the general powers of the superior court. In the case of Gregory v. Diggs, the fact that the defendant originally had a right to bring his action in the justice's court was not conclusive against the power of the superior court to exercise its right of injunction.

"There are, however, special circumstances in which a resort to the injunctive jurisdiction may still be necessary, in order to prevent a failure of justice. These cases may, I think, be reduced to a few general classes: 1. Where it is essential to promote the ends of justice that an entire controversy should be determined in one proceeding, so that, the rights and duties of all parties interested may be finally settled, it may be necessary to restrain other suits, so as to prevent the pendency of two or more actions involving the same subject matter, or to prevent a partial litigation of the controversy, or to prevent a multiplicity of suits depending upon

the same facts or principles." Pomeroy, Equity Jurisprudence (4th Ed.) par. 1371.

[3] Under our practice, the parties are entitled to have the entire issue, arising as it does from one accident, determined upon one trial, and this may only be done in the superior court, which also happens to be the court in which the proceeding originated.

While respondents allege that Johnson would suffer loss if compelled to set up his claim in the justice's court, in that it grows out of the same transaction, and might be barred if not set up, the rule here controlling, rests upon the principles of orderly administration of justice, rather than upon considerations of damage.

[4] "Where a court whose power is adequate to the administration of complete justice in the premises has acquired jurisdiction of a case, the litigation should be confined to that forum, and any attempt by either party to divert the litigation to another court will be restrained by injunction. * * * The observance of this rule is essential to the due and orderly administration of justice and the integrity of judgments and decrees, and in order to render valid its operation it is not essential that the element of irreparable damage should be involved." 32 Cor. Jur. p. 87, § 77.

We are of the opinion that the petitioners are not entitled to the relief sought. The application for a writ of prohibition is denied, and the alternative writ is discharged.

We concur: MARKS, J.; OWEN, Justice pro tem.

POSTAL TELEGRAPH-CABLE CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. *

Civ. 6803.

District Court of Appeal, Second District, Division 1, California.

May 22, 1930.

Rehearing Denied June 17, 1930. Hearing Granted by Supreme Court July 21, 1930.

1. Master and servant ⟹371.

Workmen's compensation legislation, though to be liberally construed, is limited to liability to employees for injury in course of employment (Const. art. 20, § 21).

2. Master and servant ⟹385(17).

Employee paid full wages after injury has been completely compensated for, disability during payment and wages must be deducted from award for permanent disability made after receipt of wages (Workmen's Compensation Insurance and Safety Act of 1917, § 9(b), as amended by St. 1919, p. 914, § 4).

Compensation was first awarded to a messenger boy for temporary total disability from July 16, 1924, to September 21, 1924, and from April 22, 1927, continuing indefinitely. On May 7, 1929, award was amended to allow compensation for permanent disability, beginning with July 24, 1924, with credit for disability compensation paid. Messenger boy after accident resumed position as messenger, and was paid wages from September 22, 1924, to June 1, 1926.

3. Master and servant ⟹385(16).

In case of permanent disability, employer, under amended award allowing further compensation, may be required to furnish further medical treatment.

4. Master and servant ⟹416.

Award for further medical treatment on employer's application for rehearing, not presenting such question, *held* authorized under employee's answer requesting treatment.

Employee was allowed compensation for temporary total disability, and was subsequently allowed compensation for permanent disability, and, on application for further hearing by employer, employer did not present question relating to medical or hospital treatment, but employee in answer to employer's petition for rehearing, asked for such further treatment.

5. Master and servant ⟹416.

Entry of awards did not exhaust Industrial Commission's power to extend award to cover additional medical treatment.

Proceeding under the Workmen's Compensation Law by Jack J. Coen, an incompetent minor, claimant, by Henry Coen, his guardian ad litem and trustee, opposed by the Postal Telegraph-Cable Company, employer. To review an order of the Industrial Accident Commission, awarding compensation for injury, the employer brings certiorari.

Award annulled, and cause remanded.

Haas & Dunnigan, of Los Angeles, for petitioner.

John W. Carrigan, of Los Angeles, for respondent Jack J. Coen.

Edward O. Allen, of San Francisco, for respondent Industrial Accident Commission.

YORK, J.

The only question raised herein that we feel called upon to discuss arises from the fact that the employee received wages in a sum, the amount of which is not clear from the record.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied 294 P. 1071.

before us, for at least a part of the time that the commission allowed him total disability compensation. It is clear from the record that such sum or sums were not allowed as deductions by the commission from its award, but that the commission ordered payment of an award for total disability during the time such wages were being so paid to such employee. Such amounts so paid by the employer as a wage to the employee during the time of the running of the award of the commission for disability should at least have caused a deduction or credit of the amount of the award accruing during the time the employee was so drawing such wages.

The award is therefore annulled, and the cause is remanded to the commission for further proceedings.

CONREY, P. J. (concurring).

I concur in the judgment. The employee, a boy sixteen years old, was a messenger in the service of the Telegraph Company. The accident by which he was injured occurred on the 16th day of July, 1924. The application for an award of compensation was filed April 29, 1927. By findings and award of the commission, filed November 29, 1927, it was determined that the injury caused *temporary* total disability, continuing from July 16, 1924, to and including September 21, 1924, and from April 22, 1927, continuing indefinitely. Award was made accordingly, at the rate of $8.55 per week.

Afterward, pursuant to further petitions and hearings, the commission on May 7, 1929, filed amended findings and award, whereby it was determined that the injury caused *permanent* disability, the percentage being 100. Thereupon the applicant was awarded $20.83 a week for 240 weeks, beginning July 24, 1924, and thereafter a pension at the rate of $12.82 a week for the rest of his life. Credit was allowed of all payments made as disability compensation and attorney fees.

Afterward, pursuant to further petitions and hearings, the commission on June 28, 1929, filed its second amended findings and award, but the amendments related only to attorney fees and to provisions for medical and hospital treatment.

[1, 2] There is evidence in the record, particularly in the testimony of the father of the employee, that the employee, after the accident, resumed his position as messenger and was actually working in that employment, and was paid his wages therefor, from September 22, 1924, until June 1, 1926. Nevertheless, the award, based upon the finding of permanent total disability, is made in strict accordance with the terms of section 9(b) of the Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1917, p. 837, § 9(b), as amended by St. 1919, p. 914, § 4). It is there provided that in case of permanent disability there shall be a disability payment "for one week in advance as wages on the eighth day after the injured employee leaves work as a result of the injury. Such indemnity shall thereafter be payable on the employer's regular payday," etc., subject to stated limitations. The difficulty here grows out of the finding of fact, sustained by the evidence, that the nature of the disability established is that of permanent disability. At the same time, the commission was confronted with the undisputed fact that this employee, notwithstanding his "permanent disability" (also a total disability), actually resumed and was paid for his services for a long period of time. I think that under such circumstances the law does not intend, and could not intend, that the employee should be paid twice for the same period of time. Only by allowing the employer credit, against the award, for *the amount of the award* which was paid for the period covered by the payments which were made, can the award be kept within the power of the commission. For the legislation, though it must be liberally construed, is limited to the creation of a liability of employers to compensate employees for injury or disability, "to the extent of relieving from the consequences of any injury or death incurred or sustained by workmen in the course of their employment." Const. art. 20, § 21. I see no answer to the proposition that when the employee, after his injury, has been paid full wages covering a stated period of time, he has been once and completely compensated for his disability with respect to that period of time.

[3-5] There is one other contention of petitioner which I think should receive attention. This relates to the award as last amended, whereby the employer is required to furnish further medical and hospital treatment. That this may be done in a case of permanent disability as well as under other conditions there remains no doubt. United States, etc., Co. v. Department of Industrial Relations (Cal. Sup.) 277 P. 492. But petitioner directs attention to the fact that the rehearing granted after the amended award of May 7, 1929, was allowed only in response to an application made by the employer, which application did not present any question relating to medical or hospital treatment. It further appears, however, that the employee in his answer to the employer's petition for rehearing, asked that this amendment be made, providing further medical and hospital service. So far as notice was concerned, I think that the rights of the employer were sufficiently protected. Also, the power of the commission to extend the award so as to cover the additional item relating to medical relief, I think had not been exhausted by the entry of the previous awards. Great Western Power Co. v. Ind. Acc. Comm., 191 Cal. 724, 729, 218 P. 1009.

I concur: HOUSER, J.

105 Cal. App. 673

FIETZ v. CATES.

Civ. 4101.

District Court of Appeal, Third District, California.

May 16, 1930.

1. Appeal and error ⟹907(3).

All legitimate presumptions must be indulged in support of judgment in appeal on judgment roll alone.

2. Appeal and error ⟹907(3).

Under the rule that all legitimate presumptions are to be indulged in support of the judgment in appeal on judgment roll alone, *held* that findings were sufficiently certain to sustain judgment awarding damages for breach of agreement for delivery of oil stock.

Appeal from Superior Court, Los Angeles County; J. S. Larew, Judge.

Action by A. L. Fietz against C. B. Cates. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Dudley Robinson, of Los Angeles, for appellant.

Culbert L. Olson, of Los Angeles, for respondent.

FINCH, P. J.

This is an appeal by the defendant on the judgment roll alone from a judgment for damages in favor of the plaintiff. The court found that the parties entered into an agreement reading as follows:

"Agreement of Purchase.

"On this date of August 12th, 1925, in the city of Long Beach, California, C. B. Cates hereby agrees to deliver to A. L. Fietz 100,000 shares of stock of the Trojan Oil Company at the price of one cent per share. He also gives to A. L. Fietz an option to purchase the remaining approximate 150,000 shares of Trojan Oil Company stock held by said C. B. Cates, for a period of 30 days from this date, to be delivered at the price of one and one-half cents per share."

The court further found that in consideration of the option the plaintiff paid the defendant $1,000 for 100,000 shares of the stock; "that within 30 days from the date of said agreement, plaintiff exercised the right and option so given him to purchase said additional 150,000 shares of said stock of said defendant; that plaintiff * * * tendered the defendant in cash the sum of $2,250, the agreed purchase price of said 150,000 shares of said Trojan Oil Company stock, and demanded delivery of said stock; * * * that defendant thereupon refused to accept said payment for, and refused to deliver to the plaintiff said 150,000 shares of said Trojan Oil Company stock." In several additional findings the stock covered by the option is definitely referred to as 150,000 shares, but the findings do not expressly state that the defendant's "remaining" stock consisted of 150,000 shares, although that fact may be fairly inferred from many of the findings.

Judgment was entered in favor of the plaintiff for the difference between the value of the 150,000 shares of stock and the amount the plaintiff was to pay therefor under the terms of the option.

[1, 2] Appellant contends that the judgment must be reversed because "the contract did not call for the delivery of the exact number of shares mentioned therein" and the court failed to find "that the quantity covered by the option was 150,000 shares." The plaintiff was given the option to purchase the "remaining" shares "held by said C. B. Cates." It is to be inferred from the terms of the contract that the "approximate" number of shares so held by the defendant was 150,000. If the court had found expressly that the number of such remaining shares was 150,000 all uncertainty would have been removed. The court did impliedly so find, and under the rule that all legitimate presumptions are to be indulged in support of the judgment in an appeal on the judgment roll alone, the findings are clearly sufficient.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

by reason of his insanity before commitment to hospital shall issue (Pen. Code, § 1026).

2. Constitutional law ⟹70(1).

Reviewing court cannot read into statute provision not found therein.

3. Constitutional law ⟹270.

Statute providing that person acquitted by reason of insanity may without further hearing be committed to hospital for insane *held* not to deny due process (Pen. Code, § 1026).

4. Insane persons ⟹83.

Punishment cannot be inflicted upon person for act committed while insane.

5. Insane persons ⟹86.

Statute requiring that insane person committing crime and not recovering sanity be confined in hospital for year before application for discharge is entertained *held* valid and not unreasonable (Pen. Code, § 1026a).

6. Constitutional law ⟹70(3).

Reasonableness of time for confinement of insane person committing crime, before application for discharge can be entertained, *held* primarily for Legislature (Pen. Code, § 1026a).

7. Habeas corpus ⟹2.

Statute providing that recovery of sanity is insufficient ground for releasing person from confinement until year from commitment *held* not invalid as denying habeas corpus (Pen. Code, § 1026a).

8. Insane persons ⟹86.

One acquitted of murder by reason of insanity cannot in habeas corpus proceeding show recovery of sanity where year had not elapsed since commitment to hospital (Pen. Code, §§ 1026, 1026a).

In Bank.

Application by Mary Slayback for a writ of habeas corpus against the Sheriff of Sacramento County.

The writ discharged, and petitioner remanded.

Howe, Hibbitt & Johnston, Clifford A. Russell, and O. F. Meldon, all of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., Wm. F. Cleary, Deputy Atty. Gen., and Neil R. McAllister, Dist. Atty., Guy P. Johnson, Chief Deputy Dist. Atty., and Horace F. Frye, Deputy Dist. Atty., all of Sacramento, for respondent.

CURTIS, J.

An indictment was presented against the petitioner, charging her with the crime of

209 Cal. 480

Ex parte SLAYBACK.

Cr. 3306.

Supreme Court of California.

May 28, 1930.

1. Insane persons ⟹86.

Statute *held* not to require hearing after verdict of jury that defendant was not guilty

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

murder, to which she interposed the plea of not guilty and also the plea of not guilty by reason of insanity. She was thereafter brought to trial on said indictment in the superior court of the county of Sacramento, before a jury, and found guilty of murder in the second degree. She was then tried upon her plea of "not guilty by reason of insanity," and the jury returned a verdict of not guilty by reason of insanity at the time of the commission of the offense charged. Thereupon the trial court committed her to the Napa State Hospital, "to be there held and confined according to law." In this commitment it was recited that, "it appearing to the court that the defendant has not fully recovered her sanity, it is directed that the defendant be confined in the Napa State Hospital for the Insane, located at Napa, California."

Before the making of said order, the petitioner demanded of said superior court that she be given an opportunity to be heard on the question of whether she was at that time sane or insane, and offered to prove that she then sane. This demand of the petitioner was denied by the trial court. After the making of said order of commitment, the petitioner filed a written demand with said court for a trial by jury to determine whether or not she was then sane, which demand was also denied by the trial court. Petitioner then filed with the superior court of the county of Sacramento a petition for a writ of habeas corpus, based upon the foregoing grounds, which was denied by said court. A like petition was filed in the District Court of Appeal and denied. Petitioner thereupon filed her present petition for a writ of habeas corpus in this court, directed to the sheriff of said county, in whose custody petitioner was then being detained. She claims that her detention and restraint are unlawful and illegal, and prays that she may be restored to her liberty. In her petition she alleges that she was sane on the day said commitment was ordered issued and at all times thereafter. The writ was issued as prayed for, and said sheriff has duly filed his answer and return thereto, in which he denied that petitioner was sane on the date of said commitment, or at any time thereafter, and further alleges that on the 12th day of November, 1929, the date of the issuance of said writ of habeas corpus, the petitioner was in his custody by virtue of said commitment, but that on the day thereafter the petitioner was transferred to the custody and control of the superintendent of the state hospital at Napa, in accordance with the terms of said commitment, and is now being held by the superintendent of said hospital in accordance with the terms of said commitment.

In issuing the commitment under which the petitioner is now detained by the superintendent of the state hospital at Napa, the trial court purported to follow the course of procedure prescribed by section 1026 of the Penal Code, as enacted by the Legislature of 1927. This section reads as follows:

"When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury, in the discretion of the court. In such trial the jury shall return a verdict either that the defendant was sane at the time the offense was committed or that he was insane at the time the offense was committed. If the verdict or finding be that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law. If the verdict or finding be that the defendant was insane at the time the offense was committed, the court unless it shall appear to the court that the defendant has fully recovered his sanity shall direct that the defendant be confined in the state hospital for the criminal insane, or if there be no such state hospital, then that he be confined in some other state hospital for the insane; *if, however*, it shall appear to the court that the defendant has fully recovered his sanity such defendant shall be remanded to the custody of the sheriff until his sanity shall have been finally determined in the manner prescribed by law. A defendant committed to a state hospital shall not be released from confinement unless and until the court which committed him, or the superior court of the county in which he is confined, shall after notice and hearing find and determine that his sanity has been restored. In the event such hearing is held in the county from which the defendant was committed, notice as ordered by the court shall be given to the district attorney of said county. In the event such hearing is held in the county where the defendant is confined, notice as ordered by the court shall be given to the district attorney of said county and also to the district attorney of the county from which said defendant was committed. Nothing in this section contained shall prevent the transfer of such person from one state hospital to any other state hospital by proper authority."

The first contention of the petitioner is that her commitment is void as having been issued by the trial court without due process of law, in that no hearing was afforded her

prior to her said commitment. The position the petitioner takes is that section 1026 of the Penal Code, impliedly at least, provides for a hearing after acquittal on her plea of insanity and before she can be committed to a hospital for the insane, but that, if said section fails to provide for such a hearing, then it is unconstitutional and void for want of due process of law.

[1, 2] This section clearly contemplates a hearing as to the defendant's sanity if "it shall appear to the court that the defendant has fully recovered his sanity," as he is then "remanded to the custody of the sheriff until his sanity shall have been finally determined in the manner prescribed by law." The phrase, "in the manner provided by law," evidently refers to those sections of the Political Code governing the apprehension, trial, and commitment of persons charged with being insane. Sections 2168 to 2179, Pol. Code. These sections of the Code provide, among other things, for a hearing before the court, and, under certain conditions, for a jury trial. But these provisions of law are only made applicable to the case of a defendant when it shall appear to the trial court that the defendant has fully recovered his sanity. If it shall appear to the trial court that the defendant has not fully recovered his sanity, then, by the terms of section 1026 of the Penal Code, it is made the duty of the court to commit him to the hospital for the insane. Nothing is expressly said about any hearing as to his present sanity before the trial court shall issue the commitment, and we fail to find anything in the section from which it can be inferred or implied that any hearing was contemplated after the verdict of the jury that the defendant was not guilty by reason of his insanity, and before the commitment should issue. We must take the statute as we find it, and have no right to read into it any provision not contained therein.

With this construction of the section the petitioner contends that it violates the "due process of law" clause of both the State and Federal Constitutions. As before stated, the legislation involved herein is of recent enactment, and the questions presented on this hearing are, in so far as the courts of this state are concerned, questions of first impression. In other jurisdictions, however, legislation of this character is of long standing, and the courts of these jurisdictions have frequently been called upon to pass upon the validity of the various statutes enacted within their respective jurisdictions.

In Ruling Case Law, vol. 14, p. 609, the following brief summary of the decisions of the various courts upon the subject is found: "Nearly all of the states of this country, as well as England and Canada, have statutes relating to the confinement of one acquitted of crime by reason of insanity, and the right to confine one who is still insane, and who is dangerous to the public peace and safety, until such time as he can be released with safety, provided that the present existence of such insanity or dangerous condition is properly shown, has apparently never been questioned. A statute providing that a person acquitted of a criminal charge on the ground that he was insane when the offense was committed shall be committed to the asylum for the dangerous insane, is not ex post facto as to a person tried and acquitted on that ground, after the statute was enacted for an offense committed before its passage. As to the necessity for a finding as to the continuance of the insanity of one acquitted on that ground, as a prerequisite to his confinement, it is usually held that the insanity of such a person is presumed to continue until the contrary is shown, and that it is not necessary to hold the inquisition generally required by statute in the case of persons alleged to be insane before their commitment."

In Corpus Juris we find the following statements of the law applicable to such legislation: "Even when a defendant is acquitted by the verdict of a jury on the ground of insanity, the court may and should remand him to the custody of the sheriff or marshal on being satisfied that he is still insane and that it would be dangerous to permit him to be at large, unless some other provision for such cases is made by statute. The legislature may, within its constitutional limitations, and often does, authorize the commitment of such a person until he becomes sane, if his discharge shall be deemed dangerous to the public peace or safety. At present the confinement of such person is a matter of common statutory regulation." 32 C. J. 753. Again, on the same page, we find the following: "A statute providing for restraining prisoners who are acquitted on the ground of insanity contemplates insanity existing at the time of the trial or acquittal. Where one accused of a crime has been acquitted thereof on the ground of insanity, the court may order the commitment without further hearing to determine his insanity, if it deems it dangerous to let him go at large. * * *" Corpus Juris, in volume 12, at page 1211, summarizes the law on this subject as follows: "Statutes providing that accused persons acquitted on the ground of insanity may, without further hearing, be committed to a place of confinement have in some cases been declared void for want of due process, but by the weight of authority, they have been sustained as constitutional."

Among the cases relied upon by the authors of the publications just mentioned we may mention the following: Ex parte Clark, 86 Kan. 539, 121 P. 492, 39 L. R. A. (N. S.) 680, Ann. Cas. 1913C, 317; In re Gasquet, 136 La.

957, 68 So. 89; People ex rel. Peabody v. Chanler, 133 App. Div. 159, 117 N. Y. S. 322, 323, affirmed 196 N. Y. 525, 89 N. E. 1109, 25 L. R. A. (N. S.) 946 (case of Harry K. Thaw); People v. Baker, 59 Misc. Rep. 359, 110 N. Y. S. 848 (case of Harry K. Thaw); State v. Snell, 46 Wash. 327, 89 P. 931, 9 L. R. A. (N. S.) 1191; Ex parte Brown, 39 Wash. 160, 81 P. 552, 1 L. R. A. (N. S.) 540, 109 Am. St. Rep. 868, 4 Ann. Cas. 488.

We will refer to the text of only a few of these cases. All the statutes under consideration were similar in their terms to section 1026 of the Penal Code. In Ex parte Brown, supra, 39 Wash. 160, 81 P. 552, 553, the court, on page 553 of the opinion, held as follows: "Has the petitioner been deprived of due process of law in the premises? He was tried before a jury, to whom he himself submitted the issue that he was insane when the crime was committed. He was permitted to fully introduce his evidence upon that subject, and the jury were instructed as to their duty in the premises. The verdict returned was in his favor upon the issue which he tendered, and he was therefore accorded due process of law and the right of trial by jury upon that subject. The jury found that he was insane, and it was the manifest duty of the court to enter some kind of a judgment upon the finding of the jury. The petitioner erroneously assumes that it was a judgment entered in a new and original proceeding without due process of law and without opportunity for a hearing. It was, however, a judgment rendered upon the verdict of a jury which had been regularly returned in a proceeding wherein all constitutional rights had been accorded."

In Ex parte Clark, supra, 86 Kan. 539, 121 P. 492, the Supreme Court of Kansas, after an extended review of the authorities which have given consideration to statutes similar in terms to section 1026 of the Penal Code of this state, and particularly in reference to their constitutionality, on page 495 of the opinion gives its conclusion in the following language: "The grounds upon which the statute was held valid suggested in these opinions may be briefly summarized thus: (1) That insanity of a nature dangerous to others proved on the trial was presumed to continue to the time of the commitment; (2) that the commitment was based on evidence showing the continuance of such insane condition; and (3) that, the commitment resulting from the express command of the statute, the trial and verdict upon the criminal charge was only an equivalent of proceedings provided to determine the question of insanity in cases not involving a charge of crime. Doubtless there is merit in each of these views, and each should have weight in upholding a statute which is not to be set aside unless clearly unconstitutional. If the Legislature in framing the law sought to give practical effect to the ordinary presumption referred to which so well accords with ordinary observation and experience, no good reason is perceived why it could not do so, leaving a reasonable opportunity for a future determination of the question whether and when the detention should cease."

In People ex rel. Peabody v. Chanler, supra, Justice Jenks, upon the hearing of a petition for the release of Harry K. Thaw, and in construing a statute the terms of which were in many respects like those to be found in section 1026 of the Penal Code of this state, states his conclusions as follows: "But, as there is no provision for enlightenment of the court in any other manner, it must be that the Legislature intended that the court could rest its conclusion upon the evidence given at the trial and the appearance of the defendant thereat. If the defendant's plea was insanity and it had prevailed, it would follow that insanity was litigated at the trial. Although the inquiry at the trial would be directed to insanity at the time of the commission of the offense, yet the evidence might establish that such insanity had not ceased, but had continued, that it was chronic, that the defendant might then or thereafter in the very nature of his disease be subject to recurrences of a state of mind like unto that in him when he committed the alleged crime. And, moreover, such evidence might well bear directly upon the condition of the defendant at the time of trial. * * * It cannot, then, be said that a defendant who makes the plea of insanity and seeks to establish it did not have notice under this provision of a hearing that might reveal his condition of insanity at the time of his trial, and a hearing of which the result might be such commitment upon acquittal for insanity, under the said provision of the Code of Criminal Procedure, as was made in this case. * * * Such a commitment is not for the punishment of such a defendant, for there can be no punishment for him who has been acquitted, but it is for precaution of the public, made in the exercise of the police power of the state, which permits the restraint of an insane person who at large would be a danger to the peace and safety of the people. * * *"

[3] From the foregoing citations of the law, the general rule, supported by the great weight of authority, would appear to be that a statute which provides that a person acquitted of a crime by reason of his insanity at the time the offense was committed may be without any further hearing committed to a place of confinement is valid and is not subject to the objection that it is unconstitutional on the ground that due process of law has not been accorded to the accused.

We find but few decisions of the courts holding a contrary doctrine and the reasoning

of these is neither convincing nor even persuasive; the one relied upon principally by the petitioner, Brown v. Urquhart (C. C.) 139 F. 846, having been reversed by the Supreme Court of the United States, upon the ground that the federal court had no jurisdiction in the matter, and without having expressed any opinion as to the legality of Brown's imprisonment. Urquhart v. Brown, 205 U. S. 179, 27 S. Ct. 459, 51 L. Ed. 760. The commitment considered by the court in the case of Brown v. Urquhart was the same process held valid by the Supreme Court of the state of Washington in Ex parte Brown, supra, 39 Wash. 160, 81 P. 552, 1 L. R. A. (N. S.) 540, 109 Am. St. Rep. 868, 4 Ann. Cas. 488.

The commitment under which the petitioner is now being held is therefore a valid warrant of authority, and justified the detention of the petitioner at least in its inception.

However, as we have seen, the petitioner alleges that she has fully recovered her sanity, and that at the date of said commitment she was and now is sane. She therefore contends that, notwithstanding the regularity and validity of her original commitment, she is now entitled to be restored to her liberty, and that any further detention of her under said commitment is illegal and without warrant of law. The allegation of the petitioner that she has recovered her sanity is denied by the respondent. Nevertheless, the petitioner insists that she is at least entitled to a hearing upon the issue of her present sanity and that upon proof thereof this court is in duty bound to discharge her from her present imprisonment. Undoubtedly the petitioner is correct in her contention, unless such a hearing is legally withheld from her by the terms of section 1026a of the Penal Code enacted in 1927. This section of the Code was passed at the same time the Legislature enacted section 1026 of the same Code, and reads as follows: "A person who has been committed to a state hospital, as provided in section 1026, may apply to the superior court of the county in which he is confined or of the county from which he was sentenced, to be released on the ground that his sanity has been restored. No hearing upon such application shall be allowed a person until he shall have been confined for a period of not less than one year from the date of the order of commitment, and if the finding of the court be adverse to him upon such, or any subsequent, application for release, on the ground that his sanity has not been restored, he shall not be permitted to file a further application until one year has elapsed from the date of hearing upon his last preceding application. In any hearing authorized by this section the burden of proving that his sanity has been restored shall be upon the person applying for such hearing."

The undoubted effect of this section of the Code is to impose upon a defendant coming within its terms detention and restraint in a hospital for the insane for the period of one year from the date of the order of the commitment; this restraint and detention to continue during said period of time irrespective of the fact that said defendant may before the expiration of said year have recovered her sanity.

[4] Petitioner contends that by the terms of the section she is punished for a crime committed while insane. That punishment cannot be legally inflicted upon a person for an act committed while such person was insane appears to be the consensus of the authorities generally. 14 R. C. L. 598; State v. Strasburg, 60 Wash. 106, 110 P. 1020, 32 L. R. A. (N. S.) 1216, Ann. Cas. 1912B, 917. In that case the Supreme Court of the state of Washington declared unconstitutional a statute of that state which attempted to deprive a defendant accused of crime of interposing a plea or defense of insanity. We are not fully convinced, however, that the detention which the petitioner is now subject to can be said to be an imprisonment for the punishment of any crime. It is true that she is deprived of her liberty temporarily, but not every deprivation of one's liberty can be considered as an imprisonment for crime. It often becomes necessary to take into custody those who are mentally afflicted and detain them until they become no longer a menace to the public nor dangerous to themselves. "Nothing can be clearer than the duty of the state to restrain and confine the insane, not only for their own safety and protection, but for the safety and protection of the public. The relation between the two is that of guardian and ward. The confinement in an asylum is not of the same character as imprisonment for the punishment of an offense. It is a necessity growing out of the inability of the mentally afflicted to care for themselves or prevent injury to others." Hammon v. Hill (D. C.) 228 F. 999, 1001.

[5, 6] If it is the duty of the state to restrain one mentally afflicted, as held by the above authority and others that might be cited here, this duty becomes far more urgent and pressing when it is proven that such person is not only insane, but has developed criminal tendencies as a result of his mental derangement which has caused him to take the life of a human being under circumstances which, but for his mental state, would amount to murder. In endeavoring to perform this duty of caring for those who are mentally afflicted and of protecting the public from injury by those insane persons who have been proven to possess criminal tendencies, even to the extent of committing acts which, but for their mental state, would be serious crimes, the Legislature has enacted section 1026a of the Penal Code, requiring that such persons, when it shall appear to the trial

court that they have not fully recovered their sanity, shall be confined in a hospital for the insane for the period of one year before any application for their discharge shall be entertained by any court. Is such an enactment unreasonable or beyond the power of the Legislature to enact? We think not. Insanity has so many different forms and its manifestations are so varied and uncertain that it is often impossible for the most skilled alienist or astute judge to detect its existence or to predict the time of its recurrence, when the patient appears to be for the time free from the affliction. The restraint and detention imposed is not, as we have seen, for the purpose of inflicting punishment upon a defendant, but to permit a sufficient length of time to elapse to enable those who may be called upon to pass upon the sanity of the patient to intelligently give their judgment as to whether or not he has recovered his reason. The Legislature has fixed this time as one year. Perhaps a lesser or greater time would serve the same purpose, but the Legislature was in as good a position to judge of the time required as are the courts. No definite showing has been made that the time so fixed is an unreasonable time, and, as the matter is one primarily for the Legislature, we see no reason to overturn their action.

[7] The contention is made that the Legislature has attempted to suspend the right to the writ of habeas corpus. There is no merit in this contention. The section simply provides that no hearing as to the sanity of the defendant shall be heard until he shall be confined one year. In other words, the section provides that the recovery of the sanity of the defendant shall not be a sufficient ground or reason for his release until the elapse of one year from his commitment. This requirement we have held to be valid. The commitment, therefore, if valid in other respects, would be a complete answer to the application for the writ. Any other defect in the commitment, or any other ground for her release can be raised by defendant at any time upon habeas corpus proceedings.

[8] We are of the opinion, therefore, that the section of the Code in question is not subject to any of the objections made to it by petitioner, that the commitment under which the petitioner is now held is legal and authorizes her detention, and that she is not entitled in this proceeding to show that she has recovered her sanity as one year has not elapsed since the date of her commitment.

The writ is discharged, and the petitioner is remanded.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; SEAWELL, J.; RICHARDS, J.

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209 Cal. 786

In the Matter of the Application of James E. MERWIN for a Writ of Habeas Corpus.

Cr. 3307.

Supreme Court of California.

May 28, 1930.

In Bank.

Application for writ of habeas corpus prayed to be directed to the Superintendent of the Mendocino State Hospital to secure release of petitioner on ground of present sanity. Writ discharged; petitioner remanded.

Ernest Spagnoli and Walter F. Lynch, both of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondent.

CURTIS, J.

Petition for writ of habeas corpus. Petitioner was charged with the crime of murder. He interposed the pleas of not guilty and not guilty by reason of insanity. Upon the first of said pleas he was found guilty by the jury of murder in the second degree, but, upon his plea of not guilty by reason of insanity, the jury returned a verdict in his favor. Pursuant to section 1026 of the Penal Code, and in accordance with the terms of said section, the trial court issued its order committing petitioner to the Mendocino State Hospital at Talmage, Cal. One year has not expired since the date of said commitment.

Upon the authority of In the Matter of the Application of Mary Slayback for a Writ of Habeas Corpus (Cal. Sup.) 288 P. 769, the petition is hereby denied, and the petitioner is remanded to the custody of the superintendent of said hospital.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; SEAWELL, J.; RICHARDS, J.

209 Cal. 460

ATCHISON, T. & S. F. RY. CO. v. RAILROAD COMMISSION OF CALIFORNIA et al.★

LOS ANGELES & S. L. R. CO. v. SAME.

SOUTHERN PAC. CO. et al. v. SAME.

S. F. 13056–13058.

Supreme Court of California.

May 27, 1930.

Rehearing Denied June 26, 1930.

1. Railroads ⟹58.

Transportation Act did not transfer to Interstate Commerce Commission power to make order requiring construction of union passenger station (Transportation Act of 1920).

2. Railroads ⟹58.

Statute *held* to confer on Railroad Commission power to order construction of union passenger depot (St. 1915, p. 115, §§ 13 (b), 22 (a), 30, 31, 36).

3. Courts ⟹90(1).

"Law of case" gives expression to rule that final judgment of highest court is final determination of parties' rights.

[Ed. Note.—For other definitions of "Law of the Case," see Words and Phrases.]

4. Courts ⟹90(1).

Doctrine of law of case applies only to decisions of highest court on particular issue under consideration.

5. Courts ⟹90(3, 4).

Doctrine of law of case does not apply to decision of state Supreme Court involving construction of federal Constitution or federal statutes.

6. Courts ⟹100(1).

Judgment ⟹581.

Federal Supreme Court having ruled Transportation Act did not divest state Railroad Commission of authority to require construction of union station, state Supreme Court's prior contrary holding did not operate as res judicata or law of case against commission (Transportation Act of 1920).

7. Constitutional law ⟹297.

Order requiring railroads to build union passenger depot and abandonment of present facilities *held* not to deprive railroads of property without due process.

8. Eminent domain ⟹2(8).

Order requiring construction of union passenger depot and abandonment of present facilities *held* not to take property of railroad for public purpose without compensation.

9. Railroads ⟹58.

Erection of union passenger station by railroads *held* proper subject for control under state's police power.

10. Railroads ⟹9(2).

Unless action of State Railroad Commission is beyond its jurisdiction, its findings are binding on Supreme Court in certiorari proceedings.

11. Railroads ⟹58.

It could not be assumed that Railroad Commission would require any railroad to pay as its share of cost of union depot more than amount necessary to furnish proper facilities to perform its public duty.

It was contended that effect of order was to require two railroads to join in construction of union depot, the primary purpose of which was the accomplishment of removal of tracks of a third railroad, a matter with which the two railroads were not concerned, and hence amounted to taking of property for public use without compensation and without due process of law.

12. Railroads ⟹58.

Order of Railroad Commission requiring construction of union depot *held* not arbitrary, but warranted by evidence.

The evidence disclosed that station facilities of two of railroads were inadequate, and that the grade crossings of third railroad were dangerous to life and limb and unsuited to the surroundings, that the grade crossings of third carrier could only be changed by complete and expensive change of track or a change of terminal.

13. Railroads ⟹58.

Contention that order requiring construction of union depot was void for uncertainty *held* not properly raised in Supreme Court.

It was contended that, because the order recited that it should become effective on promulgation by Interstate Commerce Commission of order granting proper and sufficient certificates authorizing construction authorized by order of Railroad Commission, and that issuance of such order by Interstate Commerce Commission should be condition precedent to effectiveness of order of Railroad Commission, the order was void for uncertainty because of question as to whether certificates were proper and sufficient, but objection was not properly raised in Supreme Court, since certificates on their face were proper and sufficient, and were so considered by Railroad Commission and Interstate Com-

merce Commission, and no question had been raised by any one as to their insufficiency, and they became part of order of Railroad Commission at time writ of review was issued by Supreme Court.

14. Railroads ⟹58.

Contention order requiring construction of union depot did not specify details of construction *held* without merit.

Order gave location of union station, the track layout was fully shown, the land necessary to be taken was definitely marked out, and general dimensions of station building were given.

In Bank.

Separate certiorari proceedings by the Atchison, Topeka & Santa Fé Railway Company, by the Los Angeles & Salt Lake Railroad Company, and by the Southern Pacific Company and the Southern Pacific Railroad Company to review orders of the Railroad Commission of California and Leon O. Whitsell and others, as members of and constituting said Railroad Commission, requiring elimination of grade crossings and establishment of union passenger station, which proceedings were consolidated in the Supreme Court.

Affirmed.

E. W. Camp, Robert Brennan, M. W. Reed, E. T. Lucey, Leo E. Sievert, A. S. Halstead, and Fred E. Pettit, Jr., all of Los Angeles, C. W. Durbrow, of San Francisco, and Frank Karr, of Los Angeles (Louis W. Myers, of Los Angeles, and Guy V. Shoup, of San Francisco, of counsel), for petitioners.

Max Thelen, of San Francisco, and Erwin P. Werner, Jess E. Stephens, and Milton Bryan, all of Los Angeles, amici curiæ for City of Los Angeles.

Carl I. Wheat, Reginald L. Vaughan, and Roderick B. Cassidy, all of San Francisco, for respondents.

PER CURIAM.

This matter comes to us upon petitions for writs to review an order of the Railroad Commission of the state of California. Three separate petitions were filed; each carrier involved in the order objecting thereto. The cases have been consolidated in this court, as many of the matters urged in the attacks upon the order of the commission are available to all the carriers affected by said order.

Said order of the Railroad Commission requires applicants to make and construct a union passenger station within that portion of the city of Los Angeles bounded by Commercial street, North Main street, Redondo avenue, Alhambra avenue, and the Los Angeles river, together with such tracks, connections and all other terminal facilities and additions, extensions, improvements and changes in the existing railroad facilities of applicants as may be reasonably necessary and incidental to the use of said union passenger station, at a cost, as estimated or suggested in said order, of approximately $10,000,000, and in substantial compliance with the plans outlined by said commission.

A similar order was made by the Railroad Commission in 1921, and a writ of certiorari to review this action of the commission was obtained from this court, and in December, 1922, this court filed its decision annulling such order. Atchison, T. & S. F. Ry. Co. v. Railroad Commission, 190 Cal. 214, 211 P. 460.

The Supreme Court of the United States, on certiorari, reviewed the judgment of this court annulling said orders of the Railroad Commission, and affirmed said judgment. Railroad Comm. v. S. P. Co., 264 U. S. 331, 44 S. Ct. 376, 68 L. Ed. 713. This case will hereinafter be referred to as the first Los Angeles Terminal Case. In discussing the purposes and effect of the Transportation Act of 1920 (41 Stat. 456), the opinion of Mr. Chief Justice Taft, in said case, quotes from an earlier opinion written by him in another proceeding as follows:

"The new act [Transportation Act of 1920] seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, its puts the railroad systems of the country, more completely than ever under the *fostering guardianship* and control of the (Interstate Commerce) Commission which is to *supervise* their issue of securities, their car supply and distribution, *their joint use of terminals*, their construction of new lines. * * *"

After this quotation, the opinion of Mr. Justice Taft continues: "On the one hand, it is urged that, with the purposes thus declared, the act commits to the *supervision and control* of the Interstate Commerce Commission such an undertaking as is here in question. * * * On the other hand, it is earnestly contended that, since no specific provision is made for the *supervision* of interstate union stations by the Interstate Commerce Commission, *the whole subject* remains in the control of the state Railroad Commissions."

After a detailed consideration of several sections of the Interstate Commerce Act, as amended, Justice Taft continues: "It is obvious from the foregoing that Congress intended to place under the *superintending and fostering direction* of the Interstate Commerce Commission all increased facilities in

the matter of distribution of cars and equipment and in joint terminals. * * * It [Interstate Commerce Act (49 USCA § 1 et seq.)] gives to the Interstate Commerce Commission the power and duty, where the public interest requires to make out of what is the passenger and freight station of one interstate carrier a union station or depot.

"But it is insisted that the *supervisory power* thus conferred does not include the installation of an interstate union station, where its terminals and main tracks are newly built, and the interstate carriers are compelled to expropriate, not the terminal property of another interstate carrier, but property of others than carriers not theretofore used for terminals. This would be giving power to the Interstate Commerce Commission to provide for a small and contracted union station of interstate carriers, limited to the terminals of one carrier, and would leave the larger and more important union stations of interstate carriers to the *control* of state commissions. We think, however, that *means of control* over installation of such new union stations for interstate carriers is given to the Interstate Commerce Commission in amended paragraphs (18 to 21) of section 402 [49 USCA § 1]. They provide that no interstate carrier shall undertake the extension of its line of railroad or the construction of a new line of railroad * * * unless and until the Commission shall certify that public convenience present or future requires it, and that no carrier shall abandon all or any portion of its line or the operation of it without a similar certificate of approval. Such a certificate is, we think, necessary in the construction of a new interstate union station, which involves a substantial and expensive extension of the main tracks or lines of interstate carriers who theretofore have maintained separate terminals."

After a discussion of the authority of the state, in the exercise of its police power to regulate intrastate business, it is said: "But there is a great difference between such relocation of tracks or local union stations and what is proposed here. The differences are more than that of mere degree, they and their consequences are so marked as to constitute a change in kind. They come within paragraphs 18 to 21 of section 402 [49 USCA § 1] *and require a certificate of the Interstate Commerce Commission as a condition precedent to the validity of any action by the carriers or of any order by the state commission.*"

It is further held that under the Interstate Commerce Act, before the extension of main lines and terminals is required, the commission is required to make a finding that the expense involved will not impair the ability of the carriers concerned to perform their duty to the public.

Pending the determination of this matter by the Supreme Court of the United States, the city of Los Angeles filed a petition with the Interstate Commerce Commission, asking for an order that the carriers provide, maintain, and use a union station within a defined area of the city; abandon main line passenger and freight service, except local freight switching, on and along a portion of Alameda street in Los Angeles, and eliminate and abandon certain railroad grade crossings in the city; construct or acquire such structures, tracks, and facilities, and construct or abandon such lines or facilities of operation and arrange for such joint or other use of existing tracks, etc., as may be reasonably necessary and incidental as a part of and in furtherance of said union station. This matter was held under consideration by said commission until the Supreme Court of the United States should have spoken upon the power and duty of said commission. After the filing of said decision by said court, the Interstate Commerce Commission proceeded to act in accordance with its interpretation of said decision, and found, after hearings held:

That public convenience and necessity permitted the abandonment of operation of all passenger and freight train service, except industrial freight-switching service, on the main line of the Southern Pacific on Alameda street from College street to East Fifteenth street, inclusive, in the city of Los Angeles, Cal.; that the extension by defendants of their respective main lines of steam railroad so as to reach and serve such union passenger station and terminal as they may construct and establish in a described portion of the city of Los Angeles, Cal., *in accordance with a lawful order of the Railroad Commission* of California, and the extension of such main lines to provide for rearrangement of their respective passenger and freight routes incidental to the convenient and proper operation of such union station and terminal, is reasonably required in the interest of public convenience and necessity, and the expense involved therein will not impair the ability of said carriers to perform their respective duties to the public; that, in addition to the abandonment of train service on Alameda street as above authorized, public convenience and necessity permit the abandonment by defendants of such portions of their lines of steam railroad, or of all or any portion of the interstate service thereon, as may be incidental to the arrangement of routes, tracks, and terminal facilities necessitated by the establishment of a union passenger station and terminal as indicated.

It was also found that the joint use by defendant steam railroads of such main-line tracks of each other as may be incidental and necessary or convenient to the proper operation of a union passenger depot and terminal as above indicated is in the public inter-

est and practicable, and will not substantially impair the ability of the carrier or carriers owning or entitled to the enjoyment of such track or tracks to handle its or their own business.

The Railroad Commission of California then made the order under review here which was based upon its own findings and the above findings of the Interstate Commerce Commission, and was made conditional upon the issuance by the Interstate Commerce Commission of proper and sufficient certificates covering and authorizing the constructions, extension, and abandonments authorized in said order of the Railroad Commission. Such certificates were issued later by the Interstate Commerce Commission after a further hearing and the order of the Railroad Commission, to which the carriers are here objecting, became effective.

The lengthy controversy in the briefs of the parties hereto as to the effect and meaning of the decision of the United States Supreme Court in the first Los Angeles Terminal Case has been settled, to some extent at least, by a later pronouncement of that court in the same matter. During the pendency of this proceeding in this court to review said order of the Railroad Commission, the city of Los Angeles, on July 12, 1928, sought from the Supreme Court of the District of Columbia a writ of mandamus compelling the Interstate Commerce Commission to consider the evidence introduced in the proceeding before it involving the Los Angeles Passenger Terminal for the purpose of determining whether the commission should order the railroads involved to build or use an interstate union passenger station in the city of Los Angeles, Cal., and, after consideration of the evidence, to make such order therein as the facts may require. The Supreme Court of the District of Columbia dismissed the petition; the Court of Appeals reversed the judgment of the said Supreme Court and remanded the cause for further proceedings; and the United States Supreme Court granted a writ of certiorari, reversing the judgment of the Court of Appeals of the District of Columbia. Interstate Commerce Commission v. United States ex rel. City of Los Angeles, 280 U. S. 52, 50 S. Ct. 53, 54, 74 L. Ed. —, decided November 25, 1929, and hereinafter referred to as the second Los Angeles Terminal case. In that case it was said: "The sole question for decision is whether the Interstate Commerce Commission has jurisdiction to order the construction of the union station."

Further, in the same opinion, the court quotes from the decision of the Interstate Commerce Commission under review, as follows: "Re-examination of the whole subject again leads us to the conclusion that under existing law we are not empowered to require the construction of a union passenger station of the character sought by the complaint." The opinion of the United States Supreme Court continues: "There are cases in the state courts in which by virtue of statutory provision railroads are required expressly to unite in a passenger station, if determined by * * * a Railroad Commission. * * * But there is no Federal case in which is built up out of such words as those which we find in the Transportation Act of 1920 authority for requiring such a station. Without more specific and express legislative direction than is found in the act, we cannot reasonably ascribe to Congress a purpose to compel the interstate carriers here to build a union passenger station in a city of the size and extent and the great business requirements of Los Angeles. The Commission was created by Congress. If it was to be clothed with the power to require railroads to abandon their existing stations and terminal tracks in a city and to combine for the purpose of establishing in lieu thereof a new union station, at a new site, that power we should expect to find in congressional legislation. * * * To attribute to Congress an intention to authorize the compulsory establishment of union passenger stations the country over, without special mention of them as such, would be most extraordinary. * * * When the interest of a great city in its improvements is to be promoted entirely at the expense of railroads that enter it, Congress would be expected to hesitate before it would change discretionary leave for the erection of such stations into positive command. In such a case the expenditure of a large amount of capital will not bring with it corresponding increase in the railroad revenues. If Congress had intended to give an executive tribunal unfettered capacity for requisitioning investment of capital of the carriers and the purchase of large quantities of land and material in an adverse proceeding, we may well be confident that Congress would have made its meaning far clearer and more direct than in the present meager provisions of the Transportation Act. * * * But it is said that we have already foreclosed the conclusion in this case by our opinion in 264 U. S. 331, 44 S. Ct. 376, 68 L. Ed. 713 [the first Los Angeles Terminal Case]. The only issue there presented to this court was whether it was necessary to secure from the Interstate Commerce Commission its approval of the construction of a union station and the relocation of the connecting tracks proposed. The point in that case was the necessity for the acquiescence by the Interstate Commerce Commission in respect to a union passenger station. We held such a certificate to be necessary before a union station or connecting lines of interstate carriers could be lawful. That is all we held."

[1] It is settled, therefore, by the highest judicial authority in the land, that the Transportation Act has not transferred to the Interstate Commerce Commission the power to make the order involved here.

It is urged, however, by petitioners that, even though it be true that the Interstate Commerce Commission has no power to enter the order for the erection and maintenance of a union station, the fact that it has some powers given it over the general subject-matter indicates that Congress "has entered the field" of regulation respecting the establishment of union stations to such an extent as to automatically terminate the state's power to deal with that subject. The most decisive answer to this question is that the language of the decision of the Supreme Court of the United States, in the first Los Angeles Terminal Case, is to the effect that an order is to be made by the state commission, conditioned only upon the proper findings and certificates of the Interstate Commerce Commission.

If we examine into the question independently of said decision of the Supreme Court of the United States we find that the Supreme Court of California, prior to the Transportation Act of 1920, assumed, at least, that the Railroad Commission had jurisdiction to order the erection and maintenance of a union station, for in the case of Civic Center Ass'n v. Railroad Commission, 175 Cal. 441, 166 P. 351, this court directed the commission to proceed with a hearing and determination on the merits of a complaint which included a demand for a union station order. Later, in the case of Atchison, Topeka & Santa Fé Railway Co. v. R. R. Comm., supra, this court held that the Railroad Commission had been divested of such power by the Federal Transportation Act of 1920, and, if this conclusion be out of harmony with the view of the United States Supreme Court, as the two decisions of that court with reference to this matter show it to be, then, assuredly, the power mentioned, never having been divested, is vested at present in the State Railroad Commission.

[2] The Constitution of this state expressly provides that the authority of the Legislature to confer powers upon the Railroad Commission is plenary and unlimited by any provision of the Constitution. Const. of Cal. art. 12, §§ 22 and 23; Pacific Tel. & Tel. Co. v. Eshleman et al., 166 Cal. 640, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822.

There can be no question that the Legislature by the Public Utilities Act (Stats. 1915, c. 91, p. 115), sections 13(b), 22(a), 30, 31 and, particularly by section 36 thereof, has conferred upon the Railroad Commission powers broad enough to include the ones sought to be exercised by said Commission herein.

While it is beyond question that, if the Congress of the United States had "occupied the field" of providing for the erection and maintenance of union passenger stations, the power of the state in that matter would have been supplanted, and no co-ordinate power would exist in the state commission, this situation does not exist under the decision of the United States Supreme Court to the effect that Congress has merely occupied the field of supervising and ascertaining the jurisdictional facts with relation to the establishment of such stations. The case of State ex rel. Corporation Commission v. Southern R. R. Co. et al., 185 N. C. at page 457, 117 S. E. 563, 574, in dealing with a similar contention, says: "We have examined the act of 1920 carefully, and we do not find any provision therein which grants to the Interstate Commerce Commission, either expressly or by clear implication, the power, or which makes it its duty, to require the erection of passenger stations. It is not claimed in this case that such an order has been made by the Interstate Commerce Commission. The right of the state, then, to act in this particular is expressly preserved to it by Transportation Act of 1920, § 402, subsec. 17 (41 Stats. at Large, p. 477), as follows: 'Provided, however, that nothing in this act shall impair or affect the right of a state, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the commission made under the provisions of this act.'"

[3-5] It is next contended that the order under review is in violation of law and in excess of jurisdiction because it violates the law of the case, as announced in the previous decision of this court, annulling a similar order of the Railroad Commission, and because the respondent is estopped to make such order under the principle of res judicata. Addressing ourselves to the first contention, the case of Klauber v. San Diego Street Car Co., 98 Cal. 105, 32 P. 876, seems to contain pertinent language, as follows: "The 'law of the case' is a phrase which has been formulated in this state to give expression to the rule that the final judgment of the highest court upon a question of law arising between the parties to an action on a given state of facts establishes the rights of the parties to that controversy, and is a final determination thereof, and, like a final judgment in any other case, estops the parties thereto from afterwards questioning its correctness." The doctrine of the "law of the case" applies only to the decisions of the highest court on the particular issue under consideration. Where this issue involves the construction of the Constitution or statutes of the United States, the highest court is the Supreme Court of the United States, and hence the doctrine of the "law of the case" does not apply to a decision of the state Supreme Court. The question involved was discussed by the Supreme Court of Mississippi in the

case of Louisville & N. R. Co. v. State, 107 Miss. 597, 65 So. 881, wherein it was said: "Ordinarily, the opinions heretofore rendered would constitute the law of the case, and the matters therein decided would not be again examined by us; but the law of the case rule has no application here for the reason that the right claimed by appellant is one which arises under the Constitution and laws of the United States, and with reference to all such questions this court is not one of final jurisdiction, but is simply an intermediate appellate court, from whose decision an appeal lies to the Supreme Court of the United States, the decisions of which court, in all such matters, are binding upon and must be followed by us."

[6] As we have stated, the decision of the United States Supreme Court in this matter was based upon other grounds than was the decision of the Supreme Court of California, and, as we have pointed out, it is our view that the final authority upon the question has held, in effect, that the state commission has jurisdiction to make the final order for a union station, upon the condition precedent that the Interstate Commerce Commission shall make the findings mentioned. This discussion also answers the argument that the state commission is estopped by the doctrine of res judicata to make the order here under review.

[7, 8] It is also contended that the order, requiring, as it does, the acquisition and dedication to public use of new property necessary for the construction of a union station and the abandonment of adequate facilities, deprives the petitioners of their property without due process of law, and takes their property for public use without compensation, contrary to the constitutional guarantees of the United States and of the state of California. That contention is not a new one, but has been passed upon by numerous state tribunals, contrary to the contention of the railroads herein, noticeably in the cases of State ex rel. Railroad Commissioners v. Atlantic Coast Line R. Co. et al., 67 Fla. 441, 63 So. 729; Griffin v. Southern Ry. Co., 150 N. C. 312, 64 S. E. 16; Corporation Commission v. Seaboard Air Line et al., 161 N. C. 270, 76 S. E. 554; Corporation Comm. v. Southern Ry. Co. et al., 185 N. C. 435, 117 S. E. 563; Gulf, C. & S. F. Ry. Co. v. State, 167 S. W. 192; Railroad Commission v. Alabama Northern Ry. Co., 182 Ala. 357, 62 So. 749; Railroad Commission v. Alabama Great Southern R. R. Co., 185 Ala. 354, 64 So. 13, L. R. A. 1915D, 98; Mayor, etc., v. N. & W. R. R. Co., 109 Mass. 103; State v. St. L. S. Ry. Co. (Tex. Civ. App.) 165 S. W. 491; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 21 S. Ct. 115, 45 L. Ed. 194.

[9] The foregoing decisions also answer the contention of petitioners that the erection of a union station is a matter of business policy and management, and not a proper subject for control under the police power of the state.

[10] The Southern Pacific Company, one of the petitioners here, contends that with relation to it the order is void because its necessary force and effect, as to said petitioner, is to require it to abandon adequate facilities and to join the other petitioners in acquiring new property which is unnecessary for a full performance of said petitioner's duties to the public. This argument is made because there has been no finding of fact made by the Railroad Commission of this state that the passenger station and facilities of the Southern Pacific Company was inadequate. There is, assuredly, an implied finding to this effect in the order of the Railroad Commission under review. The argument of the Southern Pacific Company that the evidence does not show that its passenger depot is inadequate, but, on the contrary, shows it to be adequate for some years to come loses sight of the fact that an adequate building alone will not constitute adequate passenger terminal facilities, but that a satisfactory passenger terminal contemplates also that passenger trains may safely be directed to said terminal. The record discloses that passenger trains of the Southern Pacific Company can only reach its present passenger terminal by grade crossings along Alameda street, which are so unsafe, impracticable, and unreasonable, under all the surrounding circumstances, as to require elimination. The carriers admit the desirability of eliminating the grade crossings, and submitted a plan of their own. Both commissions have found this plan undesirable, and the application of the carrier to proceed in accordance therewith was denied by the Interstate Commerce Commission. Petitioners assert that they do not object to the elimination of grade crossings, but object to the method employed for accomplishing this. Extensive hearings were had upon this general problem, and expensive investigations were made by engineers and other experts, and the findings of the Railroad Commission were made after full consideration and upon ample evidence. Unless the action of the state commission is beyond its jurisdiction, its findings are binding upon us in this proceeding. Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822.

[11] It is contended by the petitioners, Atchison, Topeka & Santa Fé Railway Company and Los Angeles and Salt Lake Railroad Company, that their property is being taken for public use without compensation and without due process of law because the necessary effect of the order under review is to require them to join in the construction of a union station, the primary purpose of which is to accomplish the removal of the tracks of the Southern Pacific Company from Alameda street, a matter with which they are unconcerned. The Railroad Commission, on the

other hand, takes a position which we think is correct, to the effect that each company is ordered to join in the erection of the union station because of its own inadequacies in terminal passenger facilities, that the proportionate expense of each has not yet been determined, and that, when it is determined, it is assumed that each carrier will be required to pay because of and in an amount proportionate to the evils in its system sought to be remedied by the new plan. It cannot be assumed that, in the event they fail to agree upon a segregation of the costs, the Railroad Commission will require any of the carriers to pay more than the amount necessary to furnish proper facilities to perform its duty to the public.

[12] It is also contended, and we think with little merit, that the order of the Railroad Commission is arbitrary because not warranted by the evidence introduced at the hearings. The evidence, indeed, the admitted facts, show that the station facilities of two of the carriers are inadequate, and that the grade crossings of the Southern Pacific, the third carrier, are dangerous to life and limb and unsuited to the surroundings. The latter matter could only be changed by a complete and expensive change of trackage or a change of terminal, and the commission adopted the latter method because of the need of a new terminal by the other two carriers. There is nothing unreasonable or arbitrary in the findings and order made.

[13] As a last attack upon the order, the carriers contend it is conditional and not absolute, indefinite, and uncertain. It is contended that, because the order recites that it shall become effective upon the promulgation by the Interstate Commerce Commission of an order issuing and granting proper and sufficient certificates or orders covering and authorizing the constructions, extensions, and abandonments authorized in said order of the Railroad Commission, and that the issuance of such order or orders by the Interstate Commerce Commission shall be a condition precedent to the effectiveness of the order of the Railroad Commission, the order is void for uncertainty. Petitioners ask who is to say whether or not such certificates as might be made by the Interstate Commerce Commission are "proper and sufficient certificates." We think this question is not properly raised here. The certificates on their face are proper and sufficient, and comply with the decision of the Supreme Court of the United States; the Railroad Commission is so considering them, as did the Interstate Commerce Commission. No question has been raised by any one as to their insufficiency, and, since they had been issued and were in existence and became a part of the order of the Railroad Commission at the time the writ of review was issued by this court, no uncertainty existed at such time as to their content, and no dispute existed as to their sufficiency.

[14] As to the objection that the order under review does not specify the details of the construction of the union station, we think it is without merit. A substantial compliance with the plans is all that is required; variation in detail being left to the discretion of the carriers. A similar situation was considered by the court in Gulf, C. & S. F. Ry. Co. v. State (Tex. Civ. App.) 167 S. W. 192, 195, where the court said: "It is urged by demurrer that the order was too vague and indefinite to be complied with, in that it did not designate the location of such depot, and failed to state the kind and character of building or structure required. We think it is unquestionably true that the Commission under this statute had the right to determine for itself the location, as well as the character and kind of depot that should be erected; but it was permissible, we think, for it to leave these matters of detail open to appellants, for the reason that these questions might be best determined by them."

In the instant case, the location of the union station is given, the track layout is fully shown, the land necessary to be taken is definitely marked out, and the general dimensions of the station building are given. As to the details of the arrangement, this is left, considerately, to the discretion of the carriers, and, as we have stated, a substantial compliance with the suggested plan is all that is required.

We find no other contentions with sufficient merit to require discussion. The order of the Railroad Commission is affirmed.

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209 Cal. 520

JACKSON v. LACTEIN CO. et al.

HAVER et al. v. SAME.

OVERMAN v. SAME.

Sac. 4320.

Supreme Court of California.
June 2, 1930.

1. Trial ⚷2.

Separate actions arising from same automobile accident *held* properly consolidated for trial, where causes of action were identical, though parties plaintiff and damages were different.

2. Automobiles ⚷244(10, 42).

Evidence *held* to support finding of truck driver's negligence and automobile driver's freedom from contributory negligence.

Road on which collision occurred, resulting in injuries sued for, consisted practically of straight strip of concrete pavement approximately twelve feet wide, with sand about two inches below surface of pavement extending along both sides. Double wheels in rear of truck protruded some six or seven inches beyond line of front wheels, and its width through rear wheels was seven feet. Ford automobile in which plaintiffs were riding was five and one-half feet wide, necessitating one or both driving partly off road when passing.

3. Appeal and error ⟹1064(1).

Giving instruction, in actions arising out of automobile accident, that plea of contributory negligence presupposed existence of negligence, though improper, *held* not prejudicial error.

In Bank.

Appeals from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Three separate actions by John F. Jackson, by George F. Haver, Sr., and wife, and by Anna Overman against the Lactein Company and another, consolidated for trial. From the judgments rendered and from an order denying motions for new trial, defendants appeal.

Affirmed.

J. M. Walthall, of Modesto, and Hartley F. Peart, of San Francisco, for appellants.

George W. Seith, of Los Angeles, and F. O. Hoover, of Modesto (Louis P. Pink, of Los Angeles, of counsel), for respondents.

PRESTON, J.

The judgments rendered in the above-entitled causes are, and each of them is hereby, affirmed.

[1] The several plaintiffs above named commenced their respective actions against the defendants, the Lactein Company, a corporation, and David L. Robinson, to recover damages for alleged injuries resulting from the collision of a Ford sedan, driven by plaintiff Jackson, in which plaintiffs Mary Haver, Anna Overman, and another lady, were riding, with a milk truck which was being operated by the defendant Robinson for the purpose of conveying milk under his contract with defendant the Lactein Company, a corporation. Save for the different parties plaintiff and the respective amounts of damage alleged to have been suffered by each of them, the three causes of action are identical, and they were therefore, by order of court, properly consolidated and tried together on the same evidence. The jury returned verdicts awarding plaintiff Mary Haver $10,000, no award being made in favor of her husband, plaintiff George F. Haver, Sr., who was seeking to recover for the loss of her services, etc., awarding plaintiff Anna Overman $2,500, and awarding plaintiff John F. Jackson $800. Judgment was duly entered thereon. Motion for a new trial in each case was denied. Defendants now appeal from the order denying their motions for new trials and from the judgment entered on said three verdicts.

[2] As appellants' main specification of error relates to the alleged insufficiency of the evidence to support the verdicts and judgment, and, as we find, upon examination of the record, abundant, ample, competent evidence in support thereof, we shall endeavor to limit our discussion to a bare statement of the essential facts.

At the time in question, September 17, 1926, about 8:40 a. m., the weather being dry and clear, plaintiff Jackson, with plaintiffs Mary Haver, Anna Overman, and a Mrs. Richards, was driving in a Ford sedan in a southerly direction on the Crows Landing road about twelve miles south of Modesto, Cal. Defendant Robinson, a young man then nineteen and a half years of age, driving a White truck, was at the same time proceeding northward on said highway. The road consisted of practically a straight strip of concrete pavement approximately twelve feet wide, with sand and dirt, wet in places from rice irrigation, about two inches below the surface of the pavement, extending along both sides. The truck had double wheels in the rear, protruding some six or seven inches beyond the line of the front wheels. Its width through the rear wheels was seven feet. The Ford was five and one-half feet wide. It will therefore be seen that, for these vehicles to pass on a twelve-foot highway, one or both of them would be forced to drive partly off the road onto the dirt along the side thereof. The Ford passed the front wheels of the truck safely, but in passing the rear wheels, a collision occurred which caused it to turn sharply to the left, sliding completely around and over on its side until it landed with its wheels in the air on the extreme east side of the road. Defendant Robinson stopped his truck a short distance further on, and Mr. Baker, a farmer who was working on a gate in a nearby ditch, also came to plaintiffs' assistance. It is unnecessary to detail here the damage done to each of them, as appellants under the evidence are in no position to make any claim that the verdicts are excessive, in view of the severity of the injuries received, and especially those suffered by Mrs. Haver.

As above stated, with respect to many particulars surrounding the actual happening of the accident, a direct conflict in the evidence was resolved in favor of plaintiffs. Some of these points will now be stated. Defendant

Robinson stated that in his opinion the speed of the Ford was around thirty miles per hour; practically all the other witnesses testified that it was about twenty-three, or between twenty and twenty-five miles, per hour, which latter speed is consonant with the distance traveled by plaintiffs during the time intervening between their morning departure and the accident. Defendant Robinson testified that he was driving the truck around thirty miles an hour. The various plaintiffs and witness Baker placed its speed at from forty to forty-five miles an hour. Defendant Robinson testified that he had pulled his truck "clear off the highway," and that the Ford was entirely on the pavement and in two feet from the outer edge. Plaintiff Jackson, on the contrary, testified that the truck was approaching in the exact center of the road, and that the right wheels of the Ford were four feet in the sand. Mrs. Overman corroborated his testimony, stating that the wheels of the Ford were off in the sand, though she did not know just how far. Mrs. Haver testified that she was reading a newspaper at the time, and did not notice what the situation was. Mrs. Richards, the other occupant of the Ford, testified that the truck was over the center line, that is, partly on the left side of the road. Mr. Baker testified that after the accident he examined the skid marks made by the truck; that those of the left wheel began past the center of the highway—that is, on the left side thereof. On cross-examination he testified as to the position of the right-hand wheels of the truck at the time of the collision, that there were marks on the highway that "appeared to be truck tracks in about three feet on the highway * * * where the collision occurred." This latter testimony, therefore, would also place the truck in practically the center of the road, with one side extending over onto the left, or wrong half thereof.

The jury could well have credited the testimony of plaintiffs and of this apparently disinterested witness as to the speed of more than forty miles per hour and center position on the road of the truck, and thereby concluded that, if the right wheels of the seven-foot truck were in three feet on the highway, only two feet thereof remained, partly at least upon which plaintiff Jackson must drive his Ford in order to avoid being hit by said vehicle which was approaching him at such a rapid speed; hence that plaintiff was not negligent in failing to turn out even further in order to clear the rear wheels of the truck, but that said defendant was plainly negligent in maintaining on the narrow pavement such a position and such a speed. Furthermore, various witnesses also testified that the truck swerved dangerously at the moment of passing, and hence plaintiff Jackson, having gotten safely past the front wheels, was still unable, even by the exercise of all due care, to avoid calamity. This latter testimony was also worthy of credit.

Certainly the sufficiency of the above showing to support a finding of negligence on the part of appellants can scarcely be denied, and it also furnishes a complete answer to appellants' claim that the evidence established contributory negligence on the part of plaintiffs. The testimony which we have already set forth and other evidence equally clear found in the record produces the conviction that the conclusion reached by this jury was well warranted under the circumstances of the case.

[3] One other complaint is made by appellants, to wit, that the trial court committed reversible error in giving to the jury an instruction in part to the effect that appellants' plea of contributory negligence presupposed the existence of negligence on their part. They cite Hoffman v. Southern Pacific Co., 84 Cal. App. 337, 258 P. 397. The issue there, however, was whether or not the trial court's refusal to charge the jury upon the question of contributory negligence was prejudicial error. No instruction was under attack, and the holding there made is not decisive of the question before us. We do recognize, in the light of that case, that the instruction before us might well be subject to the criticism directed against it, and, indeed, this is not the first time this identical matter has been before us. Linforth v. San Francisco, etc., Co., 156 Cal. 58, 66, 103 P. 320, 19 Ann. Cas. 1230; Mulholland v. Western Gas, etc., Co., 21 Cal. App. 44, 52, 131 P. 110; Wright v. Salzberger & Sons, 81 Cal. App. 690, 701, 702, 254 P. 671; Dullanty v. Smith, 203 Cal. 621, 627, 265 P. 814, 816. But it is our firm belief, after a thorough review of the entire record, in this case no miscarriage of justice resulted from the giving of said instruction; hence, we repeat as applicable here, the language recently employed in the case of Dullanty v. Smith, supra, to wit: "The other instruction mentioned has not our unqualified approval and it would have been better to have omitted it; still, it does not appear that the substantial rights of the defendant were prejudiced thereby or that the giving of it constituted reversible error."

Finding the various claims of appellants to be without merit, we have reached the conclusion first herein set forth.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.

209 Cal. 456

JAMES v. FRAZEE et al.

S. F. 13069.

Supreme Court of California.

May 26, 1930.

1. Trial ⟹296(3).

Instructions *held* not erroneous as applying different test to defendant's, than to plaintiff's duty, in view of other instructions.

The jury was fully instructed as to the burden resting on plaintiff and expressly instructed that plaintiff "was bound to use the same degree of care to prevent injury to himself as was the defendant to prevent injury to him."

2. Trial ⟹260(8).

Failure to instruct that violation of statute must have proximately caused injury to warrant recovery *held* not erroneous, in view of instructions given (California Vehicle Act).

Court instructed jury that it is not sufficient for plaintiff to show that accident occurred and that he was injured, but that he must also show that accident occurred by reason of defendant's negligence, and that burden is on him to prove by greater weight of evidence that defendant was negligent in some particular alleged and that such negligence was proximate cause of accident.

3. Trial ⟹243.

Instructions in language of statute as to right of way at intersections *held* not conflicting (California Vehicle Act).

4. Appeal and error ⟹1064(1).

Instruction that burden of proving contributory negligence is on party alleging it, unless proven or inferable from plaintiff's evidence, *held* not reversible error.

Defendant urged that latter part of instruction should have been: "Unless it can be shown or inferred from the evidence given in support of plaintiff's case."

In Bank.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Stuart James against Leonard D. Frazee and others. Judgment for plaintiff, and named defendant appeals.

Affirmed.

Superseding opinion in (Cal. App.) 279 P. 1028.

Barry J. Colding, Theodore Hale, and C. B. Crawford, all of San Francisco, and Crosby & Crosby, of Oakland, for appellant.

Ford, Johnson & Bourquin, of San Francisco, and F. A. Cutler, of Burlingame, for respondent.

PER CURIAM.

This is an appeal from a judgment for $17,500 damages for personal injuries. The appellant admits that there is a conflict in the evidence upon the question of the negligence of the defendant, and that that issue may not be reviewed here. The appeal is based upon asserted errors in the giving of instructions to the jury.

[1] The first instruction complained of is as follows: "The law imposed upon the defendant, Frazee, at the time and place of the accident, the duty of operating his automobile in a careful and prudent manner with due regard to the rights of others who might have the lawful use of the highways. If you believe from the evidence that the defendant Frazee failed in his duty in any of these respects, then and in that event he was negligent." It is urged that this instruction should have contained a statement of the standard of conduct of the average reasonable and prudent man. Other instructions are criticized for a like reason. It is urged with reference to several instructions that they apply one test to the duty of defendant and a different test to the duty of plaintiff, when the conduct of both should be governed by the same test. Whatever force such arguments have, with reference to isolated instructions, is dissipated upon a reading of the entire charge to the jury. The instructions show that the jury was fully instructed as to the burden resting upon the plaintiff in the case and expressly instructed that "the plaintiff James was bound to use the same degree of care to prevent injury to himself as was the defendant Frazee to prevent injury to him. If the plaintiff James failed to use such care and his failure in this regard proximately contributed to his alleged injuries then plaintiff is not entitled in law to recover damages and your verdict must be in favor of the defendant Frazee."

[2] With reference to another group of instructions, it is contended that the court failed to instruct the jury that defendant's violation of the California Vehicle Act,[1] if any, must have been the proximate cause of plaintiff's injury to entitle plaintiff to recover. But the court instructed the jury that "it is not sufficient in a suit to recover damages for the plaintiff to show that an accident occurred and that he was injured, but he must also show that the accident occurred by reason of the negligence of the defendant." And the jury was also instructed: "The burden of proof is upon the plaintiff to prove by the greater weight of evidence that defendant Frazee was negligent in some particular al-

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] St. 1923, p. 517 as amended.

leged, and that such negligence, if any, was the proximate cause of the accident; and even though defendant Frazee was negligent, yet you must next consider whether or not the plaintiff James was himself negligent and if he was negligent in any particular at the time and place and under the circumstances, that is, if he did not do that which a reasonably prudent person would have done under the circumstances, and his failure, if any, so to do contributed proximately to cause his injuries, if any, then plaintiff is not entitled to recover from the defendant Frazee."

[3] It is contended that the instructions are conflicting with regard to the right of way at intersections. We think this contention is without merit. The court instructed in the language of the California Vehicle Act upon this question.

[4] It is next contended that the court erred in instructing the jury "that the defense of contributory negligence is an affirmative defense, the burden of proving which is on the party alleging it, unless it has been proven or can be inferred from the evidence of the plaintiff himself." It is urged that the latter part of this statement should have been: "Unless it can be shown or inferred from the evidence given in support of plaintiff's case." While it might have been more accurate to use the language suggested by appellant, nevertheless, the language used in the instruction is susceptible of the same construction, and the error, if any, would not warrant a reversal of the judgment. Nor would error, if any, in any of the other matters urged by appellant cause us to reverse this judgment, because it is plain that the jury could not have been misled by the instructions taken as a whole and that they correctly and fairly state the rights of the respective parties.

The judgment appealed from is affirmed.

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106 Cal. App. 88

RUSSELL et al. v. STILLWELL et al.

Civ. 7234.

District Court of Appeal, First District, Division 1, California.

May 27, 1930.

1. Evidence ⚷397(2).

Parol evidence is inadmissible to vary complete and certain written agreement in absence of fraud (Civ. Code, § 1647; Code Civ. Proc. § 1860).

2. Stipulations ⚷1.

Defendants in action to recover fees for architect's services *held* not to have stipulated that contract was ambiguous as respected introduction of parol evidence.

Although parties when testifying were asked questions relative to conversations at time of execution of contract and no further objections were made, this, however, would not support the finding that the contract was ambiguous.

3. Evidence ⚷397(1).

Whether or not written contract may be varied by parol is question of substantive law.

4. Estoppel ⚷110.

Plaintiffs, in action to recover architect's fees, failing to plead estoppel against defendants by reason of statements and representations, could not rely thereon.

Plaintiffs in complaint for recovery of architect's fees relied upon and pleaded the written contract in respect to architect's fees, and in no way pleaded the doctrine of estoppel by reason of defendants' representations to commissioner of corporations that they had already expended certain amount including architect's fees, though not actually paid, but assumed personally in order to secure permit to issue bonds on building.

5. Estoppel ⚷110.

Party having opportunity to plead estoppel on which cause of action or defense depends must do so.

6. Contracts ⚷229(3).

Architects were entitled only to minimum fees provided in contract for completion of plans in case of inability of owners to satisfactorily finance construction of building.

The contract in respect to architects' compensation provided for a certain amount as liquidated damages in case satisfactory bond issue and financing could not be arranged after termination of certain payments and completion of plans, and it appeared that the owners were unable to finance building beyond constructing it to first floor, when work of construction stopped, and equity in property was transferred to others who later finished the building different in design.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by C. H. Russell and another, copartners doing business under the firm name and style of Russell & Alpaugh, against

Charles H. Stillwell and another. Judgment for plaintiffs, and defendants appeal.

Modified, and as modified affirmed.

Percy V. Hammon, of Los Angeles, and J. E. Stillwell, for appellants.

Frank W. Wheeler, John H. Foley, and John Dennison, all of Los Angeles, for respondents.

PER CURIAM.

This is an action to recover fees for architect's services alleged to have been performed by respondents under a contract entered into by them with appellants to furnish plans, specifications, detailed drawings, and superintendence of the building of a class A apartment house in the city of Long Beach. Judgment was entered in favor of plaintiffs for $43,950, and from such judgment defendants have appealed.

In April or May, 1923, the respondents were verbally employed by appellants to prepare preliminary sketches or working plans for the construction of the building in question, which they did. On October 1, 1923, the architects prepared and submitted to the owners a standard form of architect's contract, which so far as is necessary to a consideration of the questions here presented is as follows: "For a compensation to the architects of five (5%) per cent. of the cost of the building, the architects, Russell & Alpaugh, agree to furnish promotion drawings, consisting of typical floor plan, first sketches, contract working drawings, and specifications, detail working drawings, and to furnish General Superintendence and to audit all accounts for the erection of a Class 'A' Apartment building. * * * Terms of payment to be as follows: ¾% upon acceptance of preliminary plan. ¾% when working plans are one-half complete. 1% when working plans and specifications are complete. 2½% to be made to the architects as the building progresses in proportion to the cost of the work executed. It is further understood and agreed that the architects will proceed with the above contract and accept payments as follows: One thousand ($1000) dollars on or before one week after the execution of this contract and the sum of one thousand dollars ($1000) each and every week thereafter until a total of twelve thousand ($12000) has been paid by the Owners to the Architects. * * * The amount of the Architect's compensation is to be reckoned upon the total cost of the building, including all stationary fixtures." The contract not being satisfactory to appellants, the following addendum was added: "It is further understood and agreed that in case a satisfactory bond issue and financing cannot be arranged after the termination of the twelve weekly payments and the completion of the plans, we can pay the balance of the payments at the rate of five hundred dollars per week until the total of twenty-five thousand has been paid, which shall be liquidated damages. Also, Russell and Alpaugh shall each take two single apartments at the present rates as final payment of architects fees. A blue print for each apartment shall be furnished without additional cost if required and sufficient blue prints for salesmen or promotion."

Numerous objections are urged as to findings not being supported by the evidence, but if there is merit in the points made by appellants that the court erred in finding that defendants had stipulated that the contract sued upon was ambiguous and required oral testimony to interpret and explain it, erred in admitting and considering parol evidence to vary the terms of the written contract, and finding the contract entirely different than the written contract set up in plaintiff's complaint, the case is disposed of, and discussion of objections to other findings becomes unimportant.

It will be observed that in the contract the payment of the 5 per cent. commission is divided into four classes: "¾% upon acceptance of preliminary plan: ¾% when working plans are one half complete; 1% when working plans and specifications are complete. 2½% to be made to the architects as the building progresses in proportion to the cost of the work executed." When the contract was presented to appellant Charles H. Stillwell he stated, according to the testimony of respondent Russell: "'$25,000.00 is all I want to gamble.' We said 'all right,' so I dictated that clause myself, and we put it in and it was signed under that arrangement." The addendum, which was then signed with the contract as one instrument, contains the provision: "It is further agreed that in case a satisfactory bond issue cannot be arranged *after the completion of the plans*, we can pay the balance * * * until the total of twenty-five thousand has been paid which shall be liquidated damages."

[1] We can see but one construction that can be placed upon the words in the added clause "the completion of the plans," and that is *all plans* before mentioned in the contract—not merely preliminary plans. The words themselves require no explanation. If they did it could be found in the contract itself. In the absence of fraud, where the parties have reduced to writing what appears to be a complete and certain agreement, parol evidence will not be permitted for the purpose of varying the written contract. Section 1647 of the Civil Code and section 1860 of the Code of Civil Procedure simply enact the common-law rule, and it is not within their contemplation that a contract reduced to writing and executed shall have anything added to it nor taken away from it by evidence of surrounding circumstances; the rule is only employed where upon the face of the contract itself there is doubt, and the evidence is used to dis-

pel this doubt. United Iron Works v. Outer Harbor Dock & Wharf Co., 168 Cal. 81, 141 P. 917. Respondents do not controvert this rule, but rely for support of the court's finding on the ground that the contract is ambiguous because it was so stipulated by the parties, basing their claim in this respect on the following: "The Court: Do you claim the contract is ambiguous?

"Mr. Hammon: No.

"The Court: Then all the conversations are embodied in the contract, are they not?

"Mr. Hammon: Under section 1860 of the Code of Civil Procedure we are permitted to show the circumstances.

"The Court: You are permitted, provided you allege the contract is ambiguous.

"Mr. Wheeler: We agree that it is ambiguous and have no objection.

"The Court: That settles it. There is no allegation in the pleadings of that character." And during the examination of respondent Russell by his counsel appears the following:

"Q. Then do I understand that I may offer these three layouts or preliminary sketches of that building 100 by 100 feet? I would like to have them admitted in evidence by way of illustration.

"The Court: What was the objection?

"Mr. Hammon: Objected to on the ground they are irrelevant and immaterial. There is no issue on that point in the pleadings.

"Mr. Wheeler: They serve the purpose of explaining. How is the court to arrive at when we are entitled to $25,000.00 and when we are entitled to $80,000.00? We are to do one lot of work for $25,000.00, and we are to do a totally different work for $80,000.00, and we cannot explain the difference without introducing these plans in their periodic contractual relationship. That is why I say this contract is ambiguous; that it applies to one subdivision of these plans only, not to all of them.

"The Court: Sustained under the pleadings."

[2, 3] From the foregoing, which is all that is called to our attention by either of the parties, we do not see any justification for the claim that appellants stipulated that the contract is ambiguous. It is true that the parties when testifying were asked questions relative to conversations at the time of the execution of the contract, and no further objections were made. This, however, would not support the finding that the contract is ambiguous, as whether or not a written contract may be varied by parol is a question of substantive law, and parol evidence would neither be admissible to vary the contract nor, if admitted without objection, be sufficient to support a finding which is in conflict with or which in any manner varies the original written contract which the parties entered into. Dollar v. International Banking Corp., 13 Cal. App. 331, 343, 109 P. 499.

[4, 5] Respondents urge that as appellants represented to them in the early part of November, 1923, that they had their financing all arranged; represented to the commissioner of corporations that they had already expended $115,000, which included $65,000 architects fees, though not actually paid out, but assumed by the Stillwells personally to secure a permit to issue bonds on the building; that the Vaughn Construction Company, to whom Stillwell Long Beach Company—owned by appellants—and to whom appellants had transferred title to the property for the purpose of financing the building, had been given the contract to erect the structure, and that as respondents relied upon these statements and circumstances and performed or were ready and willing to perform all the conditions of the contract—"such statements and representations raise an equitable estoppel against appellants." This argument may be answered by the fact that respondents in their complaint rely upon and plead the written contract and in no way plead the doctrine of estoppel. It seems to be firmly settled as a general rule in this state—to which the situation here presented is no exception—that a party who has an opportunity to plead an estoppel upon which his cause of action or defense depends must do so. 10 Cal. Jur. 654, § 30, and cases cited.

[6] Appellants being unable to finance the building beyond constructing it to the first floor, the work of construction stopped, and appellants transferred their stock in the corporation and their equity in the property to W. C. Fertig in trust to take care of the apartment house buyers. Some time later the building, different in design and eliminating about a third of the original plans and cutting off two stories, was erected by others under a set of plans prepared by Fisher, Lake & Traver. It is apparent, no matter what appellants told respondents as to their having arranged to finance the construction of the building, that "a satisfactory bond issue and financing" could not be arranged by them as provided in the addendum contract, and that therefore respondents were only entitled to the $25,000 fee provided therein for the "completion of the plans."

While there is no cause of action alleged for the recovery of the reasonable value of services rendered by respondents in superintending the construction of the building from some time in February, 1924, until the work ceased in the months of May or June following, appellants have stipulated that "although plaintiffs in the present action might be limited to $25,000 less $23,000 paid for their services, defendants waive that question and consent that this court may on modification of judg-

ment add $1,500 to the $2,000 unpaid on the contract."

There being no controversy as to the amount due, if respondents are held to a recovery of only $25,000 as provided in the addendum to the contract—that is, that appellants have paid to respondents $23,000—and would be entitled to but $2,000, and appellants stipulating that respondents may be allowed $1,500 for services rendered in superintending construction of the building up to the time the work of construction ceased, the judgment will be modified by reducing it to the sum of $3,500, and as so modified will stand affirmed.

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106 Cal. App. 29

PEOPLE v. ENTRIKEN et al.

Cr. 3.

District Court of Appeal, Fourth District, California.

May 22, 1930.

Rehearing Denied June 5, 1930.

1. Conspiracy ⚷43(4).

Indictment charging that defendants "did willfully, unlawfully and feloniously conspire together" *held* sufficient, though not charging that they did so "knowingly."

2. Criminal law ⚷730(1).

Error, if any, in district attorney's remarks was cured by prompt instruction to disregard them.

3. Criminal law ⚷1171(3).

District attorney's remarks in reply to statement of defendant's attorney that testimony of accomplice, against whom case was dismissed so that he might testify for people, must have been surprise, *held* not prejudicial misconduct, in view of accomplice's testimony fully admitting guilt.

4. Criminal law ⚷1119(4).

District attorney's remarks, not assigned as error, will not be reviewed.

5. Criminal law ⚷814(1).

Instruction that alien's testimony in trial for conspiracy to violate Alien Land Law that defendants conspired with him that he should forge certain name to lease, *held* properly refused as attempt to inject unnecessary and foreign element into case.

6. Conspiracy ⚷25.

Conspiracy to have one of parties commit forgery is not necessary element of conspiracy to violate Alien Land Law.

7. Criminal law ⚷511(1).

Testimony of Japanese, to whom defendants leased agricultural lands, *held* sufficiently corroborated to sustain conviction of violating Alien Land Law.

There was evidence that witness' associates were Japanese, his racial appearance and characteristics were before jury, defendants conceded that he was a Japanese alien, ineligible for citizenship, in all their dealings with him, and evidence showed that name signed to lease by him was fictitious and used only for purpose of lease which was made to him alone.

8. Criminal law ⚷511(3).

Accomplice's testimony need not be corroborated by direct evidence, but corroboration is sufficient if accused's connection with crime may be fairly inferred from his entire conduct.

OWEN, Justice pro tem, dissenting.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

J. M. Entriken and George T. Thompson were convicted of a conspiracy in making a lease of agricultural lands in violation of the Alien Land Law, and they appeal.

Affirmed.

Frank Birkhauser, of El Centro, for appellants.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

MARKS, J.

An indictment was returned by the grand jury of Imperial county charging appellants and Y. Takahashi, an alien Japanese, with the crime of conspiring together in the making of a lease of agricultural lands in violation of the Alien Land Law of the state of California. The case was dismissed against Takahashi to enable him to become a witness for the people, and the jury found the appellants guilty as charged.

It appears that appellants were the owners of the land in question. Some time prior to July 1, 1928, Takahashi went into possession of the land and began to farm it. In November, 1928, a written lease was signed under date of July 1, 1928, with appellants appearing therein as lessors and K. Kosuzume as lessee. The lessee's name was signed to the lease by Takahashi without any authority. In fact, there is a strong intimation in the record that Kosuzume was a fictitious person who had no existence outside of Takahashi's mind. Takahashi remained in possession of the land and continued to farm it with the knowledge of appellants. He paid them the annual rent prior to July 1, 1928, by

giving them $40 in cash and $510 in the form of his personal check. When Takahashi first broached the question of a lease on the land he was told by appellants that they could not lease to him as he was an alien Japanese, but that they would lease to a citizen of the United States. When the lease bearing the name of Kosuzume upon it was presented to them, neither of the appellants had ever seen such a person and possessed no information that he existed, or if he did exist, that he was not an alien Japanese. Takahashi was born in Japan, which country he left in 1903, landing in San Francisco. Appellants knew that he was not a citizen and refused to lease their land to him. Neither of them made the slightest effort to learn anything about Kosuzume and showed neither interest in their purported tenant nor even curiosity about him.

[1] Appellants maintain that the indictment did not charge a public offense against them, it charging that they "did wilfully, unlawfully and feloniously conspire together" and omitted to charge that this was done "knowingly." This question has been decided adversely to appellants in the case of People v. Calvert, 93 Cal. App. 568, 269 P. 969, where it was held that to do a thing willfully is to do it knowingly.

[2, 3] Appellants complain of certain alleged misconduct on the part of the district attorney in the presence of the jury. Immediately following the first alleged misconduct, the district attorney withdrew his remarks and the jury was promptly instructed to disregard them, thereby curing the error, if any there was. People v. Ong Mon Foo, 182 Cal. 697, 189 P. 690; People v. Beggs, 178 Cal. 79, 172 P. 152. The other remarks assigned as error were as follows:

"By Mr. Birkhauser:

"Q. The District Attorney of the County of Imperial, State of California, told you, Takahashi that if you would testify in this case on behalf of the People of the State of California, he would dismiss the charge against you, did he? A. Yes, sir.

"Mr. Birkhauser: That is all.

"Questions by Mr. Patterson:

"Q. Where did I tell you that? A. No.

"Q. What do you mean by no, I did or I didn't tell you that. A. The District Attorney did not tell me such a thing.

"Q. Now Takahashi—

"Mr. Birkhauser: He did dismiss the charge. It must have been a surprise to you when he has testified.

"Mr. Patterson: Since we dismissed it, it is not necessary, and the insinuation that has been made here that it was a surprise to us that he testified. We have his statement before the Grand Jury and before this was ever taken to the Grand Jury. There was one made in my office. The insinuation has been made it was a surprise to me that he made any testimony. If we hadn't known about it, we would not have dismissed. We knew we had this record twice against him, and to let the insinuation pass after we had him twice, once before it went before the Grand Jury and then after it went to the Grand Jury—

"Mr. Birkhauser: I assign all the remarks of the District Attorney as prejudicial misconduct."

[4] It will be noted that the remarks could be understood in no other way than that they referred to Takahashi and not to appellants. We cannot see how they could prejudice them. Takahashi is not in any position to complain, as the charge against him was dismissed. In his testimony he freely and fully admitted his guilt. This evidence was before the jury and the statements of the district attorney added little to this testimony which the jury was bound to consider. No other remarks were assigned as error and while we have read those complained of by appellants, we will not lengthen this opinion with a discussion of them. They were not sufficiently prejudicial to require a reversal of the judgment, and, in the absence of assignments of error, we must decline to review them. People v. Ong Mon Foo, supra; People v. Dominguez, 61 Cal. App. 182, 214 P. 448; People v. Goodwin (Cal. App.) 286 P. 1087.

[5, 6] Appellants complain of instructions given by the trial court and others proposed by them and refused by it. They particularly complain of the refusal of the trial court to give the following: "The thing requiring corroboration in the case, is the conspiracy to violate the Alien Land Law, namely that Entriken and Thompson and Takahashi all conspired together, that Entriken and Thompson, the owners of the land, would lease to Takahashi their land, knowing that Takahashi by reason of his alienage was debarred from using, enjoying, occupying, transferring, or holding land or any interest therein for agricultural purposes, by means of substituting some other person's name in the lease, permit Takahashi to secure the benefits of his farming of the land, by the raising of crops thereon; that Entriken and Thompson conspired with Takahashi that Takahashi should forge the name of K. Kosuzume to the lease; Takahashi's testimony as to any or even all of these facts, standing alone is not sufficient to connect the defendants Entriken and Thompson with this crime. There must be some evidence independent of Takahashi's and without his testimony, tending to prove the defendants Entriken and Thompson aided or abetted him or counseled and advised him in the commission of the crime."

Particular attention is called to the clause in the proposed instruction as follows: "That

Entriken and Thompson conspired with Takahashi that Takahashi should forge the name of K. Kosuzume to the lease." This attempted to inject an unnecessary and foreign element into the case. It is not a necessary element of the crime of conspiracy to violate the Alien Land Law, that the parties should conspire together to have one of their number commit the crime of forgery. While the conclusion that a forgery was committed is necessary from the evidence, it was not admitted by the appellants, who attempted to combat it as best they could. The instruction was not a proper statement of the law and was properly refused. It was also unnecessary. People v. Osaki (Cal. Sup.) 286 P. 1025, 1027. The instructions as given were fair, full, and complete, and we find no error in them.

[7, 8] The evidence of the accomplice Takahashi was sufficiently corroborated by other evidence in the case. "His associates were persons of the Japanese race. His racial appearance and characteristics were before the jury and the trial judge" (People v. Osaki, supra), and that he was a Japanese alien was conceded by the appellants in all their dealings with him. That Kosuzume existed only in the minds of the conspirators seems certain, as does the conclusion that Takahashi adopted and used the name "K. Kosuzume" for the purpose of the lease only, which was, in fact, made to him alone. Takahashi being the real lessee acting under a fictitious name, and appellants knowing that he was an alien ineligible for citizenship, and, knowing this, leased their agricultural lands to him, their guilt was amply proven and the judgment against them cannot be disturbed. The actions and conduct of appellants in their dealings with Takahashi furnish strong evidence corroborating the testimony of the accomplice. "The law is well settled that the testimony of the accomplice need not be corroborated by direct evidence. The entire conduct of the defendant may be looked to for the corroborating circumstances, and, if from those circumstances the connection of the accused with the crime may fairly be inferred, the corroboration is sufficient. People v. Yeager, 194 Cal. 452, 229 P. 40; People v. Martin, 102 Cal. 558, 36 P. 952; People v. Demera, 64 Cal. App. 121, 220 P. 673." People v. Nikolich, 93 Cal. App. 356, 269 P. 721, 722.

Judgment affirmed.

I concur: BARNARD, Acting P. J.

OWEN, Justice pro tem.

I dissent. I am in full accord with the principles and reasoning set forth in Mr. Justice Seawell's opinion rendered in the case of People v. Osaki (Cal. Sup.) 286 P. 1025. But I cannot agree that the Osaki Case can be used as authority to sustain the conviction of an American citizen when the district attorney has dismissed the charge against the ineligible alien in order to use such alien for the purpose of securing the conviction.

The Alien Land Act, as amended, provides (Deering's Consolidated Supp. 1925–27, p. 845):

"§ 9a. * * * In any action or proceeding, civil or criminal, by the state of California, or the people thereof, under any of the provisions of this act, when the proof introduced by the state, or the people thereof, establishes the acquisition, possession, enjoyment, use, cultivation, occupation, or transferring of real property or any interest therein, or the having in whole or in part the beneficial use thereof by any defendant, or any of such fact, and the complaint, indictment or information alleges the alienage and ineligibility to United States citizenship of such defendant, *the burden of proving citizenship or eligibility to citizenship shall thereupon devolve upon such defendant.*

"§ 9b. * * * In any action or proceeding, civil or criminal, by the state of California, or the people thereof, under any of the provisions of this act, when the complaint, indictment or information, alleges the alienage and ineligibility to United States citizenship of any defendant, proof by the state, or the people thereof, of the acquisition, possession, enjoyment, use, cultivation, occupation or transferring of real property or any interest therein, or the having in whole or in part of the beneficial use thereof by such defendant, or of any such facts, and in addition proof that such defendant is a member of a race ineligible to citizenship under the naturalization laws of the United States, shall create a prima facie presumption of the ineligibility to citizenship of such defendant, *and the burden of proving citizenship or eligibility to citizenship as a defense to any such action or proceeding shall thereupon devolve upon such defendant.*" (Italics supplied.)

Had the indictment not been dismissed against Takahashi, the burden of proving his citizenship or eligibility to citizenship would have rested upon him. Mr. Justice Seawell, in holding the foregoing sections of the act to be constitutional, reviews at length the "rule of convenience," and makes a careful analysis of the cases which hold that where the "facts come more immediately within the knowledge of the defendant, the onus probandi rests upon him." If Takahashi had been prosecuted, as contemplated by the Alien Land Act, his conviction would have followed, had he failed to establish his citizenship or right to it, because the fact of his citizenship is within his knowledge, and not within the knowledge of the district attorney or the people of the state. Can the onus pass to Entriken and Thompson, who certainly can have no more ability to prove it than the district attorney? In order to secure an acquittal the defendants would have either been compelled to prove the citizenship or eligibility of Takahashi, or that of the

shadowy Kosuzume, whose name the former forged to the lease. The Alien Land Act and the Osaki Case, supra, contemplate that upon the shoulders of ineligible aliens shall rest heavily the burden of proving their right to citizenship, because the fundamental fact is solely within their keeping.

It cannot be contended that these defendants could prove the eligibility of either Takahashi or Kosuzume, and it must follow that when the indictment was dismissed against Takahashi the burden of proving it passed to the people. The district attorney being unable to prove eligibility, he must prove beyond a reasonable doubt and to a moral certainty that Takahashi and Kosuzume were not citizens nor eligible to citizenship before he can legally convict the two American citizens, defendants herein. Having dismissed the indictment against the chief offender, and using the alien to convict the citizens, forgetting, apparently, the whole spirit of the Alien Land Act, the reasons for its inception and enactment, he must be held to the same strict proof required in other criminal prosecutions.

It is admitted that Kosuzume was a dummy, whose name Takahashi signed to the lease of the land. There is no proof whatever that Kosuzume is either a citizen or an ineligible alien, or that there was, or is, such a person in existence. As to the citizenship of Takahashi, he admitted he was not a citizen. He stated once that he was born in Japan, and at another place in the record says he does not know where he was born, but was told he was born in Japan. This, coupled with the fact of his speaking Japanese, and his appearance, would have convicted him under the ruling in the Osaki Case, since if he were being prosecuted, the burden of proving that he was eligible or a citizen would have been his. No longer a defendant, and not charged with the onus probandi, the nebulous proof adduced from this coconspirator is used to establish the corpus delicti. The crime charged is conspiracy to violate the Alien Land Act. The very bone and sinew of such a crime is the ineligible alienage of the dismissed conspirator. The testimony of an accomplice must be viewed with distrust, and yet the very basic element of the crime is sought here to be proved by such testimony. I refuse to believe that the highest court in our state had any such situation in mind as here presented when the opinion in People v. Osaki was handed down. In fact, Mr. Justice Seawell placed an express limitation on that decision, doubtless, in his wisdom, feeling the danger of extending the rule, when he said: "It is not intended by what we have said to extend the rule of convenience or burden of proof to common-law crimes generally designated as malum in se, nor to all crimes malum prohibitum. We go no further than to apply the rule to the particular situation in accordance with the express mandate of said amendments."

Furthermore, I cannot agree with the prevailing opinion that the remarks of the district attorney as quoted were not prejudicial error. It is true that the statement made by that official referred to Takahashi, but since the defendants were charged with conspiracy, and Takahashi was a coconspirator, any statement made by him was applicable to the defendants Entriken and Thompson.

"We have his statement before the Grand Jury, and before this was ever taken to the Grand Jury. There was one made in my office. * * * If we hadn't known about it, we would not have dismissed. We knew we had this record twice against him, and to let the insinuation pass after we had him twice, once before it went before the Grand Jury, and then after it went to the Grand Jury."

That remark, made in the presence of the trial jury, was promptly assigned by the attorney for the defense as prejudicial misconduct. The jury was not instructed to disregard it. It may not be said that it would have been without effect had the remarks referred to a statement of the defendants to the district attorney and to the grand jury. If the prosecutor had a statement *against him* twice on a charge of conspiracy, he undoubtedly had the same statement in effect *against* the defendants, the coconspirators. It is idle to speculate whether the jurors were influenced by such a statement. Courts cannot be too careful of extraneous matter injected into the trial of a case before a jury. That any of the jurors may have attached importance to the remark, or conceived such statements made to the prosecuting attorney and grand jury to be important admissions *against* interest, is entirely possible. If any juror was influenced thereby the defendants would be entitled to a new trial. The statement was wholly out of place, and, in the very essence of the crime charged, may have been prejudicial to the defendants.

That the defendants were careless in their dealings with Takahashi is certain. He had worked for them for some time, and they may have felt justified in believing his statement that Kosuzume was a citizen. All of their statements may be reconciled with belief in their innocence, although their carelessness would tend to show their guilt. To my mind their guilt has not been proved to a moral certainty and beyond a reasonable doubt.

On Petition for Rehearing.

PER CURIAM.

Appellants' petition for a rehearing of the judgment of this court rendered and filed May 22, 1930, is denied. The petition for rehearing was filed June 5, 1930. The attention of counsel for petitioners is called to rule 30 of Rules for Supreme Court and District Courts of Appeal.

105 Cal. App. 624

ASNON v. FOLEY et al.

Civ. 5909.

District Court of Appeal, Second District, Division 2, California.

May 14, 1930.

1. Appeal and error ⟹909(3).

Appellate court must assume that property described in foreclosure complaint as insufficient claim of mechanics' lien is same property (Code Civ. Proc. § 1187, as amended by St. 1919, p. 190).

2. Mechanics' liens ⟹271(1).

Complaint for foreclosure of mechanic's lien must show substantial compliance with statutory requirements (Code Civ. Proc. § 1187, as amended by St. 1919, p. 190).

Code Civ. Proc. § 1187, as amended by St. 1919, p. 190, requires that claim of lien contain statement of claimant's demands after deducting all just credits and offsets, name of owner or reputed owner, if known, general statement of kind of work done or materials furnished, name of person by whom claimant was employed or to whom he furnished materials, and sufficient description of property for identification, and be properly verified by claimant or another.

3. Mechanics' liens ⟹271(15).

Foreclosure complaint not stating or showing that claim of mechanic's lien contains description of property is insufficient (Code Civ. Proc. § 1187, as amended by St. 1919, p. 190).

4. Appeal and error ⟹197(3).

Insufficiency of foreclosure complaint in failing to plead description of property in describing claim of mechanics' lien *held* not available on appeal, where defendants did not object to introduction of evidence on such ground.

5. Appeal and error ⟹882(6).

Where trial proceeds as though complaint is sufficient, defendant makes no objection to evidence on certain issue, and court makes finding thereon without objection, neither party can deny existence of such issue on appeal.

6. Pleading ⟹8(9).

Allegation of answer to foreclosure complaint that claim of mechanic's lien is insufficient in law *held* mere legal conclusion raising no issue.

7. Evidence ⟹112, 113(1).

Oral evidence of reasonable value of work and materials furnished under contract providing that they should be governed by certain book showing prices, plus 10 per cent., *held* irrelevant.

8. Appeal and error ⟹205.

Defendants making no offer of proof cannot complain of exclusion of evidence on appeal.

9. Contracts ⟹231(1).

Contract providing, "labor and materials furnished to be governed by Pacific Coast Sales Book, plus 10%," *held* to mean that labor and material prices should be regulated by prices stated in such book; "govern" meaning "regulate" or "to be a rule, precedent, law or deciding principle for."

[Ed. Note.—For other definitions of "Govern," see Words and Phrases.]

10. Appeal and error ⟹1010(1).

Trial court's finding, supported by evidence, that parties' only contract was written one, is conclusive.

11. Mechanics' liens ⟹279.

Burden of proof on issues raised by counterclaim in action to foreclose mechanic's lien was on defendants.

12. Appeal and error ⟹1071(6).

Defendants, offering no evidence supporting counterclaim, were not prejudiced by court's failure to find on issues raised thereby.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Frank Asnon, doing business under the fictitious firm name and style of South End Electric, against Ed. E. Foley and others, in which defendants filed a counterclaim. Judgment for plaintiff, and defendants appeal.

Affirmed.

A. E. Moore, of Los Angeles, for appellants.

Frank M. Bering, of Los Angeles, for respondent.

GATES, Justice pro tem.

Plaintiff sued defendants on a mechanic's lien to recover for labor and materials furnished. Defendants answered, denying many of the material allegations of the complaint. They also set up a number of affirmative defenses as well as a counterclaim. The findings of the court and its conclusions of law were in favor of plaintiff. Judgment was entered accordingly, and from that judgment the defendants appeal.

It is unnecessary to give the facts as found by the trial court, since no attack is made on

the findings of the court or its conclusions of law. Nor is any question raised as to the sufficiency of the evidence to sustain the findings.

The ownership of the property sought to be charged with plaintiff's claim of lien was admitted by the defendants E. Burr and Mary Burr.

Appellants contend that the trial court erred in overruling their demurrer to plaintiff's complaint. In support of such contention they insist that nowhere in the complaint is it alleged that the lien referred to was ever recorded against the particular land sought to be charged (a copy of the lien was not set forth in the body of the complaint nor attached as an exhibit), nor does the complaint allege that the lien referred to therein contained "a description of the property sought to be charged with the lien, sufficient for identification." We have carefully searched the record for the demurrer mentioned by appellants, but have been unable to find it. In referring to the overruling of a general demurrer, appellants' counsel apparently had in mind his attempted objection to the introduction in evidence of plaintiff's lien as an exhibit; or perhaps he thought that his motion at the conclusion of the case had the effect of a general demurrer.

During the trial, while plaintiff was putting on his case, the following conversation took place between counsel for defendants and the court:

"Mr. Moore: If your Honor please, I will stipulate that that is the lien which was filed on the 6th day of August, but I wish to reserve any legal exceptions and objections that we want to raise to the validity of the lien.

"The Court: Very well.

"Mr. Moore: In so far as the complaint is concerned, I will admit the lien as far as it conforms to the allegations of the complaint, but no farther.

"The Court: Very well."

Plaintiff's lien was then admitted in evidence. It shows upon its face a due and proper recordation thereof.

After the defendant had refused to offer further evidence, and plaintiff had rested his case, the following colloquy took place between the court and defendants' attorney:

"The Court: You can renew your motion as to Burr if you wish.

"Mr. Moore: I will. There is no evidence to show that Mr. Burr had anything to do with the contract, so I think the money part should be dismissed against him. Does your Honor want to hear me as to the claim of lien against the property?

"The Court: That is what I referred to.

"Mr. Moore: The complaint does not state sufficient facts to constitute a cause of action, in that it does not allege that this lien was filed against this particular piece of property, and there is no evidence. * * * I did not raise that objection at first because I thought it possible there might have been some evidence produced, or be produced, but the evidence does not substantiate that this lien was filed against this particular piece of property. The statute is clear, and the cases I have given. * * *" Counsel for appellants thereafter asked for a dismissal against all defendants except Mr. Foley. This was denied. Counsel did not ask that the evidence theretofore introduced by plaintiff and admitted by the court without objection be stricken upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

[1] Plaintiff's claim of lien, as heretofore stated, was filed and recorded August 6, 1925. The statute at that time, as it does at the present time, provided, among other things, what a claim of lien must contain, to wit, "a statement of his [the claimant's] demand after deducting all just credits and offsets, the name of the owner or reputed owner, if known, a general statement of the kind of work done or materials furnished by him, or both, the name of the person by whom he was employed or to whom he furnished the materials, and a description of the property sought to be charged with the lien sufficient for identification," with a proper verification by the claimant or some other person. Section 1187, Code Civ. Proc.; St. 1919, p. 190; as to the requirements of a claim of lien see following authorities: 17 Cal. Jur. pp. 126, 127; Union Lumber Co. v. Simon, 150 Cal. 751, 89 P. 1077, 1081; Schultheiss Bros. Co. v. Hunziker, 42 Cal. App. 73, 183 P. 347; Corbett v. Chambers, 109 Cal. 178, 41 P. 873; Sweet v. Fresno Hotel Co., 174 Cal. 789, 164 P. 788, Ann. Cas. 1918D, 346; Norton v. Bedell Engineering Co., 88 Cal. App. 777, 264 P. 311. Measured by the foregoing authorities, plaintiff's claim of lien is amply sufficient, as it contains all the essentials of a valid mechanic's lien. The description of the property in the claim of lien is identical with that contained in the complaint. We therefore must assume that it is one and the same property.

[2-4] It is well settled that a complaint for the foreclosure of a mechanic's lien must show a substantial compliance with the requirements of the statute. 17 Cal. Jur. 177, § 121; Davis v. Treacy, 8 Cal. App. 395, 97 P. 78. Plaintiff's complaint is sufficient in all respects but one, namely, the paragraph which deals with the contents of his claim of lien does not set forth nor show that such claim of lien contains a description of the property sought to be charged with the lien. This last-named requisite has been held to

be essential in an action of this nature. Schalich v. Bell, 173 Cal. 773, 161 P. 983; Coss v. MacDonough, 111 Cal. 662, 666, 667, 44 P. 325; 17 Cal. Jur. 188. The omission in the instant case to plead, in describing the claim of lien, the description of the property sought to be charged would, of course, have been fatal to plaintiff's recovery of a judgment ordering the foreclosure had the defendants seasonably and properly raised the question by an objection to the introduction of evidence on the part of plaintiff in support of its claim for a mechanic's lien upon the ground that the complaint did not state facts sufficient to constitute a cause of action for such foreclosure, assuming that such objection had been overruled by the court. Norton v. Bedell Engineering Co., supra. The appellants did not make such objection, but, on the contrary, led the trial court to believe that they had some legal objection or exception to the *claim of lien* itself that they would raise at a later time. Appellants' objection should have been clear, specific, and definite. 2 Cal. Jur. 269, subd. 85. Appellants' attorney's subsequent statement, "In so far as the complaint is concerned I will admit the lien as far as it conforms to the allegations of the complaint, but no farther," does not enlighten the court as to what his true position was. If counsel meant that he would stipulate that the lien was good as to the statement of demand, the names of the owners and reputed owners, a general statement of the kind of work done or materials furnished, or both, the name of the person by whom he was employed (these were all set forth in the complaint), he should have so stated, and in addition thereto made the proper objection as to the admission of evidence of said claim of lien. Or at the outset of the trial, and before any evidence was offered, the defendants, if dissatisfied with the plaintiff's pleading, should have made the objection that no evidence be admitted because of the failure of plaintiff's complaint to state a cause of action for the foreclosure of the lien, stating to the court at the time the missing element in the complaint. If this method had been followed, the trial court, as well as the plaintiff, would have been fully informed and apprised of appellants' real objection, to wit, his claim of the insufficiency of the complaint to state a cause of action for the foreclosure of said lien, and plaintiff could at that time have secured permission of the court to amend his complaint by supplying the necessary allegation. It is clear that a proper objection was not made.

[5] The rule applicable to the above situation is clearly stated in 2 California Jurisprudence, p. 242, § 71, as follows: "Where the trial proceeds in all respects as though the complaint sufficiently states a cause of action, and the defendant goes to trial upon the theory that there is a material issue, and allows evidence to be received upon such issue without objection in any way, and the court makes a finding upon such evidence upon the theory that the proper issue is made by the pleadings, with no objection from either party, the parties will not, nor will either of them, be allowed on appeal to say, for the first time, there was no such issue." Reading from the same paragraph (71) on page 243, the rule is further enunciated as follows: "In case of a total absence of an essential allegation, the general rule seems to be that a defendant who has treated a complaint as sufficient, has made no objection to the admission of evidence of an omitted allegation and has allowed the issue to be tried as though properly presented by the pleadings, cannot on appeal urge that it is defective through some omission which could have been supplied by amendment at the time." Treanor v. Houghton, 103 Cal. 53, 36 P. 1081; Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 P. 90; Noakes v. Los Angeles, 179 Cal. 38, 175 P. 409; Boyle v. Coast Improvement Co., 27 Cal. App. 714, 721, 151 P. 25. The reason for the foregoing rule is, as has been expressed by the Supreme Court in Greiss v. State Investment & Ins. Co., 98 Cal. 241, 33 P. 195, 196, as follows: "It is unfair for a party to withhold an objection founded upon a defect which, if pointed out in time, might be remedied, until it is too late to correct the defect, thereby inducing an opponent to rely upon his pleading as sufficient, in order that he may have a fatal objection. Such course is a fraud upon justice, and prevents a fair trial. It is therefore not tolerated." See Abner Doble Co. v. Keystone, etc., Co., 145 Cal. 490, 78 P. 1050.

The cases cited by appellants do not sustain their position, for the reason that in each case the sufficiency of the pleading was attacked in the proper manner.

[6] Appellants in their answer attempt to take advantage of the insufficiency of plaintiff's complaint by pleading the following paragraph: "* * * Alleges that the claim of lien referred to in Paragraph VIII of the complaint is insufficient in law and does not comply with the law in such case made and provided." This is nothing more nor less than a conclusion of law, and raises no issue. Curnow v. Happy Valley Blue Gravel, etc., Co., 68 Cal. 262, 9 P. 149; Bradbury v. Cronise, 46 Cal. 287; 17 Cal. Jur. 189, 190, § 133.

[7, 8] Defendants complain of the ruling of the trial court in refusing to allow them to introduce oral evidence of the reasonable value of the work and materials furnished. Such evidence was not relevant or pertinent, for the reason that there was no material issue raised of reasonable value. The express contract entered into by the parties, which was the foundation of the transaction, pro-

vided that "labor and materials furnished to be governed by Pacific Coast Sales Book plus ten per cent." This book, "Pacific Coast Sales Book," was used by many of the contractors, and showed the prices of materials as they fluctuated up and down each week. The evidence amply supports the finding of the trial court that the prices of materials furnished were found in this book, and that to these prices was added the 10 per cent. Furthermore, defendants did not make an offer of proof, and are therefore precluded from raising this point at this time. Bridges v. Fisk, 53 Cal. App. 117, 200 P. 71.

[9] Appellants make the further point that the contract did not say that the prices to be charged are the same as set forth in the Pacific Coast sales book, but that the prices are to be *governed*, that is, Pacific Coast sales book prices are to be used as a basis. The construction given this contract by the trial court is correct. While the contract does not in so many words state that the plaintiff is to charge the prices set forth in the book mentioned, it does state that the "labor and material prices to be governed by the Pacific Coast Sales Book plus ten per cent." Among the several definitions of the word "govern" we find the following: "regulate"; "to serve as a rule or deciding precedent"; "to determine." Funk & Wagnall's Standard Dictionary. Likewise Webster's Unabridged Dictionary defines the word "govern" as follows: "To be a rule, precedent, law, or deciding principle for." It is perfectly clear that the "labor and material prices" were to be determined or regulated by the prices as found in said book. Or, in other words, the prices in the book will serve as a rule or precedent in the fixing of prices to be charged. The evidence is clear, and it was so found by the trial court, that the prices of the labor and material furnished were determined and governed by the Pacific Coast sales book, plus the 10 per cent.

[10] As to appellants' next point, that an oral contract was proven, the finding of the trial court, which is amply supported by the evidence, that the only contract entered into by the parties was a written contract, must be accepted as conclusive.

[11, 12] The trial court did not find upon any of the allegations of the defendants' counterclaim. The burden of proof upon the issues raised by this counterclaim was upon the defendants. They offered no evidence in support thereof, and therefore cannot be prejudiced by the failure of the court to find upon such issues. 24 Cal. Jur. 946, and cases there cited.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

106 Cal. App. 114

CUTLER v. KUSTER et al.

Civ. 4106.

District Court of Appeal, Third District, California.

May 28, 1930.

1. Sales ⟹384(1).

Prospective profits on basis of amount of grease purchased before buyer's alleged breach of contract *held* too uncertain and speculative to be recoverable.

2. Assignments ⟹137.

Assignee of bankrupt seller's cause of action for breach of contract *held* not entitled to recover, in absence of evidence that referee ever assigned particular chose as authorized (Civ. Code, § 954; Code Civ. Proc. § 368).

Civ. Code, § 954, authorizes assignment of right to recover money for breach of contract to purchase property, but Code Civ. Proc. § 368, provides that such assignment may not prejudice any legitimate defense existing at time of transfer.

3. Sales ⟹166(1).

Buyer's refusal to accept grease, not of quality contracted for, *held* not breach of contract.

There was evidence that grease furnished after first three months of contract period was so defective that buyer's customers could not use it and returned large quantities; that seller acknowledged defect and agreed to remedy it by method consuming several days, during which time buyers agreed to accept delivery of grease under contract through other companies; that seller failed to remedy defect, and never delivered any grease thereafter; that other companies refused to deliver any more grease to seller because of latter's failure to pay bill; that seller became bankrupt and closed its place of business; and that buyer fully paid for all grease purchased.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Action by L. P. Cutler against F. W. Kuster and others, copartners doing business under the firm name of the American Grease Company. Judgment for defendants, and plaintiff appeals.

Affirmed.

Charles P. Johnson, of Los Angeles, for appellant.

Charles L. Chandler and M. E. MacKinnon, both of Los Angeles, for respondents.

R. L. THOMPSON, J.

This is an appeal from a judgment for the defendants in an action for damages in an assigned cause of action for breach of a contract.

The complaint contains three counts. The defendants were copartners doing business under the firm name of American Grease Company. The American Refining & Manufacturing Company was a corporation engaged in manufacturing and selling "Jazz grease" and "Jazz grease tanks." The grease was used for lubricating differentials and transmissions of motor vehicles. The first cause of action alleges that on July 7, 1924, the parties to this action executed the written contract which is set forth in the pleading, by the terms of which the defendants were granted exclusive sales right to handle the American Jazz Grease Machine in Los Angeles county for a term of ten years; that 193 of said grease machines, together with a truck and certain accessories, were sold and delivered to the defendants for a total consideration of $6,431.15, to be paid in specified installments; that the stipulated value of the grease machines was $30 apiece. The contract further provides that the corporation "agrees to furnish distributors [defendants] grease" of "standard quality" in drums at four cents a pound and to supply it in bulk at three and a half cents a pound; that "as an essential and indispensable part of said grease machine, a measuring device attached thereto" would be loaned to the distributor free of charge, "provided, however, that said distributor agrees not to use said measuring device for the dispending of any grease other than that furnished by said company." Except the foregoing provision, there is no covenant contained in the contract with relation to the defendants' obligation to buy or use the vendor's "Jazz grease." The complaint further alleges that the corporation subsequently leased to the defendants 208 additional "Jazz grease machines," together with accompanying measuring devices; that pursuant to said contract the corporation sold and delivered grease to the defendants until about November 1, 1924, after which time the defendants refused to accept or purchase grease from the corporation. It was then alleged the American Refining & Manufacturing Company became bankrupt. A referee was duly appointed. May 1, 1925, upon proceedings duly had in the matter of the estate of said bankrupt corporation, the entire assets of its estate were sold to C. E. Spencer for a valuable consideration; that said order of sale contained the following provision: "The sale of all of the remaining assets of the estate, including accounts receivable, choses in action, * * * be and the same is hereby confirmed and said trustee is authorized * * * to deliver * * * on receipt of the purchase price the necessary assignments; * * *" that, pursuant to said order, the title to the chose in action, represented by the present action, was assigned and transferred to the said Spencer, who subsequently assigned his interest in this cause of action to the plaintiff. Finally it is alleged that, after the defendants refused to accept delivery of grease from the corporation, it made a contract with the Union Oil Company to deliver to the defendants "all the grease to be used in said 'Jazz machines'" for the balance of the ten-year term covered by the first mentioned contract for a consideration which would "make a profit [for the corporation] of one dollar per month for the oil furnished to be used in each of the grease machines"; that the defendants refused to thereafter buy or accept delivery of grease from the corporation to its damage in the sum of $46,516.

The second cause of action alleged that, by virtue of the assignment mentioned in the first count, plaintiff is the owner of nine grease machines of the aggregate value of $369, which are deposited for storage with, and wrongfully retained by, the defendants to the damage of plaintiff in said sum of $369.

The third cause of action alleges: (1) A sale and delivery of 23 additional grease machines to the defendants for a consideration of $30 apiece, no part of which has been paid; (2) a sale and delivery of certain goods and merchandise of the agreed value of $127.50, no part of which has been paid; (3) the sale and delivery of certain other merchandise of the agreed value of $24.74, no part of which has been paid; and (4) the sale and delivery of ten additional grease machines of the agreed value of $30 each, no part of which has been paid.

A general demurrer to the complaint was overruled. The answer denied the material allegations of the complaint, except that the purchase of the grease tanks was admitted. The vendor was then charged with a breach of the contract in failing to furnish Jazz grease according to the agreement. At the trial the court found that the defendants had fully performed all the covenants of the agreement on their part and had fully paid for all the machines, grease, and property which had been purchased from the corporation; that, upon the contrary, the vendor was guilty of a breach of the contract in failing to supply defendants with the quality of Jazz grease specified by the contract, except for the first three months after the execution of the contract, and that the defendants were therefore compelled to and did purchase its grease from sources other than the corporation; that the chose upon which this action is founded was not duly assigned to the plaintiff; that he had no cause of action, and was not damaged in any sum whatever on account of a breach of contract on the part of the defendants.

There is no controversy over the fact that the defendants purchased some 400 Jazz

grease machines from the American Refining & Manufacturing Company, and that for about three months after the execution of the contract Jazz grease of satisfactory quality was furnished the defendants. The evidence satisfactorily shows that all of these machines and grease were fully paid for. After a lapse of about three months, the grease which was sold to the defendants proved to be inferior and unsatisfactory. The customers of defendants complained of its quality and returned many drums of grease which were subsequently returned to the corporation and credited to the account of the defendants. The corporation acknowledged the inferior quality of the grease, and attempted to arrange with the Union Oil Company to supply the defendants with grease at the same price stipulated in their contract, but upon terms which enabled the American Refining Company to profit to a considerable extent. For a period of about two weeks the defendants accepted and paid the refining corporation for this Union Oil Company's grease. The substitution of Union Oil grease for the Jazz grease was not authorized by the contract. The defendants were under no obligation to accept Union Oil grease from the refining corporation. The American Refining Company had failed to perform its contract with respect to the delivery of grease. The defendants were privileged to and did thereafter purchase grease directly from the Union Oil Company. Moreover, there is substantial evidence to support the defendants' contention that the refining company had failed to pay the Union Oil Company for the grease thus purchased. Its credit with that company was therefore impaired, and further delivery of grease, under such arrangements, was refused. It became necessary for the defendants to contract for their grease directly with the Union Oil Company, which they did.

[1] The chief contention of the appellant is that, as the assignee of the refining corporation, he was entitled to the profits for the furnishing of all grease used by the defendants which would have been likely to have accrued during the remainder of the ten-year term of the contract with that company. This claim is founded upon the clause of the contract to the effect that the defendants were to use the measuring devices only for dispensing the Jazz grease furnished by the refining corporation, and that, on the basis of the amount which was consumed during the first three months, the prospective profits would have amounted to $46,516.

[2, 3] There is little merit in this appeal. For the comparative small consideration of $150 an order of sale was made of all the "remaining assets of the [bankrupt] estate, including accounts receivable, choses in action, books," etc. The particular chose in action which is here involved was not identified or described in the order of sale. There is no evidence that the referee in bankruptcy ever did assign to C. E. Spencer the actual right to maintain this action pursuant to the order authorizing it to be done. The right to recover money for the breach of a contract to purchase property may be assigned. Section 954, Civ. Code. The assignment, however, may not prejudice any legitimate defense which exists at the time of the transfer. Section 368, Code Civ. Proc. In the present case the record lacks evidence of an assignment to C. E. Spencer of the right to maintain this cause of action. The contract upon which the action is founded does not bind the defendants to buy from the corporation all the grease consumed in their business. It merely recites that the "distributor agrees not to use said measuring device for the dispensing of any grease other than that furnished by said company." There is no evidence that these measuring devices were used by the defendants in dispensing any grease which was not purchased from the corporation. Moreover, after about three months of service under the contract, the corporation failed to furnish the defendants with "Jazz grease" of the standard quality required by the contract. The defendants therefore had a right to and did reject such defective grease. Mr. Spencer, the sales manager of the American Refining & Manufacturing Company, testified that Jazz grease was furnished the defendants "until approximately the middle of October," and that "they were stopped because the American Grease Company objected to the quality of the grease which we were delivering at that time being not quite what they required for their work." The defendant Sharland testified in regard to this breach of contract on the part of the corporation that for two and a half or three months they were furnished grease under the contract which was entirely satisfactory; that thereafter the grease was so permeated with water and defective in color and quality that their customers could not use it, and therefore returned large quantities of it; that the refining corporation replaced much of this objectionable grease with grease which proved to be of no better quality; that the grease was chemically tested and analyzed and found to be defective and useless; that the corporation acknowledged the defect of quality in its Jazz grease, and agreed to remedy it by a certain method of processing which would consume several days, during which time for ten days or two weeks the defendants agreed to accept delivery of grease under the contract through the Union Oil Company or the Associated Oil Company; that the refining corporation failed to remedy the defects in its Jazz grease, and never thereafter delivered to the defendants any more of the Jazz grease. Sharland testified: "I finally found out the Associated Oil Company had refused to deliver any further grease to the American Refining & Manufacturing Company, due to the

fact they had not paid their bill. * * * I refused to accept that quality of grease. He could not get it from the Associated and so the thing was dropped. * * * Their [the Refining Company's] factory was being closed then, that was the middle of December, and I didn't see him [Spencer] again until the latter part of January. * * * [Later] He said he had made satisfactory arrangements with an oil company to furnish grease as per samples which he presented to me. I examined the samples and told him it was the same grease that he had once before offered me and I didn't care to buy any of it, I could not use it. Q. Was that the same quality * * * as 'Jazz' grease? A. No, it was an entirely different grease." This witness also testified that the American Refining Company never thereafter furnished any grease to the defendants, that the corporation became bankrupt, closed its place of business, and that the defendants fully paid for all the grease machines, grease, and property which were purchased from the refining corporation.

We are of the opinion that the findings of the court and the judgment are in every respect amply supported by the evidence, and that the plaintiff is not entitled to recover in this action, for the reasons that an actual assignment of the chose to C. E. Spencer is not shown; that the defendants were not guilty of a breach of their contract; that the measure of alleged damages for failure to accept delivery of grease from the corporation is too uncertain and speculative, and because the property which was purchased from the corporation was fully paid for.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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106 Cal. App. 15

MIZE v. DUFFY.

Civ. 7189.

District Court of Appeal, First District, Division 2, California.

May 21, 1930.

Rehearing Denied June 19, 1930. Hearing Denied by Supreme Court July 17, 1930.

1. Automobiles ⟹245(8, 43).

Under conflicting evidence, question of speed at which defendant was driving automobile when striking child at intersection, and whether intersection was blind corner, *held* for jury (California Vehicle Act, § 113).

2. Negligence ⟹136(29).

Contributory negligence of minor child is ordinarily question of fact for jury.

3. Automobiles ⟹245(74).

Whether child, six years old, running suddenly from sidewalk into street in front of defendant's automobile was guilty of contributory negligence, *held* for jury.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Robert Mize, a minor, by Lorensine Mize, his guardian ad litem, against John G. Duffy, also known as J. G. Duffy. Judgment for plaintiff, and defendant appeals.

Affirmed.

B. P. Gibbs, of Los Angeles, and Barry J. Colding and Theodore Hale, both of San Francisco, for appellant.

Charles P. Knights, of San Francisco, for respondent.

NOURSE, P. J.

Plaintiff, a child of six years of age, sued for personal injuries. The cause was tried before a jury and resulted in a verdict for plaintiff for $1,500. The defendant appeals on typewritten transcripts.

We take the following statement of facts from appellant's opening brief: "Appellant was driving north on Potrero avenue. As he approached the intersection of Twenty-second street at the southeast corner, respondent, whose presence up to that instant had been concealed or partially concealed by the poles on the corner, ran suddenly from the sidewalk into the street and was struck by appellant's automobile. Appellant was between 12 and 18 feet from respondent when he first saw him. At that time appellant was driving at the rate of from 10 to 15 miles an hour and was about 7 feet westerly from the curb." (But here it should be added that other evidence was offered to show that appellant was driving at a rate of 20 to 25 miles an hour.) "When appellant saw respondent jump into the street respondent was 8 to 12 feet from appellant. Appellant immediately applied his brakes and brought the automobile to a stop about 12 feet from the point where he had hit respondent."

Two points are made on this appeal—that the evidence is insufficient to show negligence on the part of appellant, and that respondent was guilty of contributory negligence as matter of law.

[1] In charging negligence to the appellant the respondent relies upon the evidence showing that the block forming the southeast corner of the intersection was occupied by the San Francisco Hospital and was surrounded by a brick wall three feet in height, which was topped with an iron fence six feet

in height. It is argued that this wall and fence was such an obstruction to appellant's view of the intersection as to make the legal speed limit 15 miles an hour. The point raised by appellant is not debatable here. There was a clear conflict in the evidence as to the rate of speed at which appellant was traveling and as to whether the intersection was an "obstructed" or "blind" corner. It was the province of the jury to resolve these conflicts. But aside from the question whether the wall and fence obstructed the driver's view within the meaning of section 113 of the California Vehicle Act (St. 1923, p. 517), there is the more important question whether appellant was driving in a careful manner, in view of all the circumstances. See section 113(a) California Vehicle Act. It is evident from the verdict that the jury found that he was not.

[2, 3] Upon the second point our authorities are in accord with the view that the question of the contributory negligence of a minor child is "ordinarily" a question of fact for the jury. Some of the recent decisions to this effect are Sanders v. Toberman, 192 Cal. 13, 15, 218 P. 394; Varcoe v. Lee, 180 Cal. 338, 341, 181 P. 223; Schroeder v. Baumgarteker, 202 Cal. 626, 628, 262 P. 740. The appellant has not cited any reason why the case of this child of six years is out of the ordinary and, upon the record cited, we must hold that the issue was properly left with the jury.

Judgment affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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106 Cal. App. 12

MARIN UNION JUNIOR COLLEGE DIST. v. GWINN, Superintendent of Schools.

Civ. 7139.

District Court of Appeal, First District, Division 2, California.

May 21, 1930.

Schools and school districts ⟹108(3).

Statute providing for tax to pay cost of educating students, in junior college district, in another county, *held* not to include "capital expenditure" (St. 1921, p. 756, § 15, as amended by St. 1927, p. 1278).

St. 1921, p. 756, § 15, as amended by St. 1927, p. 1278, providing for tax in county of students' residence to pay the cost of educating such students in a junior college district located in another county, and providing that funds should be in proportion to the total cost of educating, and that such funds should be used to maintain the junior college, did not include cost of capital expenditures, since "capital expenditure" is in nature of an investment for the future, whereas the "cost of maintenance" is definite present expense.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Proceeding in mandamus by Marin Union Junior College District against Joseph M. Gwinn, as Superintendent of Schools of the City and County of San Francisco. From a judgment denying writ of mandate to compel approval of claim for education of students. petitioner appeals.

Affirmed.

George H. Harlan, of San Rafael, for appellant.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for respondent.

NOURSE, P. J.

Petitioner sued in mandamus to require the respondent to approve a claim for the cost of educating students in the Marin College District who were residents of the city and county of San Francisco. Respondent's demurrer to the petition was sustained without leave to amend and petitioner appeals on the judgment roll.

The Junior College District is organized under the act of May 27, 1921 (Stats. 1921, p. 756). During the fiscal year 1927–28 it expended for capital outlays, including the purchase of lands and the erection of buildings, the sum of $48,448.18. The total cost of maintaining the school during that year was $105,456.21. The aid received from the state under the act amounted to $18,800. The petitioner subtracted this amount from its total expenditures and, on the basis of an average daily attendance of 168 students, estimated the average cost per student as $515.81. During the year 16 students whose residence was in the city and county of San Francisco attended the college, and, upon the estimate above mentioned, the petitioner presented its claim to respondent in the sum of $8,252.96. The single question involved is whether under the act the city and county is required to pay an equal proportion of the cost of capital outlays made by the district.

Section 15 of the act of 1921 called for a special tax in the county of the student's residence "to pay the cost of educating such students" in a junior college district located in another county. The funds so raised were to be "in proportion to the total net cost * * *

of educating" such students. The same section provided that such funds "shall be used to *maintain* the junior college." By the act of May 23, 1927 (Stats. 1927, p. 1278), this section was amended by striking out the word "net" so that the law provided, at the time this controversy arose, that the outside county should pay "in proportion to the total cost * * * of educating" a sum to be used for maintenance purposes. Counsel for both parties concede that the amendment of 1927 has no bearing upon the question involved which is reduced to a simple interpretation of the meaning of the expression "cost of educating" and maintenance of the school.

For years the Legislature has recognized the well-established economic distinction between cost of capital expenditures and cost of maintenance. Throughout the school law this distinction has appeared in the special provisions for taxation (or for the issue of bonds) for the purchase of school lands and erection of school buildings and in the special provisions for maintenance. It is further illustrated by the numerous statutes calling for the creation of special building funds as distinct from the general, or maintenance, funds. It is based upon the sound economic principle that a capital expenditure is in the nature of an investment for the future, whereas the cost of maintenance is a definite present expense.

We can reach no other conclusion than that the Legislature had this distinction in mind when it provided that the funds raised under section 15 of the act were to be used for maintenance and that the "cost of educating" the students did not include the cost of capital expenditures. It is altogether possible that a reasonable charge in the nature of rental for the use of the buildings and equipment might have properly been included as a charge upon the cost of maintenance (as indicated by section 12 of the act); but the petitioner does not make the claim, and we do not need to decide it. The Legislature no doubt had this factor in mind when, by the act of 1929 (Stats. 1929, p. 985, School Code 1929 (Acts Supplemental to), p. 343), it provided: "The said total cost shall not include outlays for permanent construction or improvements, nor moneys received from state apportionment, but shall include sixty-five dollars per unit of average daily attendance for the use of buildings and equipment." The petitioner insists that we may not rely on this amendment because it was enacted after the claim in controversy accrued. We do not cite it as determinative of the question involved, but merely as illustrative of the legislative recognition of the well-recognized principle above noted.

Judgment affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

106 Cal. App. 191

Ex parte MYETTA.

Cr. 1974.

District Court of Appeal, Second District, Division 2, California.

June 3, 1930.

1. Criminal law ⟹1202(4).

Trial judge's statement that "defendant will be found guilty of the priors—both priors" *held* insufficient finding of prior convictions (Pen. Code, § 1158).

Pen. Code § 1158, provides that, whenever fact of previous conviction is charged, jury, if they find verdict of guilty of offense charged, must also, unless defendant's answer admits charge, find whether or not he has suffered such previous convictions.

2. Criminal law ⟹1202(6).

Absent finding that defendant charged with possession of liquor has suffered previous convictions, sentence of imprisonment, except as alternative for fine, *held* unauthorized (National Prohibition Act, tit. 2, § 29 [27 USCA § 46]; St. Cal. 1921, p. 79).

National Prohibition Act, tit. 2, § 29 (27 USCA § 46), penal provisions of which were adopted by St. Cal. 1921, p. 79, prescribes punishment for unlawful manufacture or sale of liquor or violation of permit, but provides that any person who manufactures or sells liquor shall for first offense be fined not more than $1,000 or imprisoned not exceeding six months.

Application by Jessie Myetta for a writ of habeas corpus, prayed to be directed to the Sheriff of Los Angeles County, to secure release of petitioner from custody on the ground of improper conviction.

Writ granted, and petitioner discharged.

C. B. Conlin, of Los Angeles, and S. Jack Cohen, of Hollywood, for petitioner.

Lloyd S. Nix, City Prosecutor, and Joe W. Matherly, Deputy City Prosecutor, both of Los Angeles, for respondent.

IRA F. THOMPSON, J.

The petitioner in this proceeding for a writ of habeas corpus was charged with the unlawful possession of intoxicating liquors with two previous convictions. After the case was submitted to a judge of the municipal court, he announced: "The defendant will be found guilty of the priors—both priors, and of the substantive charge." Thereafter she was sentenced to pay a fine of $500 and to confinement in the city jail for the period of 120 days. Thereafter the cause was appealed to the ap-

pellate department of the superior court and there affirmed.

[1] It is apparent that the municipal court did not find, as required by section 1158 of the Penal Code, whether the charges of the previous convictions were true or untrue. The most that can be said of the finding is that some time in the future the defendant would be found guilty of the offense charged in two prior complaints rather than that she had already suffered two convictions. See In re Hall, 88 Cal. App. 212, 263 P. 295.

[2] Assuming that the statement that the defendant will be found guilty of the substantive charge could be held to constitute a sufficient finding by the court (a proposition which we very much doubt), the court was still without authority, in the absence of a finding that she had suffered two prior convictions to impose a sentence that the defendant be confined except as an alternative for the payment of the fine. The National Prohibition Law (title 2, § 29 [27 USCA § 46]), the penal provisions of which are adopted by the Wright Act (St. 1921, p. 79), does not authorize imprisonment for a first offense, except as stated. In re Hall, supra; In re Jackson, 90 Cal. App. 349, 265 P. 863.

Writ granted, and petitioner discharged from custody.

We concur: CRAIG, Acting P. J.; GATES, Justice pro tem.

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106 Cal. App. 121

HUPP v. LAWLER.

Civ. 55.

District Court of Appeal, Fourth District, California.

May 28, 1930.

1. Specific performance ⟹32(2).

Lack of mutuality in contract may be removed in right to specific performance if there has been full or substantial performance.

2. Specific performance ⟹6.

To obtain specific performance remedy must be mutual.

3. Specific performance ⟹6.

Test of mutuality of remedy in decreeing specific performance is determined by whether, at suit of either, court of equity would decree specific performance against other.

4. Specific performance ⟹62.

Contract whereby organizer in consideration for organizing and promoting corporation to develop granite quarry was to receive undivided half of land from landowner *held* not specifically enforceable.

5. Specific performance ⟹32(2).

Mere organization of corporation *held* not such part performance of contract to promote corporation to develop granite quarry as would entitle promoter to specific performance of conveyance of land.

Mere organization of corporation was not sufficient part performance of contract whereby organizer was to organize and promote corporation in consideration for half interest in granite quarry land, since it was within discretion of corporation commissioner whether he would permit organizer and quarry landowner to own majority of capital stock of corporation to be issued to them in equal shares, after they had conveyed the land to the corporation, and to sell unissued stock to public in order to obtain funds for development of quarry, as required by the contract. It was also shown that no development of quarry had been had by reason of landowner's dealings with promoter for organization of corporation.

6. Specific performance ⟹128(4).

Where organizer did not state cause for specific performance of contract for organization of corporation to develop granite quarry, organizer could not recover damages.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Suit by Earl R. Hupp against Garnet M. Lawler. Judgment for defendant, and plaintiff appeals.

Affirmed.

Louis Luckel and J. M. Chatterson, both of Los Angeles, for appellant.

Duke Stone, of Los Angeles, for respondent.

OWEN, Justice pro tem.

Plaintiff sets up in his complaint that the defendant was the owner of a parcel of land in San Diego county, on which was located an undeveloped granite quarry; that being without money, and desiring to make the quarry income producing, the defendant entered into a contract in writing with the plaintiff whereby the plaintiff was employed to organize and promote a corporation for the purpose of taking over said land and developing the quarry; that in consideration of his services the plaintiff was to receive an undivided one-half of the land; that the plain-

tiff and defendant were to own a majority of the capital stock of the corporation to be issued to them in equal shares, after they had conveyed the land to the corporation. That pursuant to the agreement the plaintiff organized the corporation; that he devoted five months of his time, and expended over $3,000, in organizing and promoting the corporation; that he secured manufacturers and builders as customers for the granite who agreed to buy the product; that he also secured reports from granite experts, and sought and secured divers persons willing to invest in the enterprise. The plaintiff alleges other acts performed by him, which he states cannot be fully or reasonably estimated or compensated in money or damages.

Plaintiff further sets out that the stock of the corporation could not be issued or sold for the reason that the defendant failed and refused to convey one-half of the land to the plaintiff; that through the fault of the defendant the land could not be conveyed to the corporation, and stock issued to the parties to the action in consideration of the conveyance.

Alleging that the consideration moving to the defendant was adequate, fair, and reasonable, the plaintiff prays that the defendant be compelled to convey an undivided one-half of the real property to him, and be ordered to join him in a conveyance of the whole of the property to the corporation. He further prays that, in the event the defendant be unable to convey, he be awarded damages in the sum of $10,000 in addition to the sum of $3,000 expenses incurred by him.

The defendant demurred on three counts: On the ground of a misjoinder of parties, in that the corporation should have been made a party plaintiff; that the complaint is ambiguous, unintelligible, and uncertain; and that it does not state facts sufficient to constitute a cause of action.

The trial court sustained the demurrer without leave to amend.

The transcript on appeal contains the complaint, demurrer, and judgment on demurrer, but the record does not show on which count of the demurrer the court ruled.

Appellant's opening brief is devoted to a general discussion of the complaint in anticipation of respondent's argument or in answer to the points raised before the trial judge. Respondent urges that the complaint does not allege facts showing the consideration, for the agreement was adequate and fair to the defendant; that the complaint was too indefinite and uncertain to permit of the remedy sought; that the complaint shows a series of acts covering a period of time after incorporation was contemplated by the contract; that the corporation was to receive deed and hold title, and that, since the corporation was not a party to the contract, the agreement is lacking in mutuality—that, if it had been a party to the contract, it would have to be the plaintiff in the action; that the contract sought to be specifically enforced is unintelligible and uncertain in that it might or might not be possible to sell the stock or divide the majority of it between the plaintiff and defendant; and that the damages alleged are too remote and uncertain, and that before plaintiff is entitled to recover damages he must make out a case of specific performance.

Aside from a consideration of many questions raised by respondent it would appear that a discussion of two points ought to be determinative of whether or not the trial court erred in sustaining the demurrer without leave to amend.

Is the plaintiff entitled to specific performance of the contract as pleaded? Is he entitled to pursue this action for damages if the contract is not enforceable?

[1-3] 1. It is well to keep in mind that the controlling consideration and ultimate purpose governing and actuating the respondent was *the development of the quarry, and profitable sale of the product therefrom.* The appellant undertook to *organize* and *promote* a corporation. It is admitted that he organized and procured a charter for the "El Cajon Granite Company." We thus have a third legal entity coming into the proceedings, with rights to be considered, obligations to be observed, and duties to be performed. The corporation is not a party to the action. The appellant agreed further to *promote* the corporation, as well as organize it. Assuming that the officers and directors of the corporation—who they were and how many are not shown—were willing for the appellant to promote its interests, we presume that appellant's first move would be to secure the consent of the commissioner of corporations of the state of California for the issuance of a majority of stock to the parties to the contract, followed by a permit for the sale of the unissued stock to the public in order to obtain funds for the development of the quarry, and the erection of necessary buildings and the purchase of proper machinery and equipment. Again we must assume that the commissioner of corporations would issue these permits, and assume that the commissioner's engineer had reported favorably on the feasibility of the venture, the quality and value of the quarry, before it can be said that the respondent has received a valid consideration, or that a single important or definite step had been taken toward the development of the quarry and the sale of its product. These acts, which the appellant was obligated to perform, must be accomplished before it can be said that he has *organized* and *promoted* the corporation. A knowledge of the legal steps necessary in the premises, and a realization that the discretion of the commissioner of corporations is involved, makes it appear at once that the re-

spondent on her part could not have compelled the appellant to perform his part of the contract. He has performed only part of the contract. The lack of mutuality in a contract may be removed in the right to specific performance if there has been a full or substantial performance. But the mere organization of a corporation is a small beginning, when we consider the provisions of the Corporation Act and the discretionary powers of the commissioner, none of which powers are controlled by the mandate or decree in specific performance of any court.

"The remedy of specific performance must be mutual, and the test of mutuality of remedy is applied by considering whether the agreement under which the remedy is asserted is of such a character that, at the suit of either, a court of equity would decree specific performance against the other." Pacific, etc., Ry. Co. v. Campbell-Johnston, 153 Cal. 106, 94 P. 623, 625; Moore v. Tuohy, 142 Cal. 342, 75 P. 896; Los Angeles & Bakersfield Oil, etc., Co. v. Occidental Oil Co., 144 Cal. 528, 78 P. 25. Innumerable cases could be cited to the same effect. Many of these authorities cite Pomeroy on Contracts, § 312, where it is said:

"Finally, contracts which by their terms stipulate for a succession of acts, whose performance cannot be consummated by one transaction, but will be continuous and require protracted supervision and direction, with the exercise of special knowledge, skill and judgment in such oversight—such as agreements to repair or build, to construct works, to build or carry on railways, mines, quarries, and other analogous undertakings—are not as a general rule specifically enforced."

[4, 5] We do not believe the contract between the parties is subject to specific performance. Nor can we hold that the mere organization of the corporation is such a degree of performance on the part of the appellant as would entitle him to a deed to one-half of respondent's land; especially is this so when the record shows that not a drill or a pick has ever been applied to respondent's granite quarry by reason of her dealings with appellant.

[6] 2. Having determined that appellant has not stated a cause of action in specific performance, it must be held that he is not entitled to damages unless his complaint shows he is first entitled to the equitable relief sought. The rule laid down in Morgan v. Dibble, 43 Cal. App. 116, 184 P. 704, 706, seems to be decisive of the question:

"The right to pecuniary compensation in lieu of specific performance 'assumes, of course, a sufficient contract, performance or an offer to perform by the plaintiff, and every other element requisite, on his part, to the cognizance of his case in chancery.' Milkman v. Ordway, 106 Mass. 232, 254. There is no authority for holding that equity can grant damages unless some case of equitable relief is made out also, to which the damages would be applicable or subsidiary. * * * An action to recover damages in lieu of specific performance lies not at law, but in equity, for the right to such damages depends upon the right to specific performance, and is not available until the latter is established."

The judgment on demurrer of the trial court must be sustained on the two propositions considered without a discussion of the sufficiency of the allegations of damages, although from a reading of the complaint it is difficult to see how $3,000 could have been expended in "paying the costs and expenses incidental to said promotion and organization," and impossible to determine in what manner appellant was damaged in the sum of $10,000.

The judgment is affirmed.

We concur: BARNARD, Acting P. J.; MARKS, J.

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106 Cal. App. 78

TANEO FUKUCHI et al. v. YUSAN TAKESHIGE et al.

Civ. 4105.

District Court of Appeal, Third District, California.

May 26, 1930.

Appeal and error ⚷781(5).

Appeal from denial of injunction restraining action of directors of association will be dismissed, where terms have expired; question being moot.

Appeal from the Superior Court, Los Angeles County; James W. Bartlett, Judge.

Suit by Taneo Fukuchi and others against Yusan Takeshige and others. Judgment for defendants, and plaintiffs appeal.

Appeal dismissed.

J. Marion Wright, of Los Angeles, for appellants.

Lorrin Andrews, of Los Angeles, for respondents.

PLUMMER, J.

The plaintiff above named and thirteen others began this action against the defendant above named and fifteen others to obtain an injunction restraining the defendants from acting as directors of a certain voluntary Association of Japanese of Pasadena; also, for an accounting. Judgment was entered on the

pleadings, in favor of the defendants, and from this judgment the plaintiffs appeal.

The record shows that the Japanese Association of Pasadena is an unincorporated, voluntary, nonprofit association, organized for the purpose of promoting friendship among its members and a more mutual and friendly understanding between Japanese and Americans. The association appears to have adopted by-laws, which by-laws, however, are not set forth in the transcript. It would appear from the complaint that the by-laws provided for the payment of certain dues by its members to defray the expenses of the association. It is alleged in the complaint that the association has over two hundred members; that this action is prosecuted for the benefit of the association. The complaint further shows that the plaintiffs and appellants in this action claim to have been elected directors thereof at the annual meeting of the association held on or about January 23, 1927; that the term of office of the directors so elected would expire on the 23d day of January, 1918. The complaint further shows that thereafter, and on or about the 7th day of February, 1927, at a "called" meeting of the association, alleged to have been called without any authority, and not in accordance with the provisions of the by-laws of the association, the defendants herein claim to have been elected directors of said association for the period above mentioned. It is then alleged in the complaint that the defendants, so claiming to be elected directors of the association, proceeded to take charge of the business of the association, and at the time of the filing of the complaint were in charge of the business of the association; that as such directors the defendants had collected in dues and donations the sum of about $2,000. The part of said sum constituting donations, the exact amount of which is not alleged in the complaint, was for the purpose of holding a picnic in the month of March, 1927. While the complaint alleges that the association has been damaged in the sum of $2,000, being the sum alleged to have been collected by the defendants as dues belonging to the association, there is no showing in the complaint that the defendants have not accounted to the association for every dollar collected, nor is there any allegation in the complaint to the effect that any of the sums collected have been either retained by the defendants, or any of them, or that any part of the same has been used improperly, or for the benefit of any of the defendants. For aught that appears in the complaint, every dollar collected has been turned over to the treasury of the association.

There being nothing in the complaint showing cause for an accounting, the question turns upon the denial of the trial court to grant an injunction restraining and prohibiting the defendants from acting as directors of the association for the term expiring on the 23d day of January, 1928.

While the briefs of counsel have gone into the question of the right of the plaintiffs to maintain this action under the provisions of section 382 of the Code of Civil Procedure, and also as to the right or power of the court to grant an injunction to restrain parties claiming to be the directors of a voluntary association, the statement of facts which we have set forth herein discloses that whatever we might say as to the law upon the subject would be of no value either to the appellants or to the respondents. Even though it be adjudged that the plaintiffs, under the provisions of the section of the Code referred to, had the right to institute and maintain this action, and that the court had jurisdiction to determine who were the elected directors of the association for the term beginning January 23, 1927, and ending January 23, 1928, it would simply be pronouncing a judgment relative to a controversy that has become moot. It has long been the established law of this state that the court will not entertain jurisdiction, on appeal, of controversies which have become moot.

In view of the facts disclosed by this record, and as stated above, the rules of law as set forth in 2 California Jurisprudence, pp. 123 to 127, §§ 12 and 13, apply. The law as set forth in the text, and as reported by the cases cited, show that under such circumstances as are disclosed by the record in this case, the appeal will be dismissed. The controversy as to the right of the parties involved in this action to serve as directors of the association named in the complaint, from January 23, 1927, to January 23, 1928, having become moot, it is hereby ordered that the appeal herein be and the same is hereby dismissed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

PRETZER v. CALIFORNIA TRANSIT CO.

Civ. 278. *

District Court of Appeal, Fourth District, California.

May 17, 1930.

Rehearing Denied June 9, 1930. Hearing Granted by Supreme Court July 14, 1930.

1. Automobiles ⟹244(36)

Evidence showed that bus driver's negligence proximately caused collision with approaching automobile when bus turned out to pass another vehicle.

2. Appeal and error ⟹1068(3).

Instructions regarding negligence, contributory negligence, and proximate cause of automobile collision, if erroneous, were harmless, where evidence established defendant's negligence as sole cause.

3. Damages ⟹99.

In personal injury action, value of cotton crop being grown under plaintiff's supervision was improper measure of damages (Const. art. 6, § 4½).

The evidence showed that at the time of the automobile collision, wherein plaintiff received the injuries for which he sought recovery in the present action, he had been employed to superintend 1,000 acres of growing cotton, and had also been raising 2,500 acres of cotton on his own account, his duties consisting solely of superintending the work. He was permitted to testify that if he had not been injured he would have caused his crop to be irrigated; that the cotton had consequently suffered from a lack of water; and that if a normal crop had been produced it would have been worth about $200,000.

4. Damages ⟹214.

Instruction that injured plaintiff should minimize damages, and could not recover for failure to return to work when reasonably able, was improperly refused.

Plaintiff testified that he did not return to the performance of his duties for almost eight months after the automobile accident in which he had been injured, but there was evidence that he was able to perform part of his duties within five weeks, and that he had almost entirely recovered at the end of three months.

5. Damages ⟹32.

Plaintiff sustaining fractured arm, necessitating reduction by fluoroscopy and encasing arm and torso in plaster cast for five weeks, could recover for pain and suffering.

6. Appeal and error ⟹1178(6).

Court of Appeal can reverse judgment and remand for new trial solely upon issue of damages (Const. art. 6, § 4½).

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by Jack Pretzer against the California Transit Company. From a judgment for plaintiff, defendant appeals.

See, also, 283 P. 361.

Reversed in part and remanded, with directions.

Young & Young, William K. Young, and De Forrest Home, all of Los Angeles, Wakefield & Hansen, of Fresno, and Lasher B. Gallagher, of San Francisco, for appellant.

Theodore M. Stuart, of Fresno, for respondent.

MARKS, Acting P. J.

[1] On August 11, 1928, respondent was riding with his son, Ed Pretzer, his wife, and a Mrs. Margaret McCarthy, in a Ford sedan, traveling east on White's Bridge road, a county road running in a general easterly and westerly direction in the county of Fresno, state of California. At a place on the road about one and a half miles westerly from the city limits of the city of Fresno, the Ford sedan, which was being driven by Ed Pretzer, came into collision with a motor-driven passenger stage belonging to appellant, and being operated by its servant. Respondent was injured in the accident and was awarded damages in the sum of $12,000 after a trial before a jury.

According to the evidence the passenger stage was traveling west on the White's Bridge road. Preceding it was a bakery truck traveling in the same direction. When the Ford sedan, occupied by respondent and his party, had approached the bakery truck so that only between thirty-five and sixty feet intervened between these two vehicles, the stage of appellant swung to the left from behind the bakery truck and directly in the path of the Ford sedan. When Ed Pretzer saw the stage in front of him on the south half of the highway he immediately applied his brakes and swung his car slightly to the left and then to the right, hoping to avoid a collision. The stage driver did the same thing and finally drove toward his left side of the road, so that at the time of the collision the stage was headed in a southwesterly direction with its front wheels off the south edge of the pavement and with part of the body of the stage and its rear wheels on the south half of the pavement. The Ford hit the stage back of its center on its right-hand side, tearing the right fenders and right running board

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 294 P. 382.

from the sedan. Respondent was sitting in the right front seat of the Ford with the window in the door open and his right elbow protruding outside the car. The force of the collision broke respondent's right arm between the elbow and the shoulder and lacerated the skin and flesh on the arm and hand. He also received a superficial scalp wound and was rendered unconscious for a few hours. Neither of the vehicles involved in the accident was traveling at an excessive rate of speed. With the exception of the driver of the stage, all of the witnesses testifying, including passengers in the stage, described the collision as we have here set it forth.

The stage driver testified that when he attempted to pass the bakery truck the Ford sedan was at least fifteen hundred feet down the road and in front of the truck; that the bakery truck increased its speed, and that the stage and the truck proceeded side by side for about two hundred feet when he saw that a collision was imminent and attempted to drive the stage off the pavement and to the south side of the road. As we have observed, the testimony of this witness stands entirely alone. It is not consistent. His estimate of the speed of the Ford sedan was that it was traveling only slightly faster than the bakery truck and the stage. If, as this witness testified, the bakery truck and the stage traveling side by side only covered two hundred feet, it would have been impossible for the Ford, traveling at the rate of speed fixed by the stage driver, to have covered the remaining thirteen hundred feet and reached the scene of the accident in the length of time that the other two vehicles were traversing the two hundred feet side by side.

While appellant sets forth many assignments of error upon which it relies for a reversal of the judgment, these assignments fall into two general classes: First, those concerning contributory negligence on the part of respondent and his son, the driver of the sedan, and, second, those concerning the size of the verdict by which respondent was awarded damages in the sum of $12,000.

The errors complained of concerning the alleged contributory negligence of respondent and his son relate principally to instructions given by the court, and other instructions proposed by appellant and refused by the court. Some of the instructions given and complained of are inartistic and might have been improved upon. However, the jury was correctly instructed upon the question of negligence, contributory negligence, and proximate cause. The evidence in this case so conclusively shows negligence on the part of the driver of appellant's stage, and that this negligence was the sole and proximate cause of the injury unaffected by any act or omission of either respondent or his son, that the jury could do nothing else than conclude that appellant was solely responsible for the injury to respondent.

[2] The record fails to disclose any suggestion of contributory negligence on the part of either respondent or his son, therefore we conclude that if there were any errors in the instructions given or refused by the court on the question of negligence, contributory negligence and proximate cause of the injury they were harmless and not prejudicial and are not grounds for a reversal of the judgment, as any verdict that did not fix responsibility for the accident upon appellant because of the negligence of its servant would have been contrary to the evidence.

Upon the question of errors of the court affecting the amount of damages awarded to respondent, we are confronted with a more difficult problem. The amount of $12,000 is large considering the injuries of respondent.

Respondent was taken to a hospital in the city of Fresno, where his broken arm was set and his other injuries dressed. On the day following the accident his physician discovered that the broken bones in the arm had slipped, requiring that it be reset. Respondent was then taken to the office of his physician in the city of Madera and the fracture was again reduced by the aid of the fluoroscope. The arm was placed in a position at right angles to the body with the forearm extended to the front and held in position upon an ordinary hardware bracket. The entire arm and body from below the waist to the neck were encased in a plaster cast, which was not removed for about five weeks. This means of reducing a fracture was painful and undoubtedly caused respondent considerable suffering. However, respondent was not confined to his bed after the second reduction of the fracture. He walked from the doctor's office and was taken to the home of his sister in an automobile. He visited the doctor's office on frequent occasions during the ensuing two weeks, walking up and down a flight of stairs to and from the office. About two weeks after the accident he returned to his home at Knights Landing, near Sacramento, Cal., returning two or three times during the next three weeks to consult his physician, after which time the cast was removed and he was discharged from the care of his physician.

At the trial, which took place about eight months after the accident, respondent's physician testified that there was a slight impairment in the rotation of respondent's right arm, but that this would disappear within about a year from the time of the injury. No claim of any permanent injuries to respondent was made.

[3] At the time of the accident respondent was engaged in farming thirty-five hundred acres of cotton near Knights Landing in Sacramento county, Cal. He was employed by

the California Cotton Credits Corporation to superintend one thousand acres of growing cotton at a salary of $400 per month. Respondent was raising twenty-five hundred acres of cotton on his own account. His duties consisted solely of superintending the work of growing these crops and in directing the efforts of laborers employed to do the actual work upon them. There is evidence that the reasonable value of such services was the sum of $1,000 per month. Respondent was totally disabled for five weeks, and according to the testimony was partially disabled for several weeks longer. After the lapse of the first several weeks he might have resumed the duties of superintending the growing of his cotton crop. He was not reemployed by the California Cotton Credits Corporation, which stopped his wages on the day of the accident.

Over appellant's objection, respondent was permitted to testify that in the event of his not being injured he would have had his cotton crop irrigated during this time of his total disability, but that on account of the injuries this irrigation did not take place and the crop suffered from a lack of water. Over like objection he was permitted to testify that if a normal crop were produced on thirty-five hundred acres of land under the conditions existing in 1928, such crop would have amounted to about three-fourths of a bale per acre and would have had a total value of about $200,000. Upon what theory this evidence was admitted does not appear from the record. One thousand acres of the cotton belonged to the California Cotton Credits Corporation and not to him. The value of the crop on this land made no difference to him financially. He was receiving a salary of $400 per month for superintending its growing. If the crop had been a total failure the loss would have fallen on the corporation and not on respondent.

The value of the crops grown under the supervision of respondent was no proper measure of the damages suffered by him as a result of his injuries, as he superintended the growing of the crops and employed laborers to do the actual work of caring for them. As the Supreme Court said in the case of Lombardi v. California Street Railway Co., 124 Cal. 311, 57 P. 66, 69:

"The loss of profits in conducting a business involving the labor of others is not a necessary consequence of personal injury to the plaintiff. The extent of his recovery upon this ground would be what his services were worth in the conduct of such a business as he was engaged in."

To the same effect are the cases of Walsh v. New York C. & H. R. R. Co., 204 N. Y. 58, 97 N. E. 408, 37 L. R. A. (N. S.) 1137, and Lo Schiavo v. Northern Ohio T. & L. Co., 106 Ohio St. 61, 138 N. E. 372, 27 A. L. R. 424.

Respondent introduced evidence that the reasonable value of his services was the sum of $1,000 per month. The evidence as to the value of the cotton crop was dangerous because it might tend to lead the jury to believe that the actual damage to respondent was not only the loss of the reasonable value of his services, but also a very material injury to the valuable crops. Whether or not the crop actually produced was a normal one does not appear. Appellant proposed an instruction intended to attempt to cure this error, which instruction was refused by the court. It should have been given.

[4] Respondent testified that he did not return to work and to the performance of his duties for almost eight months after his injury. There is a strong inference from the evidence that he was able to perform part of his duties as soon as the cast was removed. His attending physician testified that he was able to attend to his duties three months after the injury. Appellant proposed the following instruction, which was refused by the court:

"The plaintiff is under a duty to minimize his damages in every way that he can reasonably do so, and when he was reasonably able to return to his work, whether he did so return at that time or not is immaterial, and his damage for loss of time in attending his crop would terminate at that time."

This instruction should have been given. The rule is well stated in 8 California Jurisprudence, 782, as follows:

"It is the duty of one who knows he is threatened with detriment, either in person, property or business, through another's breach of contract or tort, to do all that he reasonably can to prevent or minimize the damage, and if he negligently fails to do this, he cannot recover for what he might have prevented."

It was held in Baker v. Borello, 136 Cal. 160, 68 P. 591, 593, as follows:

"A party injured by the tort of another must not, by his negligence or willfulness, allow the damages to be unnecessarily enhanced; and, if he does so, he cannot recover for the increased loss."

[5] Respondent was totally disabled for five weeks after his injury. He was partially disabled for several weeks thereafter. He suffered more pain than would follow from a fractured arm that could be reduced in the ordinary way and is entitled to compensation for pain and suffering. The damages awarded were large for the injuries suffered, and we cannot say that the errors we have pointed out did not directly tend to increase the amount of the verdict. We cannot hold, therefore, that these errors were not prejudicial to appellant on the question of the amount of the damages awarded. Under the

circumstances of this case these particular errors affecting the amount of the verdict cannot be disregarded under the provisions of section 4½ of article 6 of the Constitution of California.

[6] As we have seen, the record before us leaves no doubt in our minds that the negligence of the driver of appellant's stage was the sole and proximate cause of the injury to respondent. No good cause appears to set aside the verdict in so far as it fixes upon appellant liability for the accident. This court can reverse the judgment and remand the cause to the lower court for a new trial solely upon the issue of the amount of damages. Morris v. Standard Oil Co., 188 Cal. 468, 205 P. 1073; Livesey v. Stock (Cal. Sup.) 281 P. 70; Davis v. Renton (Cal. App.) 278 P. 442.

Therefore the judgment is reversed, and the cause remanded for a new trial solely upon the issue of the amount of damages, with directions to the trial court to render judgment in favor of the respondent for the amount of damages so found upon a determination of that issue.

We concur: BARNARD, J.; BEAUMONT, Justice pro tem.

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106 Cal. App. 166

JOHNSTON GAS FURNACE CORPORATION, Limited, v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 7322.

District Court of Appeal, Second District, Division 2, California.

May 29, 1930.

1. Courts ⟹472(6).

Equitable action to foreclose mechanic's lien on property situated outside city *held* within exclusive jurisdiction of superior court and not within jurisdiction of municipal court (Const. art. 6, § 5; Deering's Gen. Laws Supp. 1929, Act 5238, § 29).

Deering's Gen. Laws Supp. 1929, Act 5238, § 29, gives municipal court jurisdiction in actions to enforce and foreclose mechanics' liens where amount of such liens is $2,000 or less, but such jurisdiction is restricted to those cases arising within city or city and county in which such municipal court is established. Const. art. 6, § 5, gives superior court original jurisdiction in all civil cases except as otherwise provided and except in those cases in which jurisdiction has been given to municipal courts.

2. Mandamus ⟹3(1).

To defeat remedy by mandamus, legal remedy must be equally convenient, beneficial, and effective.

3. Mandamus ⟹4(4).

Mechanic's lien claimant, after superior court erroneously dismissed lien foreclosure action, *held* entitled to mandamus compelling setting aside of dismissal, where remedy by appeal would be inadequate.

Petition for writ alleged, and allegations were not denied, that certain moneys held by mortgage company for benefit of owner and lien claimants could be disbursed without petitioner receiving any benefit therefrom, if he were required to appeal from order dismissing action to foreclose lien because of foreclosure of prior incumbrances and other liens.

4. Courts ⟹209(2).

Appellate court, with facts before it, may give relief warranted by premises, where proper relief could not be granted under writ sought.

Application by the Johnston Gas Furnace Corporation, Limited, for writ of mandate prayed to be directed to the Superior Court for the County of Los Angeles and Myron Westover, a Judge thereof, to compel respondent to set aside an order of dismissal and try cause in which petitioner was plaintiff.

Peremptory writ granted, and order of dismissal annulled.

Francis B. Cobb, of Los Angeles, for petitioner.

Charles S. McKelvey, of Los Angeles, for respondents.

IRA F. THOMPSON, J.

It is made to appear herein that the petitioner commenced an action in the respondent court for the foreclosure of a mechanic's lien in the sum of $524 on property situate outside of the limits of the city of Los Angeles. The respondent court has declined to set the cause for trial or to hear it on the ground that jurisdiction thereof is in the municipal court of Los Angeles, and has made its order dismissing the case. It is further set forth that there is certain money held by a mortgage company for the benefit of the owners and the lien claimants, which money can be disbursed by the company in the event that petitioner is put to its remedy by appeal, and that the property is in danger of being lost through the foreclosure of other liens during the period prior to the rendition of a decision on appeal. This proceeding seeks to compel the respondent court, by the writ of mandate,

to restore the cause to the calendar and to try the cause.

[1] We entertain no doubt concerning the jurisdiction of the respondent court to try the action. Section 5 of article 6 of the Constitution says: "The superior court shall have original jurisdiction in all civil cases and proceedings (except in this article otherwise provided, and except, also cases and proceedings in which jurisdiction is or shall be given by law to municipal or to justices in other inferior courts)."

The statute (section 29 of the act authorizing the establishment of municipal courts, Deering's Consol. Supp. 1929, p. 3527, Act 5238) conferring jurisdiction upon the municipal court reads as follows:

"Civil jurisdiction. Each municipal court shall have exclusive original jurisdiction of all civil cases and actions arising within the city or city and county in which such municipal court is established, of the following classes:

"1. All cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to two thousand dollars or less.

"2. All actions of forcible entry or forcible or unlawful detainer, where the rental value is two hundred dollars or less per month, and where the whole amount of damages claimed is two thousand dollars or less.

"3. All actions to enforce and foreclose liens on personal property, where the amount of such liens is two thousand dollars or less.

"Concurrent jurisdiction. In cities or cities and counties wherein such municipal court is established, and wherein an inferior court has been established and its jurisdiction determined as provided by law, such municipal court shall have concurrent jurisdiction with such inferior court to the extent of its jurisdiction.

"Original jurisdiction. Each municipal court shall have original jurisdiction of all cases specified in subdivisions 1, 2 and 3 hereinabove, arising outside the city in which a municipal court is established, and within the county in which such municipal court is established, and also of all such cases arising outside the county in which a municipal court is established, in which any proper defendant named therein resides or has his place of business within the county wherein such municipal court is established.

"Original jurisdiction concurrent with inferior court. Each municipal court shall have original jurisdiction, concurrent with that of justices' or other inferior courts in the county in which such municipal court is established, of all civil cases of which such justices' or other inferior courts are given jurisdiction, excepting civil cases of which such justices' or other inferior courts are given exclusive jurisdiction, and excepting cases cognizable in such courts, sitting as small claims courts.

"Jurisdiction in cases in equity. Each municipal court shall have jurisdiction in all cases in equity, when plead as defensive matter or by way of cross-complaint in any case at law commencing in the municipal court, of which it has exclusive jurisdiction. Each municipal court shall have jurisdiction in all actions to enforce and foreclose liens of mechanics, materialmen, artisans and laborers, where the amount of such liens is two thousand dollars, or less; provided, that where an action is pending in the superior court and affects property, which is also affected by an action pending in the municipal court to foreclose such a lien, or where the total amounts of such liens sought to be foreclosed against the same property aggregate an amount in excess of two thousand dollars, the municipal court, upon motion of any interested party, shall order such action pending therein to be transferred to the proper superior court. Upon the making of such order, the same proceedings shall be taken as are provided under section 399 of this code, with respect to the change of place of trial. [Amendment approved May 25, 1929; Stats. 1929, p. 838.]"

It is to be observed that the section of the law just quoted fails to extend the jurisdiction of this court to actions for the foreclosure of mechanics' liens to those actions arising outside the city limits. Therefore the section giving to the municipal court jurisdiction in actions "to enforce and foreclose liens of mechanics, * * * artisans and laborers, where the amount of such liens is two thousand dollars, or less," is modified and restricted by the language of the opening section of the law to those cases "arising within the city or city and county in which such municipal court is established." It is made to appear in this proceeding that the property against which the lien is sought to be foreclosed lies outside the city, and of course the labor was performed upon and the materials supplied to the property. The action did not arise within the city in which the municipal court is situated. Hence the respondent court was possessed of the jurisdiction and should hear and determine the cause. In the interests of clarity it should be noted that the action here involved is one in equity and for that reason is not controlled by subdivision 1 of the section quoted.

[2, 3] It is urged, however, that the writ of mandate is not available as a remedy to the petitioner because in the language of the return to the writ the respondent court has "made an order dismissing said action, and the said action is dismissed," and also because petitioner has "a plain, speedy, and adequate remedy by appeal." With respect to the latter of these contentions it is set out in

the petition for the writ, and not denied in the return, that there are certain moneys held by a mortgage company for the benefit of the owner and the lien claimants to a pro rata share of which the petitioner is entitled; that the moneys so held can now be disbursed without the petitioner receiving any benefit therefrom; and that during the delay attendant upon an appeal the petitioner's lien might be lost by the foreclosure of prior incumbrances and other liens. Assuming the truth of these allegations, it is manifest that the case is brought within the rule announced in Dufton v. Daniels, 190 Cal. 577, 213 P. 949, and Alexander v. Superior Court, 91 Cal. App. 312, 266 P. 993. In the former of these authorities it is said that in order to defeat the remedy by mandamus the legal remedy must be one which is equally convenient, beneficial, and effective as the proceeding by mandamus. And then, there is another reason why we are not inclined, at this time, to compel petitioner to pursue his remedy by appeal, if in fact he has one. That reason is expressed in Davis v. Superior Court, 184 Cal. 691, 195 P. 390, 393, as follows: "While the existence of the right of appeal at that time" (when the petition was presented) "might have been a sufficient reason for that court" (District Court of Appeal) "to have then refused to entertain the petition (Glougie v. Superior Court, 169 Cal. 675, 147 P. 972), yet, in view of the fact that the superior court was then and ever since has been without power of jurisdiction to proceed further in the action, as we have shown, but nevertheless proposes to do so, and that further proceedings of any kind, except to again dismiss the action, would be void, we are disposed to grant the writ, rather than put the parties to further vexation and useless expense by further attempts to prosecute it. The question is largely one of discretion, and we deem it the better policy to terminate the proceedings forthwith." To the same effect reference may also be had to Col Co. v. Superior Court, 196 Cal. 604, 238 P. 926. Furthermore, it is to be noted that the return does not say that the court has rendered a judgment of dismissal but only that it has made an order of dismissal. Presumably had the court rendered a judgment that fact would have been alleged.

[4] It is also well settled that where the relief which should be afforded the petitioner may not be granted under the writ sought that this court, with the facts before it, may give such relief as is warranted by the premises. Van Hoosear v. Railroad Commission, 189 Cal. 228, 207 P. 903; Finn v. Butler, 195 Cal. 759, 235 P. 992. In the latter of these cases the petitioner sought the writ of prohibition to prevent the referee from making an order. On the hearing it appeared that the order had been made before the alternative writ was issued. The court in extending the relief justified by the situation annulled the order.

The order of dismissal is annulled, and the peremptory writ of mandate granted.

We concur: CRAIG, Acting P. J.; GATES, Justice pro tem.

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106 Cal. App. 21

LOS ANGELES INV. CO. v. TORCHIA et al. (LIBERTY MORTG. CO., Intervener).

Civ. 4108.

District Court of Appeal, Third District, California.

May 22, 1930.

Rehearing Denied June 21, 1930. Hearing Denied by Supreme Court July 21, 1930.

1. Vendor and purchaser ⟹220.

Purchaser for value without notice from first purchaser charged with notice becomes bona fide purchaser entitled to protection.

2. Vendor and purchaser ⟹238.

Title acquired by bona fide purchaser cannot be conveyed free from prior equities, back to former owner charged with notice.

3. Vendor and purchaser ⟹238.

Purchaser with notice, from first purchaser without notice and bona fide, succeeds to all rights of his immediate grantor.

4. Vendor and purchaser ⟹238.

Original grantor under building restrictions in deed *held* not entitled to enforce forfeiture against one who advanced money to erect building violating restrictions, but who acquired title through bona fide purchaser (Civ. Code, § 1109).

Original grantor under deed containing restrictions conveyed to M., who in turn conveyed to T. T. executed trust deed covering premises to P., securing note for money advanced to erect building in violation of restrictions, P. having constructive notice of restrictions from recording of original deed but not actual notice and acting in good faith. T. acquired title asserted through foreclosure sale under another trust deed by one who acquired right under line of transaction constituting latter bona fide purchaser for value.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by the Los Angeles Investment Company, a corporation, against Edward D. Tor-

chia and wife and others, wherein the Liberty Mortgage Company, a corporation, intervened. From the judgment rendered, plaintiff appeals.

Affirmed.

Flint & MacKay and Franklin W. Peck, all of Los Angeles, for appellant.

Ernest M. Torchia, Kennicott & Williams, Hewitt, Ford & Crump, J. F. Moroney, and Neice & Packard, all of Los Angeles, for respondents.

PLUMMER, J.

The plaintiff in this action appeals from a judgment entered in the above-entitled cause denying other than injunctive relief, wherein the plaintiff sought, under the provisions of section 1109 of the Civil Code, to have declared forfeited the title to certain real property located in the city of Los Angeles, particularly described as lot 1 in block 5 of Kendall's Berry Tract, and to obtain a reconveyance thereof.

The transcript shows that on and prior to June 13, 1915, the plaintiff was the owner of the above-described land, and on said date executed and delivered a deed thereto to Annie May Marston. This deed of conveyance contained the following limitations and conditions:

"It is hereby covenanted and agreed by and between the parties hereto, and it is a part of the consideration of this indenture, that no building, porch or other portion of building, fence or structure of any kind shall be erected on said lot or lots nearer than 40 feet to the front of said lot or lots; that no building for residence purposes shall be erected on said lot or lots which shall cost less than $2500.00 and that no building on said lot or lots shall be used for any purpose except for residence and the necessary outbuildings; that the said property shall not be sold, leased or rented to any persons other than of the Caucasian race, nor shall any person or persons other than the Caucasian race, be permitted to occupy said lot or lots.

"Provided, further, that a breach of any of the foregoing conditions shall cause said premises to revert to the said grantors, their successors, devisees or assigns, each of whom, respectively, shall have the right of immediate re-entry upon said premises in the event of said breach.

"Provided, also, that the breach of any of the foregoing conditions, or any re-entry by reason of such breach, shall not defeat nor render invalid the lien of any mortgage or deed of trust made in good faith and for value."

The deed further provided that the condition subsequent above specified should expire on the 1st day of January, 1930.

The title to the above lot was, on the 25th day of April, 1922, transferred to the defendants Edward D. Torchia and Bridget Torchia, who were in possession of said premises at the date of the institution of this action.

Subsequent to acquiring title the defendants Torchia engaged in two separate and distinct lines of transaction, one of which was found by the court to be in strict compliance with the provisions of the deed of conveyance executed and delivered by the plaintiffs to Annie May Marston, and the other to be in contravention of the conditions subsequent contained in the deed. In this appeal it is attempted to enforce forfeiture against one who had advanced money to the defendants Torchia, to enable them to erect a building upon the lot, in contravention of the terms of the Marston conveyance, who acquired title to the premises from one who obtained title thereto coming down through the transactions not charged with any taint or violation, and with which line of transactions the parties subsequently acquiring title had absolutely no connection whatever. The alleged tainted line of transaction is as follows: On May 6, 1925, the defendants Torchia executed their promissory note for $20,200, in favor of the defendant Le Roy F. Pitcher, and secured the same by a deed of trust upon the real property heretofore mentioned. The money so obtained by the defendants Torchia was used in the erection of a building upon the premises, not in compliance with the conditions in the deed, and the establishing and maintaining of a tailor shop therein, in contravention of the restrictive clauses of the deed.

The transaction found by the court to violate the conditions contained in the Marston deed is set forth in finding No. 10 of the court, as follows: "All of the allegations of Paragraph XVI of the amended complaint are true." (This paragraph refers to the loaning to the defendant Torchia by the defendant Pitcher, of the sum of $20,200, and the erection upon the lot referred to of a brick building, and then alleges that the defendant Pitcher knew that the money loaned was to be used for the purpose of erecting a building on said premises in contravention of the restrictions in the deed, and the use of the same in the restriction of the deed.) "Except that it is not true that the defendant Le Roy F. Pitcher knew or had any actual notice of the existence of any condition or restriction on said lot 1 in block 5 at any time prior to the filing of plaintiff's complaint herein; and except that while defendant Pitcher did have the constructive notice of such conditions and restrictions afforded by the recordation of the deed conveying said premises to defendants Torchia, and the deed from plaintiff to said Annie May Marston, he did not intend at any time to loan any money to defendants Torchia or to advance any

money for the purpose of enabling them, or anyone else, to violate any restriction or condition; nor did he intend to assist them, or anyone else, to violate any restriction or condition; nor did he intend to violate any restriction or condition himself. Said Pitcher at all times acted in good faith, and invested upwards of $15,000 of his own funds as building contractor for defendants Torchia in the construction of a building on said premises, in ignorance (except for such constructive notice), of the existence of any building or other restriction or condition on and against said lot 1 in block 5, and in the belief that there were no conditions or restrictions on and against said property." It was upon this finding that the court concluded that the note and trust deed made in favor of Pitcher placed him in the position of an encumbrancer with notice, and that his rights under the note and the trust deed were subject to the restrictions in favor of the plaintiff in this action.

The line of transactions held by the court to have been had under the provisions of the Marston deed, which provided that the conditions subsequent should not defeat or render invalid the lien of any mortgage or deed of trust made in good faith and for value, is as follows: On the 11th day of July, 1923, the defendants Torchia executed their promissory note for $4,500 in favor of the Second Avenue State Bank of Los Angeles, and to secure this note gave to the bank a mortgage upon said lot 1 in block 5. The court found that the bank knew that the defendants Torchia intended to use this money for construction purposes in violation of the restrictions of the deed under which they deraigned title. On the 31st day of October, 1923, the Second Avenue State Bank indorsed and transferred said note and mortgage to Ellen O. Carr and Marguerite Carr, who purchased for a valuable consideration, and the court found that the Carrs paid full value for the note and mortgage and were incumbrancers in good faith, and without knowledge or notice of the uses or purposes for which the money, evidenced by the note, had been put, or of the intended purpose to which the money was put, or to be put by the defendants Torchia, and that said Carrs had no knowledge that the defendants Torchia intended to violate any of the restrictions. On August 11, 1924, the Carrs indorsed and transferred said note and mortgage to the defendant Ira C. Overell, who paid full consideration therefor, who took the same in good faith and without knowledge of any of the circumstances under which, or the purposes for which, the note and mortgage were originally given. Thereafter Overell foreclosed said mortgage, and on the 3d day of December, 1924, a decree was entered ordering the sale of said lot, and on May 11, 1925, the lot involved herein was sold by the sheriff to Overell. On May 8, 1926, Overell assigned his sheriff's certificate to the defendant in intervention, the Liberty Mortgage Company, and thereafter, no redemption having been made, a sheriff's deed was issued to the Liberty Mortgage Company, which took title for the benefit of the defendant Pitcher.

While the record shows and the court found that the defendant Pitcher had constructive notice of the restrictions contained in the conveyances by which the defendants Torchia deraigned title, it also was found by the court, and we think the record bears out the finding, that the defendant Pitcher at all times acted in good faith, and is not chargeable with any actual or constructive fraud. So far as his lien on the property is concerned, it was to secure money in the erection of a building which was in violation of the restrictive clauses, and while the defendant Pitcher had only constructive notice of the restrictions, he did know that the money loaned by him was being used in the erection of buildings on the lot.

The court also found, and we think the record bears out the finding, and likewise the conclusion of the court, that the defendant Pitcher had absolutely nothing to do with any of the transactions leading up to the judgment of foreclosure and sheriff's sale and sheriff's deed which we have set forth herein. So far as that line of transactions is concerned, Pitcher stands in the same relation as an absolute stranger.

[1-4] While his loaning money for the erection of a building, in violation of the restrictive clauses, was at his own peril, there is nothing in any of his transactions in any way related to, or which by any logical reasoning can be connected with the title coming down through the mortgage which eventually terminated in foreclosure proceedings. In other words, the defendant Pitcher is not shown by the record to have done anything in fraud of the title coming down through the sheriff's sale and acquired by the defendant and intervener, Liberty Mortgage Company, for his benefit. In other words, he is not a party to any fraud affecting that conveyance, or anything leading up thereto. Pitcher was never an owner of or the possessor of any interest in the mortgage which ultimated in foreclosure proceedings. He was not the owner of, nor anywise interested in, the note, to secure the payment of which said mortgage was executed. Pitcher was not at any time in the position of a former owner of any interest in either said note or mortgage. The fact that he had a mortgage or trust deed of his own is not a basis upon which an argument can be predicated that he stands in the relation of a former owner in the note and mortgage, the nonpayment of which led up to the foreclosure and

sale herein mentioned. That his own note and mortgage or trust deed was subject to the rights of the plaintiff by reason of the constructive notice attendant upon the recordation of the Marston and Torchia deeds has no bearing upon the issues tendered upon this appeal. There is no showing that Pitcher acted other than in good faith, or that he was guilty of any moral turpitude in relation to any of the transactions which we have mentioned, and it is only by losing sight of what we have mentioned that a confusion of ideas has apparently crept into the argument in this cause, and has led to the following statement by appellants as to the law applicable to this case, to wit: "We are familiar with the rule that a purchaser with mere notice from a purchaser without notice, takes the title to real property freed from any adverse claims or equities existing in favor of third persons. There is an exception to this rule, however, which is that one who is a party or lends himself to any fraud or illegal conduct in relation to the title to real property cannot thereafter, by accepting a conveyance of the property from an innocent purchaser, become clothed with the rights of a purchaser with notice, from a purchaser without notice." *In making this statement appellant loses sight of the essential fact that fraud or illegal conduct must be in relation to the title which such person subsequently acquires.* As we have stated, what defendant Pitcher did has no relation to any act bearing upon or in any way impeaching the title which he acquired subsequently. The rule of law applicable to this case is thus stated in volume 2 of Pomeroy's Equity Jurisprudence, beginning on page 1548 (4th Ed.): "There are two special rules on the subject, which have been settled since an early day, one being a mere application of the general doctrine, and the other a necessary inference from it. The first is, that if a second purchaser, for value and without notice, purchases from a first purchaser who is charged with notice, he thereafter becomes a bona fide purchaser and is entitled to protection. This statement may be generalized. If the title to land, having passed through successive grantees, and subject in the hands of each to prior outstanding equities, comes to a purchaser for value and without notice, it is at once freed from these equities; he obtains a valid title, and with a single exception, the full power of disposition. This exception is, that such a title cannot be conveyed free from the prior equities, back to a former owner who was charged with notice. If 'A,' holding title affected with notice, conveys to 'B,' a bona fide purchaser, and afterwards takes a reconveyance to himself, all the equities revive and attach to the lands in his hands, since the doctrine requires not only valuable consideration and absence of notice, but also good faith. The second rule is, that if a second purchaser with notice acquires title from a first purchaser who was without notice, and bona fide, he succeeds to all the rights of his immediate grantor. In fact, when land once comes, freed from equities, into the hands of a bona fide purchaser, he obtains a complete jus disponendi, with the exception last above mentioned, and may transfer a perfect title even to volunteers." Neither the defendant Le Roy F. Pitcher, nor the defendant and intervener, Liberty Mortgage Company, ever had title to the land. It never passed through either of said defendants, and therefore no equities could be chargeable against them in relation to the lot in question. The only basis upon which it could be predicated that Le Roy F. Pitcher could have been subject to a forfeiture by reason of becoming a purchaser of the title, would have been a proceeding to foreclose his own trust deed, and upon the sale of the premises under such deed, becoming a purchaser, and thereafter, selling the premises to one without notice, and then receiving a subsequent conveyance from the one to whom he had sold. That, however, is not this case, but is the substance of the theory upon which appellant's argument is made. The appellant relies upon the quotation which we have taken from Pomeroy's Equity Jurisprudence, but apparently overlooks the distinction which we have drawn in the line of transactions set forth herein. The same rule appears in volume 2 of Tiffany on Real Property, p. 2257, cited by appellant, but likewise misconstrued. The case of Huling v. Abbott, 86 Cal. 423, 25 P. 4, follows exactly the same rule which we have stated and the application which we have made.

In the case of Johnson v. Gibson, 116 Ill. 294, 6 N. E. 205, 211, cited by appellant, we find the following: "While such innocent purchasers would have been protected, yet when the property was reconveyed to her [referring to the one who is charged with equities], as it was, before the final decree was entered in that suit, it became again subject in her hands, as it was before, to the payment of her husband's debts."

The case of Bourquin v. Bourquin, 120 Ga. 115, 47 S. E. 639, 640, lays down no contrary rule to what we have stated. We take therefrom the following which sufficiently shows the correctness of what we have stated: "When the title revests in the wrongdoer, the original equity will reattach to it in his hands." All of the cases follow this rule, but the title had never vested in Pitcher; he conveyed no title and participated in no transfer which led to the foreclosure, sale and sheriff's deed.

Nor does the case of Yost v. Critcher, 112 Va. 870, 72 S. E. 594, trench upon anything contained herein. To make it applicable there would had to have been a sale under the Pitcher mortgage or trust deed, to other than to Pitcher, and then a purchase from

and reconveyance to Pitcher from the one purchasing at Pitcher's foreclosure and sale.

We do not need to spend time in reviewing any of the other cases cited by appellant because when analyzed they are not in any respect authorities against the ruling of the trial court in this case. One of the cases involved confidential relations, and if anything is said in the opinion contrary to what we have set forth, it is to that extent out of harmony with the great weight of authority.

After judgment had been entered herein, the appellant made a motion that the judgment be vacated, and that a judgment be entered upon the findings declaring a forfeiture of the premises. What we have said in relation to the judgment in this cause we think constitutes a complete answer to the appellant's motion to set aside and enter a different judgment, and therefore the denial of appellant's motion, alleged as error, need not be considered.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

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106 Cal. App. 57

BARTHOLOMAE OIL CORPORATION v. OREGON OIL & DEVELOPMENT CO

Civ. 4064.

District Court of Appeal, Third District, California.

May 24, 1930.

Rehearing Denied June 21, 1930. Hearing Denied by Supreme Court July 21, 1930.

1. Mines and minerals ⟹109.

Production of oil *held* not condition precedent to payment of consideration for drilling oil well, where contractor agreed to "complete * * * well for production."

2. Mines and minerals ⟹109.

Agreement to "complete well for production of petroleum" *held* not undertaking to produce petroleum, but only to make well suitable for production.

3. Mines and minerals ⟹109.

Final installments on drilling contract, payable ten days after well is put on production, *held* not conditioned upon striking oil.

The drilling contract provided for the payment of a certain sum for drilling to a given depth, payable in installments, the last two installments payable respectively "upon placing the well on production" and "within ten days after * * * well shall have been completed and put on production." The contract contained a clause to "complete * * * well [so that it may be used] for production." The contractee had the option to pay the last installment from the proceeds of oil produced by the well.

4. Contracts ⟹212(1).

When consideration for labor or materials is certain, but time of payment uncertain, consideration becomes due within reasonable time.

5. Contracts ⟹212(1).

When time of payment for labor or materials is determined by happening of event which fails without contractor's fault, consideration becomes due within reasonable time.

6. Mines and minerals ⟹109.

Oil well drilling contract for stipulated depth, fixing gross price payable in installments, *held* entire, not severable.

7. Contracts ⟹171(2, 3).

Generally, contracts for work or services for specified price are construed as entire.

8. Contracts ⟹171(3).

Contract is not severable merely because installments are payable as work progresses.

9. Contracts ⟹171(1).

Contract is not severable merely because final installment is payable from proceeds of anticipated result, unless such payment is conditioned upon happening of result.

10. Mines and minerals ⟹109.

Where contract provided for drilling to specified depth unless oil in paying quantities be found at lesser depth, and defined "paying quantity," such definition was not guaranty to produce oil.

The definition stated that "well producing oil in paying quantities for the purpose of this agreement shall be deemed a well which produces not less than an average of 500 barrels * * * in 24 hours continuous pumping or flow, during a period of 30 days."

11. Mines and minerals ⟹109.

Evidence *held* to sustain finding that contractor had complied with all covenants in drilling oil well and hence was not required to drill new one, although well was nonproductive.

The contract contained a clause that if the driller be unable to comply with all the specifications, covenants, and conditions thereof, he should sink a new well within a certain time.

12. Contracts ⟹277(1).

Generally, where time of payment is uncertain, demand is necessary to fix obligation.

13. Evidence ⟹184.

Where production of letter was demanded of defendant and its receipt denied, oral proof of mailing and production of carbon copy was proper.

14. Evidence ⟹71.

Proof of mailing and production of carbon copy of demand for payment, although defendant denied receipt, sustained finding that demand had been made.

15. Appeal and error ⟹1011(1).

Where evidence conflicted, finding that contractor proceeded with diligence in drilling oil well was sustained.

16. Appeal and error ⟹1013.

Where evidence was strongly conflicting, appellate court could not hold that trial court had erred in fixing amount of judgment on drilling contract.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by the Bartholomae Oil Corporation against the Oregon Oil & Development Co. From a judgment for plaintiff, defendant appeals.

Affirmed.

Bradner W. Lee and Kenyon F. Lee, both of Los Angeles, for appellant.

Joseph E. Bien and Werner Olds, both of San Francisco, for respondent.

R. L. THOMPSON, J.

This is an appeal from a judgment for the plaintiff for $62,978.79 and interest for sinking an oil well pursuant to contract.

The plaintiff is a corporation engaged in drilling oil wells. August 24, 1923, it was occupied in sinking an oil well on certain lots of Signal Hill, Los Angeles county. The well had reached a depth of 2,028 feet. W. R. McDonald then purchased the lease of the property. A written contract with McDonald was executed on the last-mentioned date, by the terms of which the well was to be completed by the plaintiff. This contract and lease were subsequently assigned to the defendant. The well was called "Bartholomae No. 4." By the terms of this contract the plaintiff agreed to continue the drilling of the well by means of its rotary drilling equipment "with reasonable diligence until a depth of 4500 feet has been attained therein unless petroleum in paying quantities shall have been found therein at a lesser depth." In the event oil was not produced before the well had reached a depth of 4,500 feet, it was provided the plaintiff should continue drilling the well to a depth "desired by the owner." In an amendment to the contract executed by the interested parties on January 8, 1924, it was stipulated the owner, at any point below the depth of 4,500 feet, could stop the drilling by giving the plaintiff written notice therefor. Upon receiving this notice the plaintiff agreed to "immediately cease drilling and to land the oil string at the point selected by the owner."

As a consideration for the service of drilling the well to this specific depth, it was stipulated the plaintiff should receive the sum of $110,000 to be paid in installments. It was provided that in the event the owner exercised its option to require the drilling to be continued below 4,500 feet, the plaintiff was to receive in addition to the foregoing payments the sum of $400 per day thereafter, together with the cost of all "pipe equipment used." It was further provided that "all fishing and sidetracking" performed by the plaintiff below the 4,500-foot level should be "at actual cost and in no event shall exceed $235 per day," in lieu of the $400 per day above provided for while engaged in drilling the well. The contract is silent with respect to the time for the payment of the $400 per diem as compensation for drilling below the 4,500-foot level. The contract also gave the defendant an option to either pay in cash the last installment in compensation for drilling the first 4,500 feet "within ten days after the well shall have been completed and put on production," or in lieu thereof settle this obligation by applying 75 per cent. of the proceeds derived from the sale of petroleum until it was fully paid. If this final installment were promptly paid without the delay of waiting for the proceeds from the sale of oil, $40,000 would be accepted in full compensation for the $45,000 installment.

February 29, 1924, the drilling of the well reached a depth of 4,500 feet without striking oil. March 10, 1924, the defendant notified the plaintiff in writing to continue the boring of the well "until ordered to cease drilling." May 8, 1924, a depth of 5,054 feet was reached. The defendant then notified the plaintiff in writing "not to make any more hole after the core at 5055 feet and (this) authorizes you to place the well on production." Upon receipt of the last-mentioned notice the plaintiff ceased drilling and began preparation for production of the well. This operation required the procuring of materials and equipment for that purpose and consumed several days' time. In this process of preparing the well for production, some seventeen cores or tests of soil were taken from the well and analyzed by experts for evidence of the pres-

ence of petroleum. Oil in commercial quantity was, however, not developed. In spite of the fact that the well was fully prepared for production, it proved to be a "dry hole" and never developed oil. By July 14, 1924, all work ceased and the well was abandoned. The plaintiff had paid on account of the contract price for drilling, the aggregate sum of $96,163. This included $60,000 on account of the agreed cost for drilling the first 4,500 feet. The balance applied on the cost of materials furnished by the plaintiff and the $400 per diem as compensation for drilling below the 4,500-foot level. Demand was thereupon made of the defendant for the balance of the contract price, which was refused. This suit was then commenced. The defendant denied the material allegations of the plaintiff and filed a cross-complaint based upon an alleged breach of the contract on the part of the plaintiff, demanding the return of all money paid to the plaintiff.

Upon the trial findings were adopted by the court, which were against the appellant upon all the material issues, and to the effect that plaintiff had proceeded to drill the well pursuant to contract with due diligence until a depth of 5,055 feet had been reached, when, upon written demand of the defendant, the drilling ceased, and the well was then prepared for production; that the plaintiff performed all the covenants of the contract on its part, completed the well, and prepared it for production, but that neither gas nor oil was developed; that under the terms of the contract there was due the plaintiff:

For drilling the well below the depth of 4500 feet	$43,316.65
For fishing and sidetracking	4,778.33
For additional pipe and equipment furnished	1,592.75
Total for drilling below the 4500-foot level	$49,687.73
Less amount paid on the foregoing items	31,708.94
Balance due for drilling below 4500-foot level	$17,978.79
Balance due for drilling to the 4500-foot level	45,000.00
Total amount due as per contract	$62,978.79

Judgment was rendered for this sum, together with legal interest from the date of demand for payment of the balance of the contract price.

[1-3] The chief contention of the appellant is that the final payment of $45,000 for the first 4,500 feet of drilling was, by the terms of the contract, made conditional upon producing oil in commercial quantity. We cannot agree with this construction of the contract.

The portion of the contract upon which the appellant relies for its construction is as follows:

"The contractor (plaintiff) covenants * * * to drill and complete a certain well for the production of petroleum, * * * (operating) with reasonable diligence until a depth of 4500 feet has been attained therein, unless petroleum in paying quantities shall have been found therein at a lesser depth. A well producing oil in paying quantities for the purpose of this agreement shall be deemed a well which produces not less than an average of 500 barrels * * * in twenty-four hours continuous pumping or flow, during a period of thirty days. * * *

"The owner covenants and agrees to pay to the contractor as compensation for the drilling of said well the sum of One Hundred and Ten Thousand (110,000) Dollars, * * * in instalments as follows:

"(a) Twenty Thousand (20,000) Dollars on the signing of this contract.

"(b) Twenty-five Thousand (25,000) Dollars on or before the 10th day of September, 1923.

"(c) Ten Thousand (10,000) Dollars upon the setting of the water string.

"(d) Five Thousand (5,000) Dollars upon landing the oil string.

"(e) Five Thousand (5,000) Dollars upon placing the well on production.

"(f) The sum of Forty Thousand (40,000) Dollars within ten days after said well shall have been completed and put on production."

Two installments in compensation for the first 4,500 feet of drilling remained unpaid, viz.: "(e) Five Thousand (5,000) Dollars upon placing the well on production", and "(f) The sum of Forty Thousand (40,000) Dollars within ten days after said well shall have been completed and put on production." A provision of the contract gave the defendant an option to liquidate this last amount by paying in lieu thereof $40,000 in cash from the sales of oil, provided it was discovered, according to the evident intent of the parties.

The appellant contends that the language of the contract, including the provisions for the payment of these two last installments, should be construed to mean that the procuring of oil in commercial quantity became a condition precedent to the payment of the consideration.

It will be observed the plaintiff, pursuant to this contract, does not agree to complete the well *and produce petroleum.* It merely agrees to "complete a certain well [so that it may be used] for the production of petroleum." The final payment for the first 4,500 feet was not declared due *if*, or *only in the event* that petroleum was produced. The contractor covenanted to drill the well to a depth of 4,500 feet for the definite and fixed sum of $110,000, payable in installments. The last payment of

$40,000 was not conditional or uncertain. The time for the payment of this installment, however, was uncertain. It was to be paid upon the happening of an anticipated event, to wit, the producing of oil. Unfortunately, this event did not occur. The defendant, like many miners who seek for treasures in the recesses of the earth, was doomed to disappointment. The contract did not provide that this installment would not become due *unless* the plaintiff developed oil. The failure to produce oil was not the fault of plaintiff. Possibly the sinking of the well to a lower depth might have resulted in striking oil. The drilling was stopped solely upon the written directions to that effect from the defendant.

[4, 5] When the consideration for labor or materials is definite and certain, but the time for the payment thereof is uncertain or dependent upon the happening of an event which fails through no fault of the contractor, the consideration does not fail, but becomes due within a reasonable time. 21 R. C. L. 11, § 5; Rosenheim v. Howze, 179 Cal. 309, 176 P. 456; Wallace v. Carlin, 92 Cal. App. 31, 267 P. 596.

[6-9] The contract in the present case, so far as it relates to the drilling of the first 4,500 feet, was entire and not severable. This appears, from the agreement, to have been the intent of the parties. It was a covenant to pay a gross sum for sinking the well to that depth, in spite of the fact that installments were payable as the work progressed. Ordinarily, when one party contracts to do certain work or perform certain services and the other party agrees to pay a specified price therefor, the contract is to be regarded as entire. 13 C. J. 561, § 525. Such a contract is not severable merely because the installments are made payable as the work progresses, or even because it is stipulated that the final payment is to be made from proceeds which may be expected to be derived as a result of the enterprise, provided it does not appear from the contract that the procuring of the anticipated result or securing proceeds from sales of the expected commodity are mutually intended by the parties to be conditions precedent to the payment of such installments. 13 C. J. 564, § 530. From an examination of the contract in this case we are satisfied it was not the intent of the parties to make the actual development of oil, or the receipt of proceeds from the sale thereof, conditions precedent to the payment of any installments or portion of the consideration for drilling the well. "Courts are disinclined to construe stipulations in a contract as conditions precedent, where to do so would result in injustice." 13 C. J. 569, § 539.

It may not be contended there was a condition attached to the obligation to pay the agreed per diem compensation for drilling below the 4,500-foot level. No such condition is expressed or inferred. It is an unreasonable construction of the contract to hold that the first three or four installments were unconditional; that compensation for drilling below the 4,500-foot level was also unconditional, but that two of the intervening installments were intended to be conditioned and dependent upon the production of oil.

[10] Nor is the appellant's construction of the contract aided by the paragraph which defines the meaning of the phrase "a well producing oil in paying quantity." This paragraph, which is relied upon by appellant, follows the covenant to drill the well with diligence to a depth of 4,500 feet "unless petroleum in paying quantities shall have been found therein at a lesser depth." This is followed by the explanation that "a well producing oil in paying quantities for the purpose of this agreement shall be deemed a well which produces not less than an average of 500 barrels * * * in twenty-four hours continuous pumping or flow, during a period of thirty days." This is not a guaranty to produce petroleum in paying quantity, or at all. It is a mere definition of what quantity of oil will be deemed to be adequate to warrant the plaintiff in ceasing to drill short of the 4,500-foot level.

[11] The appellant's contention is without merit, to the effect that the plaintiff forfeited his claim to compensation for drilling the well because of his breach of the contract in failing to sink a new well within 30 days from the abandonment of "Bartholomae No. 4."

The contract provided: "If the contractor is unable to complete said well, *in accordance with the specifications, covenants and conditions* herein contained, the contractor shall within thirty (30) days from the abandonment of the first well, commence the drilling of a new well, in lieu of the first well. * * *" The trial court found that the plaintiff performed all of the covenants of the agreement on its part. Unless it may be said that the contract contained a guaranty to produce oil in commercial quantity as a condition precedent to the right of compensation for the drilling, the evidence amply supports the finding that the plaintiff fulfilled the covenants on his part. The obligation to drill another well depended solely upon plaintiff's failure to comply with the covenants with respect to the drilling of the first well.

[12] The appellant asserts that a demand for the deferred payments was a prerequisite to maintaining the action, and that the record is devoid of proof of such demand for the payment of the final installments for the first 4,500 feet of drilling. Ordinarily, when there is an uncertainty regarding the time of payment, a demand is necessary. 35 Cyc. 264.

[13, 14] In the present case the evidence is sufficient to show that a demand was duly

made. Mr. Bartholomae testified in behalf of the plaintiff that he sent a statement of this demand for payment to the defendant. The production of this original demand was then requested of the defendant in open court during the trial. Upon denial that it had been received, the witness then produced a carbon copy thereof and testified that he mailed the original to the defendant July 12, 1924, by depositing it in the United States mail properly addressed, with the postage prepaid. The carbon copy was then received in evidence over the objection of the defendant. This constituted ample evidence of a demand. The defendant's denial that he received this demand through the mail merely created a conflict of evidence in that regard.

[15] It is claimed the evidence shows that the plaintiff did not proceed with diligence to drill below the 4,500-foot level, and that the employees were instructed to retard the work on account of the per diem basis. It is true that the cost per foot of drilling at the per diem rate greatly exceeded the contract price for the first 4,500 feet. This may be partially accounted for by the increased difficulty of drilling at a lower level. There is some testimony in support of the appellant's contention in this regard, but the evidence is conflicting upon this issue and we are therefore bound by the findings of the court.

[16] While there is much controversy and conflict regarding nearly every item contained in the accounting adopted by the court in rendering its judgment, we are unable to say that each amount is not adequately supported by competent evidence.

The judgment is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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106 Cal. App. 17

GARDNER v. PIONEER-PACIFIC WORSTED CO.

Civ. 4107.

District Court of Appeal, Third District, California.

May 22, 1930.

Rehearing Denied June 21, 1930. Hearing Denied by Supreme Court July 21, 1930.

1. Garnishment ⟹164.

That garnishee, although denying liability, compromised judgment debtor's claim for $52,915.17 by paying $5,000, did not necessarily show indebtedness existing five months earlier when garnished (Code Civ. Proc. § 544).

Code Civ. Proc. § 544, provides that persons having in their possession or control any personal property belonging to defendant, or owing any debt to him "at the time of service upon them of a copy of the writ and notice," shall be liable for such amount to plaintiff.

2. Garnishment ⟹13.

Garnishee is not liable to plaintiff in garnishment for indebtedness subsequent to garnishment (Code Civ. Proc. § 544).

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Halbert P. Gardner against the Pioneer-Pacific Worsted Company to enforce defendant's alleged liability as garnishee. From a judgment for plaintiff, defendant appeals.

Reversed.

Clyde R. Burr and Harold J. Richardson, both of Los Angeles, for appellant.

C. Stanley Price, of Los Angeles, for respondent.

FINCH, P. J.

This is an action to enforce the defendant's alleged liability as garnishee. Judgment was entered in favor of the plaintiff, and the defendant has appealed.

November 3, 1924, the plaintiff commenced an action against Lemuel J. Coburn to recover moneys alleged to be due and owing to him from Coburn. A writ of attachment was duly issued in that action and served upon the defendant herein on November 5, 1924, the plaintiff claiming that the defendant was indebted to Coburn. The plaintiff recovered judgment against Coburn, and, the judgment remaining unsatisfied in the sum of over $11,000, this action was commenced on July 19, 1926.

In addition to the foregoing facts, the complaint alleges, on information and belief, that at the time the writ was served on the defendant it was indebted to Coburn in the sum of $52,000 and that thereafter, on April 14, 1925, the defendant, "by way of compromise and settlement, paid to said Lemuel J. Coburn the sum of $5,000." The answer denies that the defendant was, at any time, indebted to Coburn in any amount. In relation to the issue thus raised the court found as follows:

"That * * * at the time that said writ * * * was served upon the defendant, * * * the said Lemuel J. Coburn had an unsettled claim and/or demand against said defendant, and thereafter, to-wit, early in the month of April, 1925, said Lemuel J. Coburn presented to said defendant for settlement a claim in the sum of $52,915.17, and the said defendant did, on April 14, 1925, by authority of its Board of Directors, at a meeting of said Board duly assembled and after a vote of a

majority of the Board of Directors present at said meeting pass a resolution in which it was stated that it did not admit any liability to said Lemuel J. Coburn, but, for the purpose of compromise and settlement and in full settlement and compromise of any and all claims and demands which said Coburn may have or claim to have against the Pioneer Pacific Worsted Company, authorized and ordered that said defendant pay unto said Lemuel J. Coburn the sum of $5,000 whereupon and by virtue of said resolution said Lemuel J. Coburn did accept the sum of $5,000, by way of compromise, release and discharge, and in full settlement of all claims and demands that he may have or might assert against said Pioneer Pacific Worsted Company, and thereupon there was paid by said defendant to said Lemuel J. Coburn, after the Writ of Attachment and Garnishment was served upon said defendant, as aforesaid, the sum of $5,000, and by reason of said payment said Coburn did release and discharge said defendant from any and all liability and demands whatsoever."

[1] The foregoing is not a finding of any ultimate fact, but of probative facts only. "It is not sufficient to find merely probative facts, unless ultimate facts are necessary inferences therefrom." Thomson v. Thomson, 81 Cal. App. 678, 683, 254 P. 644. It is not a necessary inference from the probative facts found by the court in this case that the defendant was indebted to Coburn at the time of the garnishment. It is a matter of common knowledge that groundless claims are sometimes compromised and settled. The most that can be said in favor of the plaintiff is that such probative facts, together with other facts given in evidence, are sufficient to support a finding of such indebtedness, but the evidence relating to such other facts is conflicting and contrary inferences may be drawn therefrom. Much testimony was introduced by the defendant, which, if true, is amply sufficient to show that it was not indebted to Coburn at any time. Section 544 of the Code of Civil Procedure reads as follows:

"All persons having in their possession, or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice, as provided in the last two sections, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property, or debts, until the attachment be discharged, or any judgment recovered by him be satisfied."

[2] It is clear from the language of section 544 that a debtor is liable under its provisions only when he is indebted to the defendant "at the time of service * * * of the writ." Coburn's claim against the defendant was made and the compromise agreement was entered into long after the garnishment was served on the defendant. If such agreement established the relation of debtor and creditor between the defendant and Coburn at the time of and subsequent to its execution, it does not follow that such relation existed five months prior thereto when the garnishment was served. The garnishment imposed no liability on the defendant in relation to its subsequent indebtedness to Coburn. "Garnishment is an attachment of existing debts, and what does not exist cannot be attached." Norris v. Burgoyne, 4 Cal. 409, 410; Aigeltinger Co. v. Healy-Tibbitts Const. Co., 23 Cal. App. 608, 610, 139 P. 436, 438.

The judgment is reversed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

KANE et al. v. EASTMAN et al. *

Civ. 7239.

District Court of Appeal, First District, Division 1, California.

May 27, 1930.

Rehearing Granted June 26, 1930.

1. Pleading ⚷8(2).

Where intention with which act was done is material it may be directly alleged and found as fact.

2. Bills and notes ⚷430.

In absence of express agreement under circumstances, new note of debtor did not extinguish original obligation.

The vendor of a leasehold of an apartment house accepted in part payment a note payable to and indorsed by purchasers and the assignment of a chattel mortgage securing the note. Subsequently, the maker of the note who was also indebted on another promissory note given by him to purchaser of leasehold and assigned by latter to his wife, which note was also secured by same chattel mortgage on furniture of an apartment house, entered into new arrangements whereby he executed two promissory notes, one payable to vendor of the leasehold and the other payable to purchaser's wife, and secured both by execution of new chattel mortgage to payees.

3. Bills and notes ⚷527(2).

That original note was surrendered was not sufficient to establish agreement that new note should extinguish original obligation.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing granted 295 P. 63.

4. Bills and notes ⚷404(1).

Where note is payable at different times, demand must be made for each installment and notice given to indorser of default thereon (Civ. Code, §§ 3151, 3170).

5. Bills and notes ⚷397.

Indorser's knowledge that maker was in default and that note was not presented did not dispense with notice of dishonor (Civ. Code, §§ 3151, 3170, 3190).

6. Bills and notes ⚷498.

One suing indorser of note has burden of proving presentment and notice, or that they were excused or waived (Civ. Code, §§ 3151, 3170, 3190).

7. Bills and notes ⚷422(1), 537(7).

Waiver of notice of dishonor may be implied from conduct or words of indorser of note whereby holder is reasonably induced to believe waiver was intended, and question is for jury (Civ. Code, §§ 3151, 3170, 3190).

8. Bills and notes ⚷526.

Indorser's waiver of notice of dishonor must be established by clear and unequivocal evidence.

9. Appeal and error ⚷931(1), 996.

Where evidence is sufficient to support conflicting inferences, trial court's finding either way is conclusive on appeal; and evidence must be viewed in light most favorable to support of findings and judgment.

10. Husband and wife ⚷85(2).

Wife indorsing note payable to husband is liable as indorser.

11. Bills and notes ⚷398.

Purchasers of leasehold indorsing note as part payment were discharged as indorsers and from liability upon original debt, where no presentment was made nor notice of dishonor given, and there was no showing indorsers were not injured by omission (Civ. Code, §§ 3151, 3170).

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Charles H. Kane and another against George A. Eastman and others to recover the balance of the purchase price of the leasehold of an apartment house. From the judgment, plaintiffs appeal.

Affirmed.

W. W. Kaye and Samuel Horowitz, both of Los Angeles, for appellants.

William A. Barnhill and Lewinson & Barnhill, all of Los Angeles, for respondents.

PER CURIAM.

This action was brought to recover from defendants George A. Eastman and Mildred C. Eastman, his wife, the sum of $10,850, the balance of the purchase price of the leasehold of an apartment house in Los Angeles called the Marlborough Apartments, and the furniture therein. The plaintiffs also sought to recover the same amount from defendant Goldberg on the foreclosure of a chattel mortgage of certain furniture in an apartment house called the Pickwick Apartments, executed by the latter to the defendant George A. Eastman, and by him assigned to plaintiff Charles H. Kane.

The facts of the transaction are as follows: On October 1, 1923, plaintiff Charles H. Kane entered into an agreement with defendants Eastman whereby he agreed to sell, and they agreed to buy, the leasehold and furniture of the apartment house first mentioned for the sum of $45,000, payable as follows: $13,750 in cash, $17,500 by the indorsement by the Eastmans to Kane of a promissory note executed by defendant Goldberg to George A. Eastman and the assignment of a chattel mortgage securing the same upon the furniture of the Pickwick apartment house; the balance of the purchase price, namely, $13,750, to be paid by the discharge by defendants Eastman of certain obligations of Charles H. Kane. The cash payment was made by the Eastmans, who also discharged the Kane obligations and transferred to the latter the Goldberg note and mortgage. No part of this note, which was negotiable in form and payable in installments, was paid by the Eastmans, but on May 20, 1925, Goldberg, who was then in default thereunder to the extent of $4,350, had reduced the principal to $10,850. On that date Goldberg was indebted in the same amount and was also in default to the same extent on a promissory note given by him to George A. Eastman and assigned to Mildred C. Eastman, which instrument was also secured by the same chattel mortgage upon the furniture of the Pickwick apartment house. On the date last mentioned the parties entered into a new arrangement whereby Goldberg executed two promissory notes, each for $10,850, one payable to plaintiff, the other to Mildred C. Eastman, and secured both by the execution of a new chattel mortgage to the payees. Goldberg paid nothing on either of the new notes and became in default upon both. And it further appears that between the time of filing the action and the trial, the furniture in the Pickwick Apartments, covered by the chattel mortgage, was seized under a prior mortgage by the lessor of the apartment house.

Defendants Eastman alleged as defenses that plaintiffs accepted the note executed by Goldberg to George A. Eastman and indorsed

to Charles H. Kane in full payment and satisfaction of part of the purchase price of the leasehold of the Marlborough Apartments and the furniture therein, namely, to the extent of $17,500. They also alleged that the note executed by Goldberg to plaintiffs on May 20, 1925, was accepted with the intention of satisfying and extinguishing the first-mentioned note and of releasing George A. Eastman from all obligation thereunder. The court found against defendants Eastman on the first defense, and in their favor on the second. The complaint, referring to the Goldberg note, indorsed by the Eastmans to plaintiff Kane, alleged "that defendant George A. Eastman, both before and also after default in payment and dishonor of the said promissory note * * * waived the presentment for payment of the said note to the defendant Gabriel Goldberg, and the said George A. Eastman also waived notice of such dishonor by defendant Gabriel Goldberg of the said promissory note." The court found that there was no waiver as alleged, no presentment or demand for payment, and that no notice of dishonor was given the Eastmans or either of them. Plaintiffs contend that the second of the above findings states but a conclusion of law, and that both the second and third to the extent they favor defendants Eastman, are unsupported.

[1-3] As to the first point, it will be sufficient to say that where the intention with which an act was done is material, it may be directly alleged and found as a fact. Wilcox v. Davis, 4 Minn. 197 (Gil. 139); Kavanaugh v. Kavanaugh Knitting Co., 226 N. Y. 185, 123 N. E. 148; Rochester Ry. Co. v. Robinson, 133 N. Y. 242, 30 N. E. 1008. According to the testimony, Goldberg was in default under the original notes and it was the opinion of the parties that the installment payments which he was obligated to make were larger than the business justified. Accordingly, for Goldberg's benefit and with the view that new notes, the installments of which were being promptly met, would be more readily marketable, it was agreed that Goldberg should execute such notes to plaintiffs and Mrs. Eastman for the unpaid amounts of the notes held by them, payable, however, in smaller installments, and secure the same by a new chattel mortgage upon the same property. This was done, but with the exception of the fact that plaintiffs thereupon surrendered to Goldberg the original note held by them, the record discloses no evidence of any agreement that the original obligations of any of the parties to the plaintiffs should be extinguished. It is well settled in that state that in the absence of an express agreement, a new note of either the debtor or a third person does not extinguish the original obligation. Griffith v. Grogan, 12 Cal. 317; Welch v. Allington, 23 Cal. 322; Brown v. Olmsted, 50 Cal. 162; Steinhart v. National Bank, etc., 94 Cal. 362, 29 P. 717, 28 Am. St. Rep. 132; Savings & Loan Society v. Burnett, 106 Cal. 514, 39 P. 922; Dellapiazza v. Foley, 112 Cal. 380, 44 P. 727; Jenne v. Burger, 120 Cal. 444, 52 P. 706; Savings Bank of San Diego v. Central Market Co., 122 Cal. 28, 54 P. 273; Bonestell v. Bowie, 128 Cal. 511, 61 P. 78; Merchants', etc., Bank v. Bentel, 166 Cal. 473, 137 P. 25. Nor is the fact that the original note was surrendered sufficient to establish such an agreement. Welch v. Allington, supra; Steinhart v. National Bank, etc., supra; Bonestell v. Bowie, supra.

[4-8] There remain the questions whether, as claimed, the evidence shows contrary to the finding that presentment and notice of dishonor were waived, and if not, whether a failure to present the original note for payment and to give notice of dishonor to defendants Eastman would discharge them from liability for the original debt. Presentment for payment and notice of dishonor, unless excused or waived, are necessary to charge an indorser (Civ. Code, §§ 3151, 3170), and where a note is payable in installments at different times, demand must be made for each installment, and notice given of a default thereon. Eastman v. Turman, 24 Cal. 379. A waiver may be expressed or implied (Civ. Code, § 3190), and while in the present case it might be inferred that defendants Eastman knew that Goldberg was in default and that the note was not presented, such knowledge did not dispense with notice (Keiser v. Butte Creek, etc., Co., 48 Cal. App. 38, 191 P. 552; 8 Cor. Jur., Bills and Notes, § 904, p. 642), and one suing an indorser has the burden of proving presentment and notice or that the same were excused or waived (8 Cor. Jur. § 1329, p. 1018). A waiver may be implied from the conduct or words of the indorser whereby the holder is reasonably induced to believe that a waiver was intended, and the question is one for the jury. Linthicum v. Bagby, 131 Md. 644, 102 A. 997; Simonoff v. Granite City National Bank, 279 Ill. 248, 116 N. E. 636. It will not, however, be inferred from doubtful acts or language (Worley v. Johnson, 60 Fla. 294, 53 So. 543, 33 L. R. A. (N. S.) 639), but must be established by clear and unequivocal evidence. Keyes v. Fenstermaker, 24 Cal. 329; Keiser v. Butte Creek, etc., Co., supra; 19 Cal. Jur., Negotiable Instruments, § 95, p. 915.

[9] In the present case the testimony shows that George A. Eastman in all negotiations between the parties subsequent to the execution of the contract between the Eastmans and the plaintiffs acted as agent for Mrs. Eastman, and that at his suggestion the note held by plaintiffs with the note held by Mrs. Eastman was deposited with the bank for collection. It was also shown that after Goldberg had defaulted on both notes Eastman suggested to plaintiff that Goldberg should

not be pressed for payment, stating, as testified by Kane, "I know Mr. Goldberg is not doing very much but we should wait on him." He later made substantially the same statements to Kane in discussions between them as to how and when Goldberg would pay the notes. This is all the evidence bearing on the question of waiver. There is nothing in the record supporting the conclusion that plaintiffs were induced by any statements of defendants Eastman to believe that a waiver was intended, nor is there any suggestion in plaintiffs' testimony that they had any intention of presenting the note or giving notice of dishonor. Moreover, it might fairly be inferred that neither of them knew that such action was necessary. The trial court found, in effect, that the burden of proving a waiver had not been sustained, and the evidence is not of a clear and unequivocal character which would compel us to say that the finding is unsupported. Though there is no conflict in the evidence, where there is sufficient to support conflicting inferences, the finding of the trial court either way thereon is conclusive on appeal, and the evidence must be viewed in the light most favorable to the support of the findings and judgment. Aronson & Co. v. Pearson, 199 Cal. 295, 249 P. 191; 2 Cal. Jur., Appeal and Error, § 549, p. 934.

[10] While, as stated, Mrs. Eastman was not a party to the note transferred to plaintiffs by her husband, but, as alleged, admitted and found she indorsed the same, and was consequently liable as such (Civ. Code, § 3144), but like other indorsers she would be discharged from her obligation in case the holder failed to present the note or give notice of its dishonor, unless presentment or notice was excused or waived. Deahy v. Choquet, 28 R. I. 338, 67 A. 421; Waters v. Atlanta National Bank (Tex. Civ. App.) 261 S. W. 153; Engen v. Medberry, etc., Co., 52 N. D. 410, 203 N. W. 182, 39 A. L. R. 915; Fourth National Bank v. Mead, 216 Mass. 521, 104 N. E. 377, 52 L. R. A. (N. S.) 225; Mangold & Glandt Bank v. Utterback, 54 Okl. 655, 160 P. 713, L. R. A. 1917B, 364; Houser v. Fayssoux, 168 N. C. 1, 83 S. E. 692, Ann. Cas. 1917B, 835; 3 R. C. L., Bills and Notes, § 396, p. 1178; Civ. Code, sec. 3170.

[11] With regard to the indorser's liability for the debt for which a note was given, where there has been a failure by the holder to present the instrument or give due notice of its dishonor, the decisions vary in the two cases of paper held as collateral security and as conditional payment, the distinction being discussed in a note to Coleman v. Lewis, 183 Mass. 485, 67 N. E. 603, 97 Am. St. Rep. 450, in 68 L. R. A. 482. As to the first class there are decisions, in effect, that a failure to present for payment or give notice of dishonor does not discharge the indorser from liability for the original debt unless he suffered injury therefrom. Coleman v. Lewis, supra; Anderson v. Timberlake, 114 Ala. 377, 22 So. 431, 62 Am. St. Rep. 105. It has also been held that such failure discharges the indorser, both upon the collateral security and the debt secured. Jennison v. Parker, 7 Mich. 355; Rumsey v. Laidley, 24 W. Va. 721, 12 S. E. 866, 26 Am. St. Rep. 935; State Bank of Clinton v. Parkhurst, 155 Ill. App. 101. In Tennessee the indorser under such circumstances is discharged from liability upon the instrument indorsed and prima facie from the original debt, the burden of proving that no damage resulted to the indorser being upon the plaintiff. And it is there held that the rule applies both to paper taken as conditional payment and as collateral security. American National Bank v. National Fertilizer Co., 125 Tenn. 328, 143 S. W. 597. It is held in New York that the failure to present and give notice of the dishonor of paper taken as conditional payment discharges the indorser from liability upon the original debt to the extent that he has been damaged. Carroll v. Sweet, 128 N. Y. 19, 27 N. E. 763, 13 L. R. A. 43. With respect to the latter class, it is said in Daniel on Negotiable Instruments (6th Ed.) § 971: "So absolute is the necessity for notice to an indorser, in order to charge him, that if a note has been indorsed to the holder in conditional payment of a debt, the failure to give notice to the indorser will not only discharge the indorser as a party to the note, but also as a debtor upon the original consideration * * *." The rules are stated in 8 Corpus Juris, Bills and Notes, §§ 738, 890, pages 525, 635, as follows: "Whenever it is incumbent on the holder of a bill or note to make presentment thereof, and he neglects to do so, he will lose his remedy not only on the bill or note, but also on the consideration or debt in respect of which it was given or transferred, as against the person discharged from liability on the instrument because of failure to present for payment"; and "failure to give, or laches in giving, notice of dishonor, without proper excuse therefor, operates to discharge the indorser * * * from his obligation absolutely, and not only discharges such party from his liability as * * * indorser * * *, but also operates as a complete satisfaction, as to him, of the indebtedness for which the paper was received * * *." See, also, 3 Ruling Case Law, Bills and Notes, § 446, p. 1224. The following decisions support the same rule: Gracie v. Sandford, 9 Ark. 238; Adams v. Darby, 28 Mo. 162, 75 Am. Dec. 115; Stam v. Kerr, 31 Miss. 199; Phœnix Ins. Co. v. Allen, 11 Mich. 501, 83 Am. Dec. 756; Orange Screen Co. v. Holmes, 103 N. J. Law, 560, 138 A. 105; Mauney v. Coit, 80 N. C. 300, 30 Am. Rep. 80; Hawley v. Jette, 10 Or. 31, 45 Am. Rep. 129; Nuzum v. Sheppard, 87 W. Va. 243, 104 S. E. 587, 11 A. L. R. 1024; Allan v. Eldred, 50 Wis. 132, 6 N.

W. 565. The comment on the cases by the editors of American Leading Cases, quoted in Daniel on Negotiable Instruments, § 1277 (6th Ed.) is as follows: "The true view would seem to be that the failure of the creditors to pursue the usual course of business with reference to commercial instruments taken for a debt is a prima facie bar to a suit for the debt itself, which may, notwithstanding be removed by proving that the instrument was unavailable as means of payment, and that the debtor has not been injured by the omission to present it at maturity and to give notice of its nonpayment." No California decisions in point have been called to our attention.

In the case at bar it is conceded that no presentment was made or notice of dishonor given. It also appears beyond question that neither was waived nor excused, and there is no attempt to show that appellants were not injured by the omissions. These facts under all the decisions sustain the conclusion that defendants Eastman were discharged not only as indorsers, but from their liability upon the original debt, and are sufficient to support the judgment in their favor. The appeal is from the whole judgment, but no grounds for a reversal of the portion entered against defendant Goldberg have been shown, and this portion must also be affirmed.

For the reasons stated, the judgment is affirmed.

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106 Cal. App. 74

TABLER v. HARLIN et al.

Civ. 4100.

District Court of Appeal, Third District, California.

May 26, 1930.

Rehearing Denied June 25, 1930. Hearing Denied by Supreme Court July 24, 1930.

1. Appeal and error ⟹907(3).

In action for breach of employment contract in which court found all allegations true, except as to damages, reviewing court, absent transcript, assumed proof of employment, agreement respecting consideration, failure to pay, and discharge without cause was ample.

2. Appeal and error ⟹907(2).

Reviewing court, to support judgment in action for breach of employment contract, assumed that evidence showed satisfaction of alleged consideration, except for sum allowed plaintiff.

The court found that all facts alleged were true, except allegations of amount of damages and allowed damages in amount of $1,800, whereas allegations showed damages of $3,163.50 for nonpayment of wages alone.

3. Trial ⟹395(3).

Court need not adopt separate findings for different causes of action which are properly united, provided general findings adequately cover material allegations of all counts.

4. Trial ⟹395(3).

It is uncertain and inadequate to find all "material" allegations of complaint true.

This is true because it is impossible to determine what particular facts the court deems material.

5. Damages ⟹222.

Damages in aggregate sum may be properly found.

6. Trial ⟹395(6).

Where allegations are specific and certain, general finding, by reference to pleading, that all statements are true, is sufficient to support judgment.

Appeal from Superior Court, Los Angeles County; Charles D. Wallace, Judge.

Action by W. S. Tabler against Claude Harlin and another. Judgment for plaintiff, and defendant J. A. McCadden appeals.

Affirmed.

J. Edward Keating and Theodore E. Bowen, both of Los Angeles, for appellant.

Wood & McArthur, of Long Beach, for respondent.

R. L. THOMPSON, J.

The complaint in this action is based upon allegations of damages resulting from the breach of a contract to employ five men in the drilling of an oil well near King City. The complaint contains five counts. It is alleged in the first cause of action that on August 20, 1924, the defendant McCadden employed the plaintiff as an oil driller until the oil well was completed, for the agreed compensation of $12 per day and $1.50 a day additional in lieu of the cost of board, together with other conditional consideration which is immaterial for the purposes of this appeal; that the plaintiff was actually engaged in the performance of his work from the date of employment to October 17, 1924, a period of 57 days; that on the last-named date said defendant, without cause, discharged the plaintiff and refused to permit him to continue his employment; that no part of the consideration for his services was

paid; that the plaintiff demanded of the defendants that he be reinstated and that he be paid the agreed consideration, which was refused. Allegations identical with those of the first count were recited in the other four causes of action with reference to similar employments of four other men, whose claims for services were duly assigned to the plaintiff. The employment, the period of service and the consideration were alleged to be the same in each cause, except that three of the assignors were to receive but $9.50 per day. Each of the four assignors, whose causes of action were separately stated, was also discharged without cause. Damages for breach of the contract of employment is claimed in each instance.

Upon the trial the court adopted the following finding of fact only: "That all the facts alleged in the complaint herein are true except the allegations of the amount of damages and as to those allegations the court finds that plaintiff has sustained and is entitled to damages by reason of the premises in the sum of Eighteen Hundred Dollars ($1,800.00)." Judgment was entered for this sum against the defendant McCadden, from which he has appealed upon the judgment roll alone.

A reversal is urged on the ground that the findings are uncertain and inadequate to support the judgment.

[1, 2] We are of the opinion that the findings are sufficiently explicit to support the judgment. In support of the judgment, in the absence of the transcript of testimony, this court must assume there was ample proof of the employment of the workmen upon the terms alleged, the agreement as to the consideration, the failure to pay the same, and the discharge of the men without cause. Disregarding all other elements of damage for a breach of the contract except the unpaid wages of the five workmen, it will be observed that two of them were entitled to $769.50 each, and the other three to $541.50 each. The complaint alleges damages for the nonpayment of wages alone in the aggregate sum of $3,163.50.

It is argued that the findings are uncertain and inconsistent, in that it is therein determined by the court that "*all of the facts* alleged in the complaint herein are true," which would infer that at least $3,163.50 damages were due, and it cannot be determined what claims or portions of the foregoing aggregate sum is not due, since the court rendered judgment for only the sum of $1,800. But the court made an exception to the foregoing omnibus finding of facts as follows: "Except the allegations of the amount of damages," which was found to be $1,800. This court may then assume, for the purpose of supporting the judgment, that the evidence adequately shows a satisfaction of the wages and other alleged consideration for employment, except the sum of $1,800. It does not concern the appellant how this sum may be divided between the workmen. Their claims were duly assigned to the plaintiff, and this judgment will bind each of the assignors.

[3-6] It is unnecessary to adopt separate findings for different causes of action which are properly united provided general findings adequately cover the material allegations of all the counts. Anderson v. Blean, 19 Cal. App. 581, 126 P. 859. It is uncertain and inadequate to find that all of the *material* allegations of a complaint are true for the obvious reason that it is impossible to determine what particular facts the court deems material. Gordon v. Beck, 196 Cal. 768, 239 P. 309. In the present case, however, no such uncertainty exists. All the facts which are alleged in each of the counts of the complaint are found to be true, except the amount of damages which is claimed. Damages in an aggregate sum may be properly found by the court. 8 Cal. Jur. 878, § 120; Murphy v. Stelling, 8 Cal. App. 702, 97 P. 672. When the allegations of a pleading are specific and certain, a general finding, by reference to the pleading, that all of the statements are true, is sufficient to support the judgment. This rule has been approved in many authorities of this jurisdiction. Fritz v. Mills, 170 Cal. 449, 459, 150 P. 375; Ferguson v. Koch, 204 Cal. 342, 348, 268 P. 342, 58 A. L. R. 1176; MacMurtry v. Fraties, 84 Cal. App. 401, 258 P. 120.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

ANDERSON v. EATON. *

Civ. 59.

District Court of Appeal, Fourth District, California.

May 27, 1930.

Rehearing Denied June 23, 1930. Hearing Granted by Supreme Court July 24, 1930.

1. Attorney and client ⟹166(1).

Evidence *held* not to show fraud by attorney or failure to disclose to client representation of adverse interests.

Client was the mother of a gas company's employee who was killed in the course of his employment through the negligence of the employees of a lumber company. The attorney of the gas company's compensation insurance carrier, when getting in touch with the mother to ascertain to what extent she had been dependent upon her son, disclosed his

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 293 P. 788.

identity, told her that her right to compensation would not be contested, and informed her fully as to her rights against the lumber company. She employed him, without having been solicited to do so, to represent her against the lumber company; the fee to be in a certain ratio to the amount recovered.

2. Attorney and client ⟹20.

Court should not give countenance to situation whereby attorney might represent adverse interests at same time.

3. Attorney and client ⟹20.

Compensation insurer's attorney, not contesting claimant's right to compensation, and representing claimant to collect damages from stranger who had caused compensable injury, *held* not acting for adverse interests.

4. Attorney and client ⟹166(1).

Evidence *held* not to show that compensation insurer's attorney, engaged to represent compensation claimant against stranger, solicited business.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by F. L. Anderson against Mabel E. Eaton. From a judgment for defendant, plaintiff appeals.

Reversed.

Clarence Harden, of San Diego, for appellant.

Crouch & Sanders, of San Diego, for respondent.

CARY, P. J.

Plaintiff, a Los Angeles attorney, brought this action to recover from defendant one-third of the amount defendant received through the settlement of a death claim arising from the death of her son, and plaintiff appeals from a judgment rendered in favor of defendant.

Defendant's son, in the course of his employment by the San Diego Consolidated Gas & Electric Company, hereafter referred to as the gas company, met his death as the result of the negligence of the employees of the Benson Lumber Company, hereafter referred to as the lumber company. Fidelity & Casualty Company of New York, hereafter referred to as fidelity company, was the compensation insurance carrier for the gas company. Federal Mutual Liability Insurance Company, hereinafter referred to as federal company, was on a policy of public liability insurance carried by the lumber company. Plaintiff was on a retainer from the fidelity company, but was also engaged in private practice.

The court found the employment of plaintiff by defendant on a contingent fee basis of one-third of the amount recovered by defendant and that defendant had received $3,100 in settlement of the claim. It further found that plaintiff, as attorney for the fidelity company, represented an interest adverse to defendant; that in procuring the contract of employment plaintiff was guilty of fraud in that he failed to inform defendant that his appearance before the Industrial Accident Commission, as representing the compensation insurance carrier, would be adverse to his duties as her counsel; that he told her there would be no contest made by the compensation insurance carrier and that she need employ no counsel other than himself; that he cautioned defendant to keep secret from the referee his employment as her attorney; that he failed to inform her that it was his duty to the fidelity company to favor a settlement of her claim against the lumber company for a small amount rather than run the risk of litigation which might result in no recovery; that the adverse employment of plaintiff was neither known by nor explained to defendant. Upon these findings of fact the court concluded that the contract for plaintiff's employment was against public policy and void.

Appellant's first contention is that the findings regarding fraud are without support in the evidence. This necessitates a statement of the additional evidence before the trial court.

Plaintiff, preparatory to the hearing before the Industrial Accident Commission, contacted defendant to find out to what extent she was dependent upon her son, and in the course of his conversation stated there would be no contest by the fidelity company of her right to compensation, and stated further that since the death was caused by the negligence of the lumber company she had a right of action against that company for a much larger sum than she could hope to secure through the award of the accident commission. A written agreement resulted, whereby defendant employed plaintiff to represent her in her claim against the lumber company on a contingent fee basis of one-third of any amount paid to defendant in settlement of her claim against the lumber company. Defendant understood that plaintiff was representing the fidelity company and was informed that the fidelity company had the right to proceed directly against the lumber company, independently of any action she might bring, but probably would not if she herself would do so, and that if she received, for example, $2,000 from the lumber company and the commission awarded her $500 compensation against the fidelity company she would have nothing coming from the latter, since

she would have received more from a third party than the liability of the fidelity company.

Several hearings before the referee were held, the fidelity company at no time disputing its liability, but the referee considering primarily what other persons beside defendant were dependent upon the deceased. At one of these hearings defendant was represented by her own counsel, a Mr. Tyler. An award was finally made to defendant. Meanwhile plaintiff conducted negotiations with the claim agent of the Federal company, which, up to the time when defendant discharged him, had resulted in an offer by it of $4,750 in settlement of defendant's claim against the lumber company.

At this point matters took a new turn. The claim agent for the Federal company advised defendant that her fee contract with plaintiff was void because plaintiff represented the fidelity company, the interests of which were adverse to those of defendant. Discontinuing his negotiations with plaintiff the Federal company claim agent made a direct offer to defendant to settle for $3,100, which, it may be noted in passing, is approximately two-thirds of the $4,750 theretofore offered defendant through her counsel, and further agreed in writing with defendant to pay all attorney's fees which might be due plaintiff. Defendant accepted this sum in full settlement and wrote to plaintiff stating that she desired to cancel her arrangements with him, that he was discharged, and offering to pay plaintiff a reasonable fee for his services to date, but made no mention of the settlement. Plaintiff replied that he felt he was entitled to a one-third of the amount he had induced the Federal company to offer in settlement. Later plaintiff was informed by the Federal company that a settlement had been effected, whereupon plaintiff wrote defendant suggesting that he was willing to accept a smaller amount in liquidation of his fee, and suggested that she mail him a check for what she thought was right and he would either accept or reject it. Defendant not replying to either of these communications, this action was instituted.

[1] We have carefully scrutinized the record and have concluded that there is no evidence upon which findings of actual fraud could have been predicated. In fact, the court in its oral decision expressly absolved plaintiff from all intentional wrongdoing.

[2, 3] Defendant argues that even though no actual fraud were shown, the plaintiff had voluntarily placed himself in a position which as an officer of the court he should never be permitted to occupy, and that with due regard to the upholding of the high sense of honor and fidelity to the client that is imposed upon the profession, this court should declare the entire transaction contrary to public policy and void. That the courts should not give countenance to any situation, whereby an attorney might at one and the same time represent parties with adverse interests, is clear. But we do not feel that this principle is applicable under the facts in the case at bar. It is a matter of common knowledge that persons carrying automobile insurance, when the insurance company admits its liability and willingness to settle, frequently employ the attorney for that same insurance company as their own attorney, to collect from some third person damages resulting from the same accident. It is also a matter of common knowledge that persons carrying fire insurance, when the insurance company admits its liability and willingness to settle, frequently employ the attorney for that same insurance company as their own attorney to collect damages from some third person by whose act the fire originated. We have not been informed that the propriety of an attorney's accepting such employment has been questioned, and yet if defendant's position be correct, it might be said that in all such cases counsel owes a duty to his insurance company to reduce the amount of claimant's recovery to the minimum, and since that is so, then any contract between the claimant and the insurance company's counsel for a fee for services in representing that claimant against a third person to collect damages for the act insured against, would be void. A mere statement of these situations serves to indicate the absence of sound foundation to defendant's contention. In the case at bar not a scintilla of evidence is presented to show that the fidelity company either resisted or intended to resist defendant's claim for compensation. Clearly, it was to the interest of the fidelity company that a recovery be had against the lumber company, at least to the extent of the fidelity company's compensation liability, and as clearly it was to the interest of plaintiff to procure the greatest amount possible from the lumber company for the defendant, since the size of his fee depended upon the size of such recovery.

We have carefully examined our own decisions on the subject, and find none where the facts are similar to those now under consideration. In the following cases the attorney was held disqualified to represent the second client because of adverse interest: Weidekind v. Tuolumne Water Co., 74 Cal. 386, 19 P. 173, 5 Am. St. Rep. 445; In re Cowdery, 69 Cal. 32, 10 P. 47, 58 Am. Rep. 545; Adams v. Woods, 8 Cal. 306. And in the following no disqualification was held to exist: McCabe v. Healy, 138 Cal. 81, 70 P. 1008; Perkins v. West Coast Lumber Co., 129 Cal. 427, 62 P. 57; Jones v. Lamont, 118 Cal. 499, 50 P. 766, 62 Am. St. Rep. 251; Estate of Kafitz, 51 Cal. App. 325, 196 P. 790, and Gaver v. Early, 58 Cal. App.

725, 209 P. 390. An interesting note on the question is to be found in 51 A. L. R. 1307. On page 1312 are cited a number of cases, the facts in many of which appear stronger from the client's standpoint than those now presented, and yet in which it was held no adverse interest existed. In the case of Hunter v. Troup, 315 Ill. 293, 146 N. E. 321, the client sought to defeat the attorney's right to compensation on the ground that the attorney had an adverse interest. The court there held that where an attorney discloses all facts which he honestly conceives to be material to his employment, yet fails to disclose some fact which by the court may be deemed material to such employment, and such concealment is not fraudulent, the attorney is not by reason thereof barred from receiving compensation for his services.

[4] Defendant also cites cases to the effect that where an attorney solicits business, that fact bars him from receiving compensation, but no facts are shown here which justify the application of such rule.

The judgment is reversed.

We concur: MARKS, J.; BARNARD, J.

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105 Cal. App. 731

PEOPLE'S NAT. BANK v. SOUTHERN SURETY CO.

Civ. 4102.

District Court of Appeal, Third District, California.

May 20, 1930.

Rehearing Denied June 20, 1930. Hearing Denied by Supreme Court July 17, 1930.

1. Municipal corporations ⟹347(1).

Money bank advanced to public building contractor to pay laborers' wages, for which bank sought to recover in suit on contractor's bond, constituted "loan" (St. 1919, p. 487).

[Ed. Note.—For other definitions of "Loan," see Words and Phrases.]

2. Principal and surety ⟹59.

Surety is entitled to stand on terms of bond.

3. Municipal corporations ⟹347(1).

Words "supplies," "materials," etc., in public building contractor's bond, referred to something going into or consumed in the performance of the work (St. 1919, p. 487).

The bond contained a provision that if contractor or subcontractors failed to pay for any materials, provisions, provender, or other supplies or teams used in, upon, or for or about the performance of work or labor done, surety would pay same in amount not exceeding sum set forth.

[Ed. Note.—For other definitions of "Materials" and "Supply (Noun)," see Words and Phrases.]

4. Municipal corporations ⟹347(1).

Bank, lending public building contractor money to pay laborers' wages, could not recover on bond given in pursuance of statute, on theory that word "supplies" includes money loaned (St. 1919, p. 487).

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by the People's National Bank against the Southern Surety Company to recover on a surety bond for money advanced or loaned to a contractor. From a judgment for defendant, plaintiff appeals.

Affirmed.

Janeway, Beach & Pratt and S. T. Hankey, all of Los Angeles, for appellant.

W. I. Gilbert, Kenneth Keeper and John J Wilson, all of Los Angeles, for respondent.

PLUMMER, J.

This appeal is from a judgment in favor of the defendant in an action prosecuted by the plaintiff to recover on a surety bond for money advanced or loaned to a contractor in the performance of work on a public building in the city of Los Angeles.

The record shows that a contracting firm doing business under the name of Hennessy Bros. & Co., Incorporated, obtained a contract for the building of a concrete warehouse for the city of Los Angeles, and in pursuance of an act of the Legislature approved May 10, 1919 (Stats. 1919, p. 487), a surety bond was given by the defendant corporation.

Omitting all the preliminary matters set forth in the surety bond, we herewith set forth the portion thereof involved in this action:

"Now, Therefore, if said principal, as contractor in said contract, or its sub-contractors, fails to pay for any materials, provisions, provender, or other supplies or teams used in, upon, or for or about the performance of the work or labor done thereon, of any kind, said surety will pay the same in an amount not exceeding the sum set forth above, and also, in case suit is brought upon this bond, a reasonable attorney's fee, to be fixed by the court," etc.

The bond was in the sum of $39,000.

During the course of the work upon the building mentioned by the contracting firm, the plaintiff advanced or loaned to the con-

tractor certain sums of money at different times, upon which there was due the plaintiff, at the time of the beginning of this suit, the aggregate sum of $21,369.89, as principal. Paragraph VI of the plaintiff's amended complaint, relative to its advancement of money, is in the following words:

"That thereafter plaintiff, at the request of the contractor, did for the purpose of paying the wages of the laborers employed by the contractor on said work, supply the contractor with the following sums of money, on the dates set opposite the respective amounts, to-wit:" (Then follows a statement of the dates and amounts advanced at the particular times mentioned.)

[1] While there is considerable refinement in the arguments of counsel concerning the nature of this transaction, we think there is no escape from the conclusion that the money advanced to the contractor, irrespective of the purpose for which it was advanced, constituted essentially a loan, to the amount of the money advanced, and that the relationship of creditor and debtor between the bank and the contractor was thereby created. The fact that the money was advanced for a particular purpose, as alleged in the amended complaint, does not change the legal character of the act, or affect in any particular the legal relation between the bank and the contractor, effected thereby. A loan does not become any less a loan because the borrower names the purpose for which he desires the money, or the loaning party advances the money to be used by the borrower, for a specified purpose. It is a loan, and simply a loan, and takes on no additional character, nor is the loan clothed with any additional sanctity simply because the parties thereto are agreed as to the purposes for which the money loaned is to be used. We make this statement because it is necessary to keep in mind the distinction between money loaned and materials or supplies which are consumed or enter into the construction of a building, or the labor that is expended thereon. Money is not consumed, nor does it enter into and become a component part of a building, even though it may be used to pay for the materials or supplies which do enter into a building.

[2-4] We do not need to cite authorities in support of the statement that a surety is entitled to stand upon the terms of his bond. Admitting this principle, however, the appellant claims that the word "supplies" is sufficiently broad in meaning to include money loaned or advanced to a contractor; it being the contention of the appellant that the words "fails to pay for any materials, provisions, provender or other supplies or teams used in, upon, or for or about the performance of the work contracted to be done," etc., are sufficient, by reason of the insertion of the word "supplies," to render the surety liable for the money loaned by the bank to the contractor. We do not think, however, that the word "supplies" as here used can be taken from the portion of the bond in which it appears, and given a distinct and separate interpretation from that which necessarily follows from the reading of the entire portion of the bond covering which the surety has obligated itself. These words, we think, refer to something which goes into or is consumed in the performance of the work contracted to be done. The word "supplies" is connected with the word "provender," and is followed by the word "teams," and if given a strict meaning, would relate thereto, but following the rule usually adopted in construing lien cases, and desiring to effectuate the purposes for which the bond is given, we may conclude that the word "supplies" covers any kind of material which goes into the building, or is consumed necessarily in the erection of the building. It does not follow from this that it goes outside of the context of the bond, and relates either to money loaned or to money advanced. While appellant uses the term "money advanced," we use the term "money loaned" and "money advanced," in this case, as meaning one and the same thing.

In view of the cases hereafter cited, we do not need to review many of the authorities relied upon by the appellant. It is sufficient to say that none of them are based upon circumstances similar to the issues here presented.

In the case of Brogan v. National Surety Co., 246 U. S. 257, 38 S. Ct. 250, 62 L. Ed. 703, L. R. A. 1918D, 776, strongly relied upon by appellant, the facts involved were as follows: Groceries and provisions were furnished a contractor for a public work, for use in a boarding house. The contractor was obliged to maintain a boarding house for the laborers. It was held that the materials used in the prosecution of the work were within the meaning of the statutes there cited. It was also held that if the boarding house had been conducted by others where the men boarded, or had been conducted by the contractor as an independent enterprise, solely for the sake of profit, a different conclusion would have been reached. Under the state of facts here disclosed the bondsman was held liable.

In Pacific Wood & Coal Co. v. Oswald, 179 Cal. 712, 178 P. 854, 855, it was held (quoting from the syllabus), that an action could be maintained upon a bond in "a claim for hay, grain, and other supplies furnished to a subcontractor for feeding and maintaining horses and mules used in the performance of a contract for road work done under the 'Road District Improvement Act of 1907' (Stats. 1907, p. 806)," irrespective of the presence or absence of the word "supplies." We do not need to follow the arguments of appellant relative to what is said in some of the federal cases as to what might reasonably be includ-

ed, but will call attention to the case of United States, etc., v. Rundle (C. C. A.) 107 F. 227, 52 L. R. A. 505, where the question of whether an action could be maintained upon a bond, by a bank, where the covenant therein referred to labor or materials in the prosecution of the work. The holding of the court was as follows: "Money furnished by a bank to pay labor claims is not within the protection of a bond conditioned to pay persons supplying the principal with 'labor or materials in the prosecution' of his work." In that case, just as in this, the money was advanced from time to time, and it would appear from a recital of the facts that the money was actually paid over the counter of the bank to the different laborers, who took receipts from the laborers for the amount of money paid, respectively, and not assignments of their claims. The money appears to have been paid under an arrangement with the contractor, for the bank advancing the money in the amount necessary from time to time to pay the laborers, the contractor being, as in this case, actually a borrower of so much money under the arrangement by which he was being financed. It was there held that such an arrangement constituted a loan.

Without quoting from the cases at length, it is sufficient to say that the following language taken from the notes found in Ann. Cas. 1918D, 352, is a clear statement of the law: "A person lending money to a contractor may not recover the amount in an action on the contractor's bond given to secure the payment of persons performing labor or furnishing material but wherein no stipulation is made as to the lending of money to the contractor, notwithstanding the funds are used in procuring labor or material for carrying on the work. U. S. v. Rundle, 107 F. 227, 46 C. C. A. 251, 52 L. R. A. 505; Hardaway v. National Surety Co., 211 U. S. 552, 29 S. Ct. 202, 53 L. Ed. 321, affirming 150 F. 465, 80 C. C. A. 283; Cadenasso v. Antonelle, 127 Cal. 382, 59 P. 765; People's National Bank v. Corse, 133 Tenn. 720, 182 S.W. 917." These cases all follow the rule that even though the money is used for the purchase of materials or the payment of laborers, does not enable the person loaning or advancing the money to maintain suit upon a contractor's bond conditioned in all essentials as the one involved in this action. There are other cases, however, which permit the maintenance of actions upon contractors' bonds, but an examination of them shows that the covenants contained in the bonds involved are essentially different from the one given by the defendant. Thus, it has been held in several cases that a bond conditioned that the contractors "shall promptly pay all debts incurred by them in the prosecution of said work, including labor, materials furnished," etc., enables the one advancing or loaning the money to maintain an action on a bond so conditioned. Title Guaranty, etc., Co. v. State, 61 Ind. App. 268, 109 N. E. 237, 111 N. E. 19; Puget Sound v. Gallucci, 82 Wash. 445, 144 P. 698, Ann. Cas. 1916A, 767. Other cases might be cited following the same rule where the covenant in the bond includes debts and obligations. While not exactly the same as an action to enforce a mechanic's lien against a building, the essential purposes of the act under which a bond is given, relating to the construction of a public building, are the same, to wit, to make sure that the materials, labor, and supplies entering into and becoming an essential portion or ingredient of the building, or necessarily consumed in the construction thereof, shall be paid for. It follows therefore that cases having to do with the enforcement of mechanic's liens, where money is loaned, are authoritative here.

In 40 C. J. p. 77, § 56, the text, supported by a long list of authorities, is as follows: "There can be no mechanic's lien for money loaned or advanced to a contractor or other person for the purpose of enabling him to purchase material for, or to pay for labor upon a building or other improvement, nor can a lien be had as security in favor of one who lends his credit to another to enable him to purchase materials." Sweet v. Fresno Hotel Co., 174 Cal. 789, 164 P. 788, Ann. Cas. 1918D, 346; Burr v. Peppers Cotton Lumber Co., 91 Cal. App. 268, 266 P. 1025. In the last case cited this court had before it, in substance, the same question that is here presented. We do not deem it necessary to quote from the opinion in that case, but will refer to it as a conclusive answer to every proposition presented by the appellant. Likewise, in the case of Cadenasso v. Antonelle, supra, the action was upon a bond covenanted to secure the payment of labor or materials furnished, etc. It was held that money loaned did not give a right of action against the sureties.

In view of what we have said, it does not appear necessary to follow the appellant in its varied refinements of the meaning of the word "supplies," where discussion is indulged in as to supplying money or other supplies. We know it is often said that when Congress has voted an appropriation, say for the army, that it has voted supplies for the army, in truth and in fact, nothing of the kind has taken place. Money is voted to buy supplies, and that is just exactly what was done in the case at bar. Money was loaned to buy or pay for labor. The money was loaned, not for use in the building, but to pay for that which went into the building.

We see no escape from the conclusion that the plaintiff has no cause of action under the covenants contained in the bond given by the defendant.

It follows that the judgment must be, and the same is hereby, affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

106 Cal. App. 196

CASSETTA v. BAIMA et al.

Civ. 5961.

District Court of Appeal, Second District, Division 2, California.

June 3, 1930.

Rehearing Denied July 2, 1930. Hearing Denied by Supreme Court July 31, 1930.

1. Bills and notes ⟹501.

Where court excluded note made basis of cause of action, court did not err in later receiving note in evidence upon its own volition.

2. Bills and notes ⟹60.

Holder of note was presumed to have right to fill in blanks in promissory note delivered to him (Civ. Code, § 3095).

Civ. Code, § 3095, provides that, where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up blanks therein.

3. Alteration of instruments ⟹12.

Generally, if one signs instrument containing blanks, he must intend it to be filled in by person to whom it is delivered.

4. Bills and notes ⟹60.

Presumption of holder's authority to fill in blanks in note is applicable to nonnegotiable as well as negotiable instrument (Civ. Code, § 3095).

5. Appeal and error ⟹1008(1).

Appellate court *held* bound by trial court's determination as to whether evidence overcame statutory presumption of holder's authority to fill in blanks in note (Civ. Code, § 3095).

6. Bills and notes ⟹60.

Holder of note containing blanks could fill in blanks during trial of cause.

7. Bills and notes ⟹443(3).

Holder of note drawn to makers' order could sue thereon as transferee, notwithstanding note was not indorsed by makers (Civ. Code, § 3130).

8. Bills and notes ⟹179.

Statute, providing in part that note drawn to maker's own order is not complete until indorsed by him, refers to negotiable and not nonnegotiable notes (Civ. Code, § 3265).

9. Bills and notes ⟹518(1).

Evidence *held* to establish consideration for note.

10. Judgment ⟹249.

Where complaint was based on note given for money loaned, contention that judgment was entered for money loaned, and hence improper, *held* without merit.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by Secondo Cassetta against Angelina Baima and another. Judgment for plaintiff, and the named defendant appeals.

Affirmed.

Ernest M. Torchia, of Los Angeles, for appellant.

Roger Marchetti, of Los Angeles, for respondent.

GATES, Justice pro tem.

Plaintiff commenced this action against the defendant Baima and others upon a promissory note for the sum of $700, which note was executed by said defendant and one Ben Zalunardo on or about August 20, 1923, in favor of themselves. The instrument at the time of its execution was undated, with the exception of the numerals "1923," which were in the upper right-hand corner of the paper. It mentions no amount as principal nor as interest, except that in the upper left-hand corner is found these figures and symbol: "$700.00." The note, among other things, recites: "One day after date, for value received, we promise to pay to A. Baima, and Ben Zalunardo or order at ——— the sum of ——— dollars with interest at the rate of ——— per cent. per ———. (Signed) Angelina Baima Ben Zalunardo." On or about the 20th day of August, 1923, the makers of the note, for the sum of $700 cash paid by the plaintiff herein, transferred the instrument to the latter, who is now the legal owner and holder thereof. Subsequently, the exact time not appearing in the record, the plaintiff filled in certain blank spaces in the note. The first part of the instrument now reads as follows: "$700.00 Los Angeles, California August 23, 1923. One day after date, for value received, we promise to pay to A. Baima, Ben Zalunardo or order at Los Angeles, California, the sum of seven hundred dollars with interest at the rate of seven per cent. per annum from date, until paid. * * *" It further appears that the sum set forth in the note or any part thereof has not been paid. Defendant Baima in her answer denied the transfer of the note to plaintiff, and denied that there is anything due thereon. She further denied that plaintiff had any power or authority to fill in any of the blank spaces in the instrument. The trial court found against her upon the issues thus presented and in favor of the plaintiff, and judgment in the sum of $700, interest, and costs was entered accordingly. The defendant Baima alone appeals.

[1] Appellant's first contention is that the note in question was never admitted in evidence. When the instrument was offered appellant objected to its introduction, and the court sustained the objection. However, at the conclusion of plaintiff's direct examination, the court of its own volition received the note in evidence, and it was marked "Plaintiff's Exhibit 1." There was no error in this, as the note was the basis of plaintiff's cause of action and was relevant. Furthermore, no objection was made at the time it was admitted. 2 Cal. Jur. 263, § 82.

The next claim is that the evidence is insufficient to support the decision. In support thereof several points are discussed. These we shall take up separately.

[2-4] Appellant challenges the right of respondent to fill in the blanks in the promissory note delivered to him. Section 3095 of the Civil Code, among other things, provides: "Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. * * *" There is no question about the right of respondent to fill in the blanks. The general rule is that, if one signs an instrument containing blanks, he must intend it to be filled in by the person to whom it is delivered. Riverside Portland Cement Co. v. Maryland Casualty Co., 46 Cal. App. 87, 189 P. 808; Thomas v. Fursman, 39 Cal. App. 278, 178 P. 870; Visher v. Webster, 8 Cal. 109; Fisher v. Dennis, 6 Cal. 577, 65 Am. Dec. 534; Blochman Commercial, etc., Bank v. Ketcham, 36 Cal. App. 284, 171 P. 1084. The facts in the case of Walsh v. Hunt, 120 Cal. 46, 52 P. 115, 39 L. R. A. 697, cited by appellant, are not analogous to those in the instant case. In the case referred to the instrument involved was not patently incomplete, as in the present matter, nor were there circumstances there that would justify the making of the alterations.

In 8 Corpus Juris 182, 183, the rule relative to filling blanks in bills or notes is correctly stated as follows: "The delivery of an inchoate or incomplete bill or note, as where the instrument is delivered with blanks left for the insertion of the amount or terms of payment, or where a signature on a blank paper is delivered with the intention of having a complete instrument written over it, confers presumptive authority on the person to whom it is delivered, and on subsequent holders, to complete the instrument by filling the blanks, or by writing the instrument, as the case may be, in the way apparently contemplated by the signer, with matter in general conformity with the character of the writing." The foregoing rule is just as applicable to a nonnegotiable instrument as it is to a negotiable instrument. Johnston Harvester Co. v. McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39.

[5] As to appellant's contention that she did not give respondent express authority to fill in the blanks, it may be said that, aside from the presumption afforded by section 3095 of the Civil Code, there was no evidence offered by appellant to directly overcome this presumption. And, even if such evidence had been offered, it was for the trial court to determine whether the presumption had been overthrown by such evidence. We are bound by the determination of the trial court.

[6] Appellant maintains that there was undue delay in making the necessary insertions in the note. She claims it was done during the time between the filing of the second amended complaint and the filing of the third amended complaint herein, the latter being the one upon which the parties proceeded to trial. The exact time does not appear. Conceding that it was done at the time indicated, it is, however, immaterial, as insertions may be made during the trial of the cause. Croskey v. Skinner, 44 Ill. 321; Whiteford v. Burckmyer, 1 Gill [Md.] 127, 39 Am. Dec. 640; Mitchell v. Mitchell, 11 Gill. & J. (Md.) 388; Seay v. State Bank, 3 Sneed. (Tenn.) 558, 67 Am. Dec. 579. It has been held that the filling in of blanks may be dispensed with at the trial. Weston v. Myers, 33 Ill. 424. "The blanks should be filled by the holder within a reasonable time, and what this is is a question of fact for the jury." 8 C. J. 188. We cannot, therefore, say that the delay in filling the blanks was unreasonable as a matter of law. Nor is it shown how appellant's rights have been affected or prejudiced by any delay in the matter.

[7, 8] Appellant makes the further contention that the note involved herein is not a complete note, for the reason that it was not indorsed by the makers. In support of her contention she cites section 3265 of the Civil Code. That section, after defining a negotiable promissory note and stating that its negotiability shall not be affected in certain instances, adds these words: "Where a note is drawn to the maker's own order it is not complete until endorsed by him." Appellant argues that by virtue of the language of the section there could be no valid note without an indorsement by the makers. She further maintains that the instrument cannot be transferred because it is payable to "order" and not to "bearer," and that an indorsement is essential before title will pass. Civ. Code, § 3111. Appellant's theory is untenable for the reason that section 3265 refers to a negotiable promissory note. The principle covering the situation in the instant case is correctly stated in 19 California Jurisprudence, 845, as follows: "The provisions of the statute are not to be taken as meaning that an instrument payable to order can only be transferred

by indorsement; they mean only that such indorsement is necessary in order to carry the *qualities* and *incidents* of negotiable paper to the indorsee. As in the case of the transfer of other instruments, the title of the transferor may be conveyed by an assignment in a separate instrument, on the instrument itself, or by *mere delivery*. In such cases, however, the transferee is vested with such title only as his transferor has, and is not protected against equities which exist against such transferor." (Italics ours.) The foregoing principle has been sanctioned by the following cases: Vance v. Gilbert, 178 Cal. 574, 174 P. 42; More v. Finger, 128 Cal. 313, 60 P. 933; Shoenhair v. Jones, 33 Cal. App. 545, 165 P. 971.

The transferee of an instrument has a right, in a proper case, to have the indorsement of the transferor. Civ. Code, § 3130. Plaintiff had a perfect right to sue upon this note, as he had acquired by the transfer all the rights that his transferor had. Edwards v. Wagner, 121 Cal. 376, 53 P. 821; Herman v. Hecht, 116 Cal. 553, 48 P. 611; Mellor v. Bank of Willows, 173 Cal. 454, 160 P. 567.

[9] As to appellant's contention that there was no consideration, little need be said upon this point, for the reason that it is clear from the evidence that appellant and Zalunardo, the joint makers of the note, were in business together, and that the sum of $700 was loaned to them ostensibly to be used by them in their business. The check which is evidence of the loan and which was given to appellant and her associate bears their joint indorsement.

[10] Appellant further contends that respondent's complaint was drawn upon the theory of a promissory note, and a judgment was entered for money loaned. There is no merit to this point. The complaint was based upon a promissory note, which note was given for money loaned. The trial court's finding that money was loaned by plaintiff to the defendants Baima and Zalunardo does not in any way detract from the conclusion of the court. In fact, it tends to strengthen the court's finding that there was a valuable consideration for the note.

Appellant contends that findings Nos. II and III are not supported by the evidence. Such contention cannot be sustained, as there is ample evidence to sustain such findings and each of them. The findings fully cover all material issue raised by the pleadings, and each is amply supported by the evidence. The findings of fact and conclusions of law fully sustain the judgment rendered.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

PEOPLE v. LEDBETTER et al.

Cr. 1917.

District Court of Appeal, Second District, Division 1, California.

May 28, 1930.

Rehearing Denied June 10, 1930.

1. Criminal law ⚷938(1).

In criminal case, whether new trial should be granted for newly discovered evidence rests in discretion of trial court.

2. Criminal law ⚷1156(3).

Unless trial court's discretion in denying new trial for newly discovered evidence has been abused, appellate court will not disturb judgment.

3. Criminal law ⚷941(1).

In prosecution for bribery, court *held* not to have abused its discretion in refusing new trial for newly discovered evidence which was merely cumulative.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Miles H. Ledbetter and another were convicted of the crime of bribery, and they appeal.

Affirmed.

MacDonald & Thompson, Alfred F. MacDonald, and Theo. C. McKenna, all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., James H. Howie, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and William R. McKay, Deputy Dist. Atty., both of Los Angeles, for the People.

HOUSER, J.

Following their conviction of the crime of bribery, defendants appeal from the judgment as well as from an order denying their motion for a new trial. The only reason suggested by appellants for a reversal of the judgment is that error was committed by the trial court in its order by which the motion for a new trial was denied.

The dependent circumstances may be briefly stated as follows: The prosecuting witness, who was corroborated in his testimony by his wife, and one Betty Pierce, who was employed in the household of the prosecuting witness, tended to show that the alleged offense was committed at the home of the prosecuting witness, in the city of Los Angeles, some time either in the latter part of the month of September or the early part of the month of October, and especially at a time after Betty Pierce was employed by such wit-

ness. In substance, it was stipulated by the parties to the action that Betty Pierce was not in the employ of the prosecuting witness prior to August 8th; and admittedly the evidence is conclusive to the effect that, as far as related to the transaction out of which the alleged bribery arose, defendants came in contact with the prosecuting witness at his home on two occasions only. In defense of the charge, evidence was introduced which tended to prove not only that the two meetings in question between the prosecuting witness and the defendants were innocent in character and could not have occurred either in the month of September or the month of October, but that both of the meetings which took place among the interested persons were at the home of the prosecuting witness, in the city of Los Angeles, on the 7th and the 8th days of July preceding, which dates, as before indicated, were long anterior to the date at which Betty Pierce began her employment with the prosecuting witness, and which fact carried the implication that any testimony given by her which tended to corroborate that given by the prosecuting witness was necessarily false, and cast discredit upon the testimony given by each of the other witnesses introduced by the prosecution. In rebuttal of such testimony, the prosecuting witness and his wife testified that neither of them was at the home of the prosecuting witness in the city of Los Angeles on either the 7th or the 8th day of July. On the hearing of the motion for a new trial, which was based upon the ground of "newly discovered evidence," defendants relied upon affidavits presented by them therein which were in direct contradiction of the testimony given by the prosecuting witness and his wife to the effect that neither of them was at the home of the prosecuting witness, in the city of Los Angeles, on either the 7th or the 8th day of July. In response to such affidavits, the people introduced several counteraffidavits which in substance were in corroboration of the testimony given by the prosecuting witness and his wife relating to their whereabouts on such dates as being in an apartment house in the city of Venice.

[1, 2] On a review of the authorities, the principle of law is outstanding that whether a new trial should be granted for the reason that since the trial of the action new evidence has been discovered, which is either corroborative of that introduced by the moving party, or, on the other hand, in the nature of impeachment of, or contradictory to, that produced by the other party, rests in the sound discretion of the trial court; and unless it manifestly appear that the discretion lodged in the trial court has been abused, the appellate court will not disturb the judgment.

In the case of People v. Sing Yow, 145 Cal. 1, 78 P. 235, 236, the principal point made on the appeal related to the action of the trial court in refusing to grant the motion for a new trial urged by the defendant on the ground of newly discovered evidence. From the statements contained in the several affidavits presented by the defendant on his motion for a new trial, it appeared, not only that the defendant did not commit the crime of which he was charged, but as well that the crime was committed by two other individuals whose identity was clearly established; furthermore, the falsity of the testimony of one of the witnesses who had testified that he saw the defendant commit the crime was clearly made to appear; and, in addition thereto, a complete alibi for the defendant was set up in that at the time the crime was committed he was "not in fact present thereat, but at the time thereof were [was] elsewhere." In denying the motion for a new trial, the Supreme Court said, in part:

"* * * It has been repeatedly said by this court that a motion for a new trial on this ground is addressed to the sound legal discretion of the trial court, and that the action of that court will not be disturbed, except in an instance manifesting a clear abuse of such discretion. A defendant is not entitled to a new trial, as a matter of right, simply because he has discovered new evidence which might have been admitted on the trial if discovered earlier. * * *

"The question as to the effect upon the case of the newly discovered evidence is, from its nature, peculiarly one that is addressed to the discretion of the trial court; * * * and the motion should undoubtedly be granted where the showing is such as to make it apparent to the trial court that the defendant has, without fault on his part, not had a fair trial on the merits, and that by reason of the newly discovered evidence the result would probably be or should be different on a retrial. But, unless the appellate court can plainly see that this discretion has been abused, that the showing made was of such a character as to make it manifest that the case would or should result differently on a new trial in view of the newly discovered evidence, the order of the trial court refusing a new trial will not be disturbed. (Citing cases.)

"The showing made by the affidavits presented on behalf of defendant was not such as to warrant us in holding that the trial court abused the discretion confided to it in this matter. * * *"

For rulings to the same effect in similar situations, see Linforth v. San Francisco Gas & Elec. Co., 156 Cal. 58, 103 P. 320, 19 Ann. Cas. 1230; Waer v. Waer, 189 Cal. 178, 207 P. 891; People v. Lakenan, 61 Cal. App. 368, 214 P. 1021; People v. Froehlich, 65 Cal. App. 502, 224 P. 471.

[3] On the trial of the instant case, the evidence introduced by the people tended to show that the offense, if any, was committed on some date near the 1st of October; while the effort of the defendants was chiefly expended in showing that the only opportunity afforded for its commission was on the 7th and the 8th days of the preceding July. It thus appears that the "newly discovered evidence" disclosed by the affidavits presented by defendants on their motion for a new trial would have been but cumulative to that introduced by them on the trial of the action. If the date of the two meetings among the defendants and the prosecuting witness *had been established* as of the 7th and the 8th days of July, other than generally discrediting the testimony of the prosecuting witness and his wife, the only effect thereof would have been that the testimony given by Betty Pierce would have been successfully impeached. The substance of her testimony was that on one of two occasions happening between September 1st and the following Christmas, in the house of the prosecuting witness, at a time when the prosecuting witness, defendant Ledbetter, and "another man" were present, she "saw a roll of bills * * * in somebody's hands." Again, if it be assumed that the testimony given by Betty Pierce was false, the other evidence in the case would still remain; and its insufficiency to support the verdict is not even suggested by appellants. The action by the trial court in denying the motion for a new trial was tantamount to its declaration that in its opinion not only did the defendants have a fair trial on the merits, but in addition thereto, that should a new trial be granted, on a rehearing of the action the "newly discovered evidence" would make no difference as far as the verdict of the jury was concerned.

In arriving at a conclusion contrary to that urged by appellants, this court is not unmindful of the case of People v. Goodwin, 202 Cal. 527, 261 P. 1009, which in its facts presented a situation resembling that in the instant case, and where an order by the trial court denying a motion for a new trial was reversed. However, it is the law that a decision in each case must rest upon its own peculiar facts; and the final test on appeal must be whether in denying a motion for a new trial the trial court abused its discretion. In the instant case this court is unable to perceive any failure on the part of the trial court to properly and legally perform its duty in that regard.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

105 Cal. App. 664

WALLACE v. PACIFIC ELECTRIC RY. CO. et al.

Civ. 6232.

District Court of Appeal, Second District, Division 1, California.

May 16, 1930.

Rehearing Denied June 11, 1930. Hearing Denied by Supreme Court July 14, 1930.

1. Joint Adventures ⚷1.

Partnership ⚷20.

Relationship, under contract, between railroad company and express company whose employee was injured, *held* not to be that of partners or joint adventurers.

By the contract referred to, the railway company "does let and demise, to the express company, the exclusive right and privilege, * * * to control, conduct and transact all the express transportation business over the lines" of such railway company. The compensation therefor was in part from particular revenues, but, speaking generally, it was a per centum of the net revenues determined at fixed periods by a complicated system of accounting.

2. Joint adventures ⚷1.

Partnership ⚷3.

There must be community of interest in business to constitute either "partnership" or "joint adventure"; sharing of profits alone being insufficient.

[Ed. Note.—For other definitions of "Joint Adventure" and "Partnership," see Words and Phrases.]

3. Master and servant ⚷354.

Employee within Workmen's Compensation Act can maintain action against employer's agent for injuries sustained through negligence of agent (Workmen's Compensation, Insurance and Safety Act of 1917, § 6, as amended by St. 1923, p. 375, and § 26, as amended by St. 1919, p. 920, § 8).

Workmen's Compensation, Insurance and Safety Act of 1918, St. 1917, p. 834, § 6, as amended by St. 1923, p. 375, provides that compensation liability is in lieu of any other liability of employer, but does not say in satisfaction thereon, and St. 1917, p. 854, § 26, as amended by St. 1919, p. 920, § 8, declares that claim of employee for compensation shall not affect his right of action for damages arising out of injury against any person other than the employer.

4. Master and servant ⚷354.

That express company, employer, would be required to pay twice for same injuries if

judgment for its employee were allowed to stand, is not ground for reversal, where employer's ultimate liability to railroad injuring employee, if any, resulted from contract voluntarily made.

The contract between the railroad company and the express company contained provision that as between the two companies the express company should be liable for injuries to its employees, and that express company would save railroad company harmless against suits etc. A compensation award had already been made against the express company.

5. Master and servant ⟹354.

Employee without knowledge was not bound by employer's waiver of liability to employee for injuries by another's negligence.

6. Limitation of actions ⟹127(5).

Where original complaint was based on common-law negligence, and intervening amended complaints were under Federal Employers' Liability Act, cause of action alleged in fourth amended complaint, based on common-law negligence, was not barred.

Plaintiff's injuries occurred January 14, 1925, and the first complaint was filed June 10, 1925, and amended complaint was filed June 25, 1925. The second amended complaint was filed July 18, 1925, and the fourth amended complaint was filed May 24, 1926.

7. Appeal and error ⟹1064(2).

Where defendants admitted negligence, but not injury, instruction to determine fact as to extent, if any, of injuries, *held* not prejudicial error.

The instruction referred to was to effect that jury's only function was to take law as given by court and determine fact as to extent, if any, of injuries suffered by plaintiff caused by negligent act which had been admitted, and that, in doing so, jury should consider how badly plaintiff was injured by accident, extent of injury, etc., and award such damages as evidence showed he sustained by negligent act admitted.

8. Appeal and error ⟹1067.

Refusal to give customary falsus in uno instruction *held* not prejudicial error (Code Civ. Proc. § 2061, subd. 3).

Defendants requested an instruction in the language of the statute (Code Civ. Proc. § 2061, subd. 3), providing, "A witness false in one part of his testimony is to be distrusted in others," and the court refused to give this instruction, and did not give any substitute for it.

9. Appeal and error ⟹1004(1).

Appellate court's power over excessive damages exists only when facts are such that excess suggests passion, prejudice, or corruption on jury's part.

10. Appeal and error ⟹932(1).

In considering attack on verdict as excessive, appellate court must give respondent benefit of every inference that can reasonably be drawn.

11. Damages ⟹132(3).

$12,500 to express messenger 48 years old, sustaining injury to spinal vertebræ, *held* not excessive.

12. Appeal and error ⟹151(2).

Appeal of defendant against which no judgment was rendered must be dismissed; it not being party aggrieved (Code Civ. Proc. § 938).

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Lester A. Wallace against the Pacific Electric Railway Company and another for damages for personal injuries. From a judgment for plaintiff against defendant named, both defendants appeal separately.

Judgment against defendant named affirmed, and the other appeal dismissed.

Newlin & Ashburn, R. L. Haight, Frank Karr, O. O. Collins, and E. E. Morris, all of Los Angeles, for appellant Pacific Electric Ry. Co.

Newlin & Ashburn and R. L. Haight, all of Los Angeles, for appellant American Ry. Express Co.

William B. Ogden, James Donovan, and G. M. Grant, all of Los Angeles, for respondent.

ELIOT CRAIG, Justice pro tem.

Plaintiff, on January 14, 1925, was engaged as an express messenger for the American Railway Express Company (hereinafter called express company) upon an express car operated by the Pacific Electric Railway Company (hereinafter called railway company). A collision of the express car and the rear end of a train occurred through the admitted negligence of the railway company, but both defendants deny that any injury resulted therefrom to plaintiff. The judgment as rendered is in favor of the plaintiff and against the railway company. Nevertheless, both defendants have appealed, separately, but have joined in the filing of briefs, and have presented six propositions for our consideration. We shall discuss them in the order presented.

[1, 2] Point 1: "The court erred in ruling as a matter of law that plaintiff was not employed jointly by both defendants."

The operations of the express business over the lines of the railway company were conducted under a contract between the two defendants. They claim that the proper interpretation of that contract is that defendants were partners in the express transportation business, or, if not partners, that they were at least joint adventurers. The ultimate point in appellants' contention is that, if the relationship of the defendants be either that of partnership or joint adventure, then it must follow that plaintiff is the joint employee of both defendants, and plaintiff would thereby be limited to an award under "the Workmen's Compensation, Insurance and Safety Act of 1917." By said contract the railway company "does let and demise, to the Express Company, the exclusive right and privilege, * * * to control, conduct and transact all the express transportation business over the lines * * *" of said railway company. The compensation therefor is in part from particular revenues, but, speaking generally, is a per centum of the net revenues determined at fixed periods by a very complicated system of accounting. Our conclusion is that the contract relationship of the defendants, each to the other, is neither that of partners nor of joint adventurers. The intention of the parties to the contract, as expressed therein, is clearly against the contention of partnership or joint adventure, in that said contract provides for a letting to the express company of the right to control, conduct, and transact transportation business over the lines of the railway company, and the railway company agrees to furnish the necessary cars and car space to the express company for the per centum of net proceeds as compensation. A sharing of profits is not the only test; there must be a community of interest in the business to constitute either a partnership or a joint adventure. Under the contract the business is the business of the express company and not the business of the railway company.

Point 2: "Railway Company was by valid contract relieved from liability for injuries to employees of the Express Company, and plaintiff is bound thereby."

The contract between the defendants contains the provision that as between the two companies the express company shall be liable for injuries to express company employees while engaged in its business on any of the lines covered by the contract. The contract further provides that the express company shall indemnify and save harmless the railway company against all claims, demands, suits, and actions whatsoever therefor.

[3] Appellants contend that, if it is held that the defendants are not partners or engaged in a joint enterprise, then it must follow that the railway company is the agent of the express company, and both would be liable as agent and principal, respectively, for the agent's negligence; and that, since full satisfaction has been had as against the principal (the express company) by reason of the compensation award (which is being paid regularly and to which no objection is raised), there cannot be a double satisfaction of this liability, i. e., collection may not be had from the agent after satisfaction by the principal. The fallacy of appellants' position, as we see it, is in the fact that the compensation liability which has been adjudged is not the common-law negligence liability, recovery of which is now sought as against the "agent" only (assuming for this statement only that the railway company is an "agent" in this case).

Section 6 of the Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1917, p. 834, § 6, as amended by St. 1923, p. 375) provides that compensation liability is "in lieu of any other liability" of the employer, but does not say in satisfaction thereon; and section 26 of said act (St. 1917, p. 854, § 26, as amended by St. 1919, p. 920, § 8) specifically declares that the claim of an employee for compensation shall not affect his right of action for damages arising out of injury against any person other than the employer. Therefore it follows that, even though an employee within said act cannot maintain an action for damages against his employer for injury sustained through the negligence of an agent of the said employer, such employee can maintain such action against such agent, and satisfaction by the employer of a compensation award is not a satisfaction by a principal of the agent's liability to the employee.

[4] Appellants argue that, if this judgment is allowed to stand, the express company will be required to pay twice for the same injury. Section 26 of the Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1917, p. 854, § 26, as amended by St. 1919, p. 920, § 8), provides: "The court shall, on application, allow as a first lien against any judgment recovered by the employee the amount of the employer's expenditures for compensation." However, without attempting to determine the effect of this provision of the law upon the amount or amounts which the express company may ultimately be required to pay, a sufficient answer to appellants' argument is that ultimate liability, if any there be, on the part of the express company for the judgment in this case, is solely upon and by reason of its own contract voluntarily made, and is not the result of any obligation imposed by law.

[5] Appellants also argue that the plaintiff as express messenger had no greater right to be in the car than the rights of the express company under its contract; that his presence as express messenger was only the presence of the express company, and that, as there could be no liability on the part of the railway

company to the express company, it must follow that there is no liability of the railway company to the plaintiff. A sufficient answer to this contention is that plaintiff, under the record in this case, had no knowledge of the said waiver of liability, and therefore (even if otherwise he would be bound), he is not bound by a waiver by the express company to the railway company of liability to plaintiff for injury to him by the negligence of said railway company. Chamberlain v. Pierson (C. C. A.) 87 F. 420.

[6] Point 3: "The court erred in permitting plaintiff to introduce by amendment a new cause of action after same had been barred by statute of limitations."

A recital of dates is here necessary. The collision occurred January 14, 1925. The complaint was filed against both defendants on June 10, 1925; the amended complaint was filed June 25, 1925; the second amended complaint was filed July 18, 1925. On August 7, 1925, the express company answered this second amended complaint, and set up a counterclaim for recovery of money paid out to and for plaintiff in connection with his alleged injuries. On September 16, 1925, plaintiff appeared before the Industrial Accident Commission of the state of California and filed application for adjustment of his claim against the express company. This application was heard October 1, 1925, and resulted in an award of $20.52 per week for an indefinite period.

In the third amended complaint, filed May 3, 1926, plaintiff endeavored to drop the express company as a party defendant, but, as it was then seeking affirmative relief upon its counterclaim, it remained in the case. The fourth amended complaint was filed May 24, 1926, and, as in the third amended complaint, the railway company was the only defendant named therein. Both defendants demurred to the fourth amended complaint, but the demurrers were overruled, and the trial resulted in a verdict and judgment for plaintiff against the railway company.

It will be noted from the above dates that the limitation of one year for commencing an action for personal injury under state law expired while the case was pending on the second amended complaint. The first amended and second amended complaints attempted to state a cause of action against both defendants under the Federal Employers' Liability Act (45 USCA §§ 51–59). The third and fourth amended complaint declared for a cause of action against the railway company on common-law negligence under the state law. As between these two sets of amended complaints, there was a switching from law to law, i. e., from a cause of action given by the Federal Employer's Liability Act, a federal statute, to a cause of action on common-law negligence under state law. The answer to appellants' said point 3, therefore, must be found by an examination of the original complaint. The original complaint contained no allegation of interstate business. It follows therefore that there was the implied allegation of intrastate business. The Express Company demurred to this original complaint upon the ground that plaintiff's relief, if any, as against it was exclusively by a proceeding under the Workmen's Compensation, Insurance and Safety Act of this state, and said demurrer was sustained. Hence the cause of action actually stated therein against the railway company was on the common-law negligence cause of action. The right to maintain this cause of action first stated under the original complaint was not finally terminated by the intervening amended complaints, which were finally replaced by the fourth amended complaint; and, since the latter was practically identical with the original complaint except as to the attempt to drop the express company as a party defendant thereunder, it follows that the cause of action set forth in the fourth amended complaint was not barred by the statute of limitations.

[7] Point 4: "The court, by its ruling, usurped the functions of the jury."

At the trial defendants admitted negligence, but not the fact of injury.

In his instructions to the jury the trial judge said: "Your only function now is to take the law as given you by the court and determine the fact as to the extent if any of the injuries suffered by the plaintiff caused by the negligent act which has been admitted. In doing so you will consider how badly he was injured by this accident, the extent of the injury, whether temporary or permanent, the pain and suffering which he has already endured caused by this act, the act which I have mentioned, and which is reasonably certain to be suffered in the future. * * * You shall award such damages as you find from the evidence he sustained caused by the negligent act which has been admitted and which he will be reasonably certain to endure in the future."

Appellants contend that the court instructed the jury that the only issue was amount of damages. We think that appellants' contention is not sustained when the instructions are considered as a whole, even though the instructions contain the words "if any" only once. We do not consider as prejudicial error the fact that the expression was "extent if any of the injuries" rather than "extent of the injuries, if any." If there was no "extent," then there could be no "injuries." The failure of the trial judge to repeat the words "if any" or similar words throughout the instructions did not, in our opinion, result in prejudicial error.

[8] Point 5: "The court erred in refusing to give the jury the customary falsus in uno instruction."

Defendants requested an instruction in the language of the statute (subdivision 3, § 2061, Code Civ. Proc.), to wit: "A witness false in one part of his testimony is to be distrusted in others." The court refused to give this instruction, and did not give any substitute for it.

Undoubtedly earlier cases, by obiter dicta, have indicated that the court must give this instruction when requested in a proper case; but later cases have materially modified these earlier statements.

"An instruction that a 'witness false in one part of his testimony is to be distrusted in others,' belongs to that class of instructions which pertain to mere commonplace matters that jurors are presumed to know about and act upon in the absence of being instructed thereon. Hence if not prejudicial to the case of the complaining party, neither the giving nor the refusing of such instruction will be held ground for reversal." Medlin v. Spazier, 23 Cal. App. 242, 137 P. 1078—hearing in Supreme Court denied.

"It should certainly not be deemed of vital importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar." Reynolds v. E. Clemens Horst Co., 35 Cal. App. 711, 170 P. 1082, 1086.

[9-11] After a consideration of the whole record in this case, we conclude that the refusal to give this instruction was not prejudicial error.

Point 6: "The verdict is so excessive as to require a reversal."

"In every case of this character the soundness of the verdict must be determined by its own peculiar facts and circumstances. It is true, also, as said in Bond v. United Railroads, supra [159 Cal. 277, 113 P. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50], that 'our power over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury (citing cases). Practically, the trial court must bear the whole responsibility in every case.' But if 'the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury' (Morgan v. Southern Pac. Co., 95 Cal. 510, 30 P. 603, 17 L. R. A. 71, 29 Am. St. Rep. 143), the verdict must be held excessive." Wiezorek v. Ferris, 176 Cal. 353, 358, 167 P. 234.

"In considering an attack upon a verdict as excessive, the appellate court must treat every conflict in the evidence as resolved in favor of the respondent, and must give to him the benefit of every inference that can reasonably be drawn in support of his claim." Kimic v. San Jose, etc., Ry., 156 Cal. 273, 104 P. 312, 314.

The record before us shows that it was stipulated at the trial that the Carlisle Experience Tables gives the present value of an annual income of $1,726.80 for a man of the age of 48 years as $20,886.36. While plaintiff's employment in this particular position had been of but short duration at the time of the collision, and he was then on what is called the "extra list," nevertheless he was employed, and for an indefinite period and for full-time work would have received a total of $1,726.80 annually. Plaintiff's age at the time of the collision was shown to be 48 years.

The briefs state that a motion for a new trial was made by defendants, and that one of the grounds thereof was that the verdict was excessive. Apparently, then, the trial court did not consider the verdict excessive.

The testimony as to the extent of the injury to plaintiff's spinal vertebræ was conflicting, but we consider the evidence as a whole sufficient to support the amount of the verdict, to wit, the sum of $12,500.

[12] It appearing that there is no judgment against the express company, and that it is not a party aggrieved by the judgment, and has no right of appeal from this judgment, the appeal of the express company is dismissed. Section 938, Code Civ. Proc. The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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106 Cal. App. 81

PEOPLE v. SCHUMANN-HEINK.

Cr. No. 201.

District Court of Appeal, Fourth District. California.

May 26, 1930.

As Modified on Denial of Rehearing June 5, 1930.

Hearing Denied by Supreme Court June 23, 1930.

1. Criminal Law ⟹511(1).

Evidence of accomplice *held* sufficiently corroborated to sustain conviction for grand theft (Pen. Code, § 1111).

2. Criminal law ⟹351(1).

Conduct and actions of defendant in criminal matter may be scrutinized by court or jury and may be important evidence of guilty knowledge.

3. Larceny ⟹64(1).

Possession of stolen property constitutes some evidence against defendant in prosecution for theft.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Henry Schumann-Heink was convicted of grand theft, and he appeals.

Affirmed.

Curtis Hillyer, of San Francisco, and Irve C. Boldman, of San Diego, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Stephen Connell, Dist. Atty., and J. H. McKinney, Deputy Dist. Atty., both of San Diego, for the People.

MARKS, Acting P. J.

Appellant was convicted of the crime of grand theft upon a trial before the court without a jury. He was granted probation, and has appealed from the judgment of conviction. The sole ground presented for a reversal of the judgment is that the evidence is insufficient to support the judgment in that the testimony of Wilfrid M. Clare, a witness for respondent and an admitted accomplice, was not sufficiently corroborated to meet the requirements of section 1111 of the Penal Code.

This case was tried once before, and upon the conviction of appellant a new trial was granted on appeal. People v. Schumann-Heink, (Cal. App.) 276 P. 625.

Schumann-Heink & Co., Inc., was a corporation organized and existing under the laws of the state of California for the purpose of carrying on a general stock and bond brokerage business with its principal place of business in the city of San Diego, Cal. It maintained branch offices in the cities of Los Angeles and Oakland, Cal., and Tucson, Ariz. Appellant was the president and a director of the corporation, and spent his time in active management of the business. The greater part of his time was spent in the Los Angeles offices, with frequent visits to the other offices of the corporation, and to other cities.

Wilfrid M. Clare was the secretary and treasurer and one of the directors of the corporation. He spent his time in the San Diego office, and was permitted to buy and sell securities in San Diego on behalf of the corporation. He was required to render daily reports to appellant at the Los Angeles office showing summaries of his business transacted for the corporation.

In the early part of the year 1927, appellant was personally indebted to the United States National Bank at San Diego, which indebtedness was evidenced by his promissory notes. A renewal note was given by him under date of June 21, 1927, in the sum of $3,000, and was made payable on demand. The bank had been pressing appellant for payment of this indebtedness some time prior to June 21, 1927, and had demanded that he pay the debt or give security for it. The renewal note was mailed to appellant in Los Angeles, signed by him there, and returned to the bank. Clare indorsed the note about August 27th of the same year. Prior to this date he (Clare) had talked with an officer of the bank about securing this note, and had submitted a list of securities which he claimed to own. On the list were twelve shares of the capital stock of the Security Commercial & Savings Bank and also a bond of $1,000 of the city of Buenos Aires. These were selected by the bank to be pledged as security for the note. On August 27, 1927, Clare delivered the bank stock to the United States National Bank as collateral to secure the payment of the $3,000 note. This stock was issued in Clare's name, but was the property of Schumann-Heink & Co., Inc. The bond was not delivered to the bank. Clare testified that, prior to pledging the bank stock, he had a telephone conversation with appellant, and was directed by him to pledge this stock to secure payment of the promissory note. Appellant denied this conversation, but admitted that Clare told him all the details of the transaction, including the pledge of the stock, in September, 1927.

On January 26, 1928, Clare and appellant were jointly indicted by the grand jury of San Diego county on eight counts alleging grand theft from Schumann-Heink & Co., Inc., one of which counts was based upon the pledge of the bank stock. On June 11, 1928, the charge contained in this particular count was referred back by the trial court to the grand jury for further action, and on June 15, 1928, the grand jury returned a separate indictment against appellant, charging grand theft of the bank stock in question from Schumann-Heink & Co., Inc. The case before us went to trial upon this indictment and appellant's plea of not guilty thereto. About the same time Clare was indicted by the grand jury for his part in the transaction.

After the first indictment was returned the bank had appellant call upon it and a conference ensued concerning the $3,000 note and the pledge of the bank stock. Appellant was told that the stock would bring something like $200 a share on the market. He told an officer of the bank that he was satisfied with that price, and further directed the bank to go ahead and sell the stock and credit the amount upon his note. The stock was sold in May, 1928, for the sum of $2,370, which amount, together with a $30 dividend, was credited upon appellant's note. Appellant then executed his note to the bank for the unpaid balance of the principal, $600 and $187.90 accrued interest. At no time did appellant inform any of the employees of the bank, or any one else, that the stock belonged to the corporation of which he was president.

The only testimony in the record which would indicate an actual knowledge on the part of appellant that he knew of the pledge

of the bank stock before August 27, 1927, was the testimony of Clare, who was an admitted accomplice of appellant in the commission of the alleged crime. Appellant contends that the lack of corroboration of Clare's testimony upon this point is sufficient ground for a reversal of the judgment.

In the case of People v. Schumann-Heink, supra, it was held that the crime of grand theft was committed by the pledge of the stock belonging to the Schumann-Heink & Company, Inc., on August 27, 1927. It was further held that to render appellant guilty of the crime charged he must have been an active participant in the act of pledging this stock on or before this date by directing Clare to pledge the same. This decision puts the question squarely before this court of determining whether or not Clare's evidence was sufficiently corroborated to justify the judgment of the court finding the appellant guilty as charged.

The rule concerning the sufficiency of the evidence to corroborate the testimony of an accomplice has been clearly stated in the case of People v. Woodcock, 52 Cal. App. 412, 199 P. 565, 568, as follows:

"The corroborating circumstances used to support the testimony of a single witness must be more than evidence tending to prove that the testimony was given, and that it may or may not be false. The rule as to the character of corroborating circumstances necessary to support the testimony of an accomplice is well stated in 12 Cyc. at page 456, quoted with approval by the Supreme Court in People v. Robbins, 171 Cal. 466, 470, 154 P. 317, 319, as follows: '"It is necessary that the evidence corroborating an accomplice shall connect or tend to connect the defendant with the commission of the crime. Corroborative evidence is insufficient where it merely casts a grave suspicion upon the accused. It must not only show the commission of the offense and the circumstances thereof, but must also implicate the accused in it. * * * But where the circumstances when proved, taken separately or collectively, are consistent with the innocence of the accused, there is no corroboration, and a verdict of conviction thereon will be set aside."' And in the same case the court said (171 Cal. 471, 154 P. 319): 'The corroborative evidence required to convict the defendant in addition to that of the accomplice is not sufficient if it merely tends to raise a suspicion of the guilt of the accused. * * * Mere suspicion, as has been shown, will not suffice as corroborative evidence; and where the evidence relied upon as corroborative of the accomplice is, as in the present case, only such as to raise a suspicion of the guilt of the defendant, the verdict must be set aside.' Then again (171 Cal. 476, 154 P. 321): 'The proofs of mere suspicious circumstances and of opportunity to commit a crime are never sufficient to justify a conviction upon the testimony of an accomplice. People v. Thompson, 50 Cal. 480; People v. Smith, 98 Cal. 218, 33 P. 58; People v. Koening, 99 Cal. 574, 576, 34 P. 238; State v. Willis, 9 Iowa, 582; People v. Morton, 139 Cal. 725, 73 P. 609.'

"In People v. Morton, 139 Cal. 719, at page 724, 73 P. 609, at page 611, the Supreme Court quoted with approval from Welden v. State, 10 Tex. App. 400, as follows: 'We suggest this mode as a proper test: Eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witness or witnesses with the view to ascertain if there be inculpatory evidence—evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no inculpatory evidence, there is not corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him.' And again, on the same page, the court said: 'In New York, under the same code provision (Code Crim. Proc. § 399), it was said: "The corroboration, however strong in all other respects, must point to the connection of the defendant with the commission of the crime to be of any avail." People v. Ryland, 28 Hun [N. Y.] 568, 570.'"

To these authorities we must add the rule laid down in the case of People v. Yeager, 194 Cal. 452, 473, 229 P. 40, 49, as follows:

"It has been held that to corroborate an accomplice the evidence need not establish the actual commission of the offense, nor extend to every fact and detail covered by the statements of the accomplice, or to all the elements of the offense, nor prove that the accomplice has told the truth. The corroborative evidence must tend in some slight degree, at least to implicate the defendant. While it need not be strong, more is required by way of corroboration than a mere suspicion. It is sufficient if the corroborating evidence tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to little weight. It is not necessary to corroborate the accomplice by direct evidence. If the connection of the accused with the alleged crime may be inferred from the corroborating evidence in the case it is sufficient."

In the case of People v. Nikolich, 93 Cal. App. 356, 269 P. 721, 722, it was held as follows:

"The law is well settled that the testimony of the accomplice need not be corroborated by direct evidence. The entire conduct of the defendant may be looked to for the corroborating circumstances, and, if from those circumstances the connection of the accused with the crime may fairly be inferred, the corroboration is sufficient. People v. Yeager, 194 Cal. 452, 229 P. 40; People v. Martin, 102

Cal. 558, 36 P. 952; People v. Demera, 64 Cal. App. 121, 220 P. 673."

[1] With these rules of law established by the well-considered opinions of our courts before us, we have reached the conclusion that the evidence of Clare, as to the directions given him by appellant to pledge this stock on or before August 27, 1927, is sufficiently corroborated, and that there is evidence in the record, other than that of Clare, directly connecting appellant with the commission of the crime charged in the indictment. Appellant admitted in his testimony that a short time after the stock was pledged he was informed of the transaction. He made no effort to inform the bank of the true facts of the case or to secure the return of the stock to its lawful owner, the Schumann-Heink Company, Inc. When the bank demanded the payment of his note, he consented to the stock being sold and the proceeds being applied upon his note, and gave his personal note for the unpaid balance of the principal and interest due to the bank.

[2, 3] The conduct and actions of a defendant in a criminal matter may be scrutinized by the court or jury and may be important evidence of a guilty knowledge of a commission of a crime. In this case the evidence goes much farther than that of mere guilty knowledge, because we find the defendant in possession of the fruits of the crime. The stock was used to secure his personal note. Possession of stolen property by a defendant has always been considered some evidence against him in a prosecution for theft. In this case appellant further accepted and received the benefits of the crime. As was said in the case of People v. Jones, 87 Cal. App. 482, 262 P. 361, 366:

"It was proper for the prosecution to show that appellant received part of the proceeds of the embezzlement, as tending to connect him with the commission of the offense."

Appellant does not contend that the corroborative evidence was insufficient, except upon the one point of his knowledge of the pledge of the stock on or before August 27, 1927. After excluding the testimony of Clare, every fact and circumstance connected with the crime was proved by competent evidence. Appellant admitted all the elements of the crime, except the knowledge that the stock was to be pledged. His conduct, after the time he admitted learning of the pledge of the stock and his retaining and appropriating the fruits of the theft to his own use, coupled with these admissions, furnish sufficient evidence to support the judgment against him. With the testimony of the accomplice corroborated in all particulars by competent independent evidence, the trial court could reach no other conclusion than that appellant was guilty of the crime charged.

Judgment, and the order denying appellant's motion for new trial, are affirmed.

I concur: BARNARD, J.

Justice CARY, deeming himself disqualified, did not participate herein.

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106 Cal. App. 171

In re LENCI'S ESTATE.

MALERBI v. MAFFEI et al.

Civ. 7370.

District Court of Appeal, First District, Division 1. California.

June 3, 1930.

1. Appeal and error ⟹1048(3).

No error may be claimed on refusal to permit question, where question was allowed after being reframed.

The reframing of the question was, in effect, a withdrawal of the original question.

2. Wills ⟹384.

Where finding of unsoundness of testator's mind was supported by other evidence, admission of army discharge and annexed medical report *held* harmless.

The medical record, evidencing epilepsy, was not introduced to prove testator's insanity, but to establish the cause of his mental condition. There was, moreover, ample other evidence to establish both the fact and the cause of testator's unsoundness of mind.

3. Wills ⟹53(3).

Where issue was soundness of testator's mind, admission in evidence of commitment of his mother to insane asylum was proper.

4. Wills ⟹53(7).

In will contest, evidence of testator's habitual, excessive drinking was properly admitted as tending to show cause of unsoundness of mind.

5. Evidence ⟹334(4).

Death certificate from bureau of vital statistics, properly certified, was admissible as prima facie evidence of contents, although not in proper form (St. 1905, p. 121, § 15, as amended by St. 1911, p. 287).

That the certificate is not in proper form is no obstacle to its use as prima facie evidence of the facts therein stated, although such certificate should not be used

as authority for burial, cremation, or disinterment purposes.

6. Trial ⚷255(4).

In will contest, failure to instruct jury as to purpose of introduction of death certificate *held* not error, where no instruction was requested.

7. Evidence ⚷498½.

Whether lay witness was sufficiently acquainted with testator to express opinion as to sanity, *held* in discretion of trial court (Code Civ. Proc. § 1870, subd. 10).

Code Civ. Proc. § 1870, subd. 10, provides that the opinion of an intimate acquaintance, respecting the mental sanity of a person, shall be admissible in evidence, the reason for the opinion being given, but the statute does not specify the degree of intimacy necessary.

8. Appeal and error ⚷971(2).

Court's ruling on competency of lay witness to give opinion as to person's sanity will not be disturbed, unless clear abuse of discretion.

9. Evidence ⚷498½.

In determining competency of lay witness to give opinion respecting person's sanity, court should consider period of acquaintance and opportunity of observation (Code Civ. Proc. § 1870, subd. 10).

10. Evidence ⚷498½.

In determining competency of lay witness to express opinion respecting testator's sanity, each case rests on its own peculiar facts.

Not only opportunity for observation but knowledge of the mental peculiarities, intellectual status, eccentricities of character, environment, and general conduct of the testator enter into the question whether an acquaintance of his is qualified to offer an opinion as to his sanity.

11. Evidence ⚷474(4).

In will contest, *held* that witnesses, as intimate acquaintances of testator, were properly permitted to express opinion as to his sanity (Code Civ. Proc. § 1870, subd. 10).

12. Evidence ⚷568(2).

In will contest, weight of opinion of testator's acquaintances as to his sanity was for jury.

13. Wills ⚷55(1).

Opinions of testator's acquaintances respecting his sanity, based on irrational conduct, actions, appearance, etc., *held* sufficient to support finding of insanity.

14. Wills ⚷163(2).

Confidential business relations between testator and beneficiaries, standing alone, *held* not sufficient to shift burden to proponents of will, on issue of undue influence.

15. Wills ⚷326.

There being no affirmative proof on issue of undue influence upon testator, nonsuit should have been granted, where evidence of relationship uberrimae fidei did not appear prior to motion.

16. Wills ⚷55(1).

Evidence *held* sufficient to sustain finding of unsoundness of testator's mind at execution of will.

The record included evidence that testator's mother had been a one time inmate of an insane asylum, that testator had been from childhood weak minded, "abnormal," and irrational in his appearance, conversations, and action, ignorant of his interest in his father's estate, and addicted to the excessive use of liquor.

17. Wills ⚷55(1).

Unsoundness of mind may be shown by many witnesses, testifying to apparently slight circumstances, which, though inconsequential when standing alone, present convincing proof when taken together.

18. Wills ⚷55(1).

Testator's incompetency may be proved by conduct, statements, etc., before and after, although there be no evidence of his mental condition on the day of, execution of will.

19. Wills ⚷55(9).

Inability to understand ordinary affairs, or total ignorance of ownership of property based on obtuseness, justifies inference of lack of disposing mind.

20. Wills ⚷53(1).

In will contest, remoteness of evidence as to unsoundness of mind is not valid objection, where connected with evidence of recent date.

21. Witnesses ⚷270(3).

Where improper testimony is elicited on direct examination, it is proper subject for cross-examination.

22. Wills ⚷384.

In will contest, evidence as to undue influence, if improper, *held* harmless under circumstances.

The evidence related to the conduct of the proponent of testator's will in administering the estate of testator's father. The appellate court found that a nonsuit

should have been granted on the issue of undue influence, but that there was sufficient evidence for the jury on the question of unsoundness of mind. Counsel, in the presence of the jury, stated the purpose of the allegedly improper evidence was only to show undue influence, and the trial court instructed the jury that each issue is separate and distinct. Under those circumstances, the jury could not have considered the objectionable evidence in determining the issue as to testator's sanity.

23. Wills ⟹360.

Where no finding whether will was unnatural was submitted to jury, proponent could not raise insufficiency of evidence in that respect.

24. Wills ⟹384.

Where jury's finding, that testator was of unsound mind, was sustained by evidence, improper refusal of nonsuit on issue of undue influence was not reversible.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Proceeding by Mary Lenci Malerbi against Paul Maffei and Vincent Maffei, executors of and devisees and legatees under the last will and testament of Frank Lenci, deceased, to annul and revoke the probate of testator's will. From a judgment for contestant and an order denying a motion for a new trial, proponents appeal.

Affirmed.

Thomas F. O'Neill and Ivan N. Maroevich, both of San Francisco, for appellants.

Robert McMahon and John P. Doran, both of San Francisco (Geary & Geary, C. J. Tauzer, and A. W. Hollingsworth, all of Santa Rosa, of counsel), for respondent.

WARD, Justice pro tem.

This is an appeal from the judgment annulling and revoking the probate of the will of Frank Lenci, deceased, and from the order denying defendants' motion for a new trial. The contest was tried by a jury, which rendered a verdict upon both grounds in favor of the contestants, viz., that deceased was not of sound and disposing mind at the time of the execution of the will, and that it was procured by undue influence.

[1] The first contention of appellants is that the trial court erred in sustaining an objection to a question propounded to one of the subscribing witnesses to the will. The witness was asked, "In your opinion what was the condition of his mind at that time, sound or unsound"? The respondent objected and the court indicated that the foundation for the question had not been laid, whereupon appellant reframed the question. The reframing of a question is, in effect, a withdrawal of the original question and no error may be successfully claimed thereon. In the case at bar, as reframed, the question was allowed.

[2] We are not prepared to rule that the admission of the army discharge and medical report attached thereto was properly admissible, but as in the case of Williams v. Williams, 63 Cal. App. 482, 218 P. 783, wherein a similar discharge was presented, we find other evidence to support the finding of the jury that the decedent was of unsound mind. Its presentation was not prejudicial, as epilepsy, while in many instances is the cause of insanity, it does not constitute it. The admission of the medical record was not presented to prove insanity, but to establish the cause of the mental condition. We find ample other evidence to establish the cause irrespective of any evidence of epilepsy.

[3] A commitment of the mother of decedent to an insane hospital was introduced. The record shows that the mother some time before her death was released from the asylum and died at the ranch of the father of testator. In a case of unsoundness of mind, it was proper that the jury should know whether or not the immediate progenitors of the testator were of weak or of normal mental condition. Estate of Dolbeer, 149 Cal. 248, 86 P. 695, 9 Ann. Cas. 795.

[4] Considerable evidence was introduced relative to the intoxication of the decedent. It was not the claim of the contestants that Lenci was drunk upon the date of making the will, but rather that continuous drinking to excess produced, or tended to produce, a weakness in mentality resulting in unsoundness of mind. This evidence was properly admitted. Estate of Gharky, 57 Cal. 278.

[5, 6] The contention of appellants that the certified death certificate from the bureau of vital statistics was improperly admitted and that the jury was not instructed as to the purpose for which the certificate could be considered, may be answered that our attention has not been called to any proposed instruction offered by appellant upon this subject. A death certificate from the bureau of vital statistics, when properly certified, is prima facie evidence in all courts of the evidence therein stated. Section 15 of an act approved March 18, 1905, St. 1905, p. 121, as amended in 1911, Stats. 1911, p. 287. If the death certificate is not in proper form it should not be used as authority for burial, cremation, or disinterment purposes, but this would not interfere with its introduction into evidence as prima facie proof of its contents.

[7-13] Appellants list the testimony of five witnesses as not coming within the intimate

acquaintance rule. Subdivision 10 of section 1870, Code Civil Procedure, provides that the opinion of an intimate acquaintance, as to the mental sanity of a person, is competent, but is silent as to the degree of intimacy that is essential. It is therefore a matter in the discretion of the trial court, and rulings thereon will not be disturbed unless there is a clear abuse of discretion. Courts should consider the period of acquaintance and the opportunity for observation. One opportunity of observation may well qualify a witness in one case and disqualify another witness in a second case, depending upon the knowledge of the testator's mental peculiarities, intellectual status, eccentricities of character, environment, behavior, and conduct generally. There can be no fixed and fast rule. In the present case, one witness testified that the decedent had threatened suicide and that he "had an empty stare." The witness based her opinion of his mental condition "on my observation of him all through his life, way back in his childhood." It is true this witness did not see him often over a period of thirty years, but upon the occasions of meeting him her opportunity for observation was good. A second witness knew him for about one year and a half and saw him about two or three times a week. A third saw him a couple of times a week for a period of about six months. A fourth knew him for four years and a half, and met him two or three times a week, and the fifth knew Lenci for three or four years and saw him three to four times a week. The court used its discretion wisely in determining that these witnesses were intimate acquaintances and permitted them to testify. It was the duty of the jury to determine the weight of the opinion of these witnesses. People v. Williams, 184 Cal. 593, 194 P. 1019. The testimony of these witnesses indicates a weakness of mind through which the testator was unable to carry on an intelligent conversation, and which likened him to the harmless lunatic who receives the sympathy of the adult and the derision of the child. If the jury found this condition was continuous and confirmed so that it might be classified as habitual insanity, there can be no doubt as to the sufficiency of the reasons given by various witnesses. Estate of Baker, 176 Cal. at page 436, 168 P. 881.

[14-16] Appellants contend that the motion for a nonsuit upon both issues of the case should have been granted. Upon the issue of undue influence, the transcript presents evidence of opportunity to exercise undue influence, but prior to the making of the will no proof of actual use of undue influence. Whatever confidential business relations existed between Frank Lenci and Paul Maffei, beneficiary under the will herein and administrator of the estate of Vincent Lenci, standing alone, would not be sufficient to shift the burden of proof from the contestants to the proponents. Respondents contend that there is ample evidence to establish a relationship uberrimae fidei between Paul Maffei and Frank Lenci as trustee and cestui que trust, and that therefore the burden of proof shifted. Without passing upon the sufficiency of the evidence it did not appear prior to the presentation of the motion for nonsuit and accordingly upon the issue of undue influence should have been granted. We find, however, ample evidence justifying the position of the trial court in denying the motion for a nonsuit on the issue of unsoundness of mind. In this case it was necessary that the contestants should paint a picture of practically the whole life of the decedent. The tale fills pages of the transcript, but briefly the father and the mother were cousins. The mother was at one time an inmate of an insane asylum, was subsequently released and lived with her husband and son on the ranch. As a child Frank Lenci was sickly and "wasn't all there." His childhood sickness "left him kind of weak in his mind." After childhood be became worse. He was of uncouth appearance and "looked dirty." His eyes had an empty stare and "were all the time twisting and twirling around and were very shiny." "He looked like a man whose mind was wandering." "He appeared abnormal." He was forgetful, and in conversation was incoherent. He was unable to comprehend that sugar which he had purchased had leaked out of a sack. He slept in disreputable quarters over an old wine cellar when suitable habitation on his own property was available. He thought that he had obtained nothing from his father's estate though he was entitled to one-half thereof. Small boys teased him and adults made signs indicating the condition of his mind. He used liquor to excess. These are a few bits of evidence presented in chief.

[17-19] Unsoundness of mind cannot always be proved by one statement, one circumstance, or by one witness, but often rests upon seemingly slight but numerous circumstances, which, when "taken together, carry conviction of mental unsoundness." 28 R. C. L. 98, and cases cited. Incompetency need not be proved by direct evidence, but acts, conduct, statements, both before and after, may be the determining factor, though no evidence be introduced of the exact condition of the testator's mind upon the day of the making of a will. Estate of Johnson, 72 Cal. App. 670, 237 P. 816. One may be so stupid as to be unable to comprehend ordinary affairs, or so dull or obtuse as not to know that he owned property, if so, then it is a fair inference to draw that such a person would have no conception of the character, nature, or result of a testamentary disposition, and to that extent be of unsound mind.

[20] Objection is made of the remoteness of part of contestants' evidence. Of necessity it

was remote for the purpose of indicating the continuation of this condition of mind that the jurors might consider and compare the remote with the evidence of recent date, and therefrom infer the unsoundness of mind upon the date of the will.

[21] The papers in the estate of Vincent Lenci, father of the decedent, Frank Lenci, were introduced in evidence in this proceeding without objection. Appellants now not only contend that such evidence was inadmissible, but that it was prejudicial. The first bit of evidence of Paul Maffei's connection as administrator of the estate of Vincent Lenci was drawn out on direct examination by appellants. It was therefore a proper subject for cross-examination. On page 391 of the transcript, contestants propounded the following questions:

"Q. You acted as administrator of the estate of Vincent Lenci? A. Well, Frank———

"Q. You acted as administrator of the estate, you received the money and paid it out? A. Yes, sir."

[22] These questions were asked without objection. When the witness was interrogated in reference to the receipt of money for rent of the Richmond property, an objection was made which was overruled and subsequently proponents moved to strike out all the evidence with reference to the account in the estate of Vincent Lenci. This motion was denied. To further questions we find further objections which the court overruled, but no further motion to strike out. Appellants now contend that the admission of such evidence was prejudicial to the rights of the proponents and that it was impossible to wipe out this evidence from the mind of the jury. The evidence was presented by appellants upon the issue of undue influence. In view of this court's conclusion that the motion for a nonsuit upon the issue of undue influence should have been granted, but that the motion for nonsuit upon the issue of unsoundness of mind was properly denied, no injury can befall appellant upon the issue of undue influence. However, it might be contended that this evidence was prejudicial to the rights of proponents upon the issue of unsoundness of mind. It was clearly stated by counsel for respondents: "The purpose is only this—this man is charged with undue influence." This statement was made in the presence of the jury and they certainly understood that the evidence had nothing to do with the question of the unsoundness of mind of Frank Lenci. The embezzlement, if there was an embezzlement, of the funds of the Vincent Lenci estate by one of the proponents of the Frank Lenci will could not have induced the jury to have returned a verdict on the unsoundness of mind issue when they well knew that the collection of rents by Paul Maffei had nothing to do with the unsoundness of mind of Frank Lenci. The court instructed the jury that "each of the grounds of contest of the will raised by the contestants are separate and distinct issues." The jury undoubtedly did not take this phase of the evidence as applying to unsoundness of mind.

[23] Appellants contend that the evidence was insufficient to support a finding that the will was an unnatural one. There was no such finding submitted to the jury, and the only instruction given upon this subject was one submitted by appellant.

[24] The motion for a nonsuit upon the issue of undue influence should have been granted, but it is unnecessary to make any further order thereon in view of our conclusion that there is ample evidence to sustain the finding of unsoundness of mind and the record, being free of reversible error, the judgment and the order denying the motion for a new trial are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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106 Cal. App. 144

CHARLES NELSON CO. v. MORTON et al.

Civ. 7047.

District Court of Appeal, First District, Division 2, California.

May 29, 1930.

Rehearing Denied June 25, 1930. Hearing Denied by Supreme Court July 28, 1930.

1. Bills and notes ⚷123(2).

Trustees of business trust signing note in name of trustees thereof, with addition of their own names as president and secretary, *held* not personally liable on note (Civ. Code § 3103).

The note was signed "Trustees of Greater San Francisco Speedway Association (a Trust) F. W. Pres. C. C. L. Sec." Civ. Code § 3103, provides that "where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability." While the trustees did not sign as agents, their representative character was similar to that of an agent, and the statute should be held to limit liability on the note to the trust property itself.

2. Bills and notes ⚷152.

Construction of note to make only trust property applicable to payment, did not defeat its negotiability (Civ. Code § 3101).

3. Joint-stock companies and business trusts ⚷17.

That trustees of business trust omitted to include in note stipulation of personal exemption, as required by trust agreement, did not affect their power to incur indebtedness.

4. Bills and notes ⚷146.

Courts, in construing Negotiable Instruments Law, should have in mind purpose of securing uniformity.

5. Statutes ⚷226.

Statute of sister state is adopted with judicial construction put upon it by courts of that state.

6. Bills and notes ⚷123(2).

Where note was signed in name of trustees of business trust, added signatures of president and secretary did not render them personally liable, irrespective of Negotiable Instruments Act.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by the Charles Nelson Company against Frew Morton and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellant.

Frank J. Solinsky and Sidney Rhein, both of San Francisco, for respondents.

DOOLING, Justice pro tem.

This is an appeal by the plaintiff from a judgment in favor of defendants without prejudice to an action against defendants as trustees to procure satisfaction out of trust property.

[1] The decision of the case depends chiefly upon the proper construction to be given to section 3101 of the Civil Code (section 20 of the Uniform Negotiable Instruments Law), which reads as follows: "Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability."

In deciding the case the learned trial judge wrote an opinion, the following portions of which we adopt as a part of the opinion of the court:

"This case involves the question whether the plaintiff can hold the defendants personally liable under a promissory note signed, on behalf of the trustees of a business trust, by the defendants, themselves trustees, or must look only to the trust property.

"Plaintiff, The Charles Nelson Company, became the holder of the note before maturity by transfer from the payee, Sunset Lumber Company, which is an allied corporation retailing lumber bought in part from The Charles Nelson Company, a wholesaler. The note is in the following form:

" '$13,891.60 San Francisco, Calif., May 19 1922

" 'On or before May 15 1923 after date, for value received We promise to pay to Sunset Lumber Co. Oakland Calif or order the sum of Thirteen Thousand eight hundred ninety one and 60/100 Dollars, at the office of The Charles Nelson Co. 230 California St. San Francisco, Calif. in United States Gold Coin, with interest at the rate of seven per cent. per annum, interest payable at maturity. And in case said interest is not paid within one month after the same becomes due, it shall be added to the principal and bear a like rate of interest until paid, and the whole of said principal and interest shall forthwith become due, at the option of the holder hereof, without notice. And in case suit is brought to collect this note or any portion thereof, we promise and agree to pay such additional sum as the Court may adjudge reasonable, for attorneys' fees in said action.

" 'Trustees of Greater San Francisco Speedway Association (a Trust)

" 'Frew Morton, Pres.

" 'C. C. Loser, Sec.

"The defendants contend that under section 3101 of the Civil Code (which is in the language of section 20 of the Uniform Negotiable Instruments Act), the defendants are exempted from personal liability.

"The evidence shows that the defendant Morton was president and the defendant Loser secretary of the board of three trustees of a business trust having as its trade name Greater San Francisco Speedway Association. While under the original articles of agreement the association would have to be classed as a partnership rather than a trust, yet the amended articles, which were entered into before the execution of the note, created a legal trust. Williams v. Milton, 215 Mass. 1, 7–9, 102 N. E. 355.

"By the trust agreement the trustees were directed to build and equip a racing speedway for automobiles. And, among other things, they were authorized to borrow money for the purpose, to issue notes or other forms

of indebtedness therefor, and in general to make all such contracts as the trustees might deem expedient in the conduct of the business of the trust.

"The note in suit represents a balance of the purchase price of lumber bought for the association from the Sunset Lumber Company by the trustees, and used in the construction of the speedway.

"The trust agreement provides, as is pleaded in the complaint, that all persons contracting with the trustees shall look only to the trust property for payment, and that in every written contract the trustees shall incorporate a stipulation against personal liability on the part of the trustees, the certificate holders or the trustors. It will be observed that the note in this case is without such stipulation.

"The case must hang upon the effect to be given to section 3101, Civil Code.

"In order to secure personal exemption under that section for a signer not acting in his own private interest, he must not only be duly authorized to act, but the note must show that 'he signed for or on behalf of a principal, or in a representative capacity'; and there must be sufficient to disclose the principal.

"Counsel for plaintiff argue that this section had nothing to do with the case, because trustees are themselves principals always. Plaintiff's counsel would limit the application of the section, therefore, to cases of strict agency for a known principal.

"Trustees are of course masters of the trust property, managing it for their beneficiaries; and contracts made in their official capacity are their contracts and, as is said in Taylor v. Davis, 110 U. S. 330, 335, 4 S. Ct. 147, 28 L. Ed. 163, cited by plaintiff, impose personal liability upon themselves, in the absence of special grounds of exemption.

"In a contract so made the trustees are indeed principals, and section 3101, Civil Code, can afford them no relief, if that section may be invoked only in protection of a subordinate acting as the authorized substitute or representative of some identified person having contractual competency.

"Justice Holmes has taught us, however, that law does not always keep step with logic. And in an attempt to penetrate the meaning of words or phrases of a statute affecting common business transactions, it is not wise to take more thought of the husk than of the corn in the husk. Much of the confusion hitherto existing in the decisions, characterized by the United States Supreme Court in Falk v. Moebs, 127 U. S. 597, 8 S. Ct. 1319, 32 L. Ed. 266, as 'the anarchy of the authorities' and which led to the formulation of section 20 of the Negotiable Instruments Act, was caused by judicial blindness to mercantile usage and a straining after overnice distinctions which have served but to perplex the man of affairs. Upon questions affecting negotiable instruments it is far more important to have uniform rules than inerrant logic; and uniform laws must necessarily fail of their purpose, unless there is uniformity in their interpretation and application. Utah State National Bank v. Smith, 180 Cal. 1, 3, 4, 179 P. 160.

"It becomes expedient then to ascertain the effect given elsewhere to the section in analogous situations.

"In Kerby v. Ruegamer, 107 App. Div. 401, 95 N. Y. S. 408, parties who were engaged in the improvement of certain lands, having become financially embarrassed, conveyed the property to trustees for their creditors, with power in the trustees to complete the building operations and for that purpose to receive money under a building loan, and apply it in payment of existing claims as well as the expenses of completion. A note having been executed by the trustees officially, in renewal of an earlier note of the grantors, the payee in a suit upon the note demanded personal judgment against the trustees. Though the note made no reference to any particular trust, it was shown that the payee already had knowledge of the state of affairs; and accordingly he was not permitted to hold the trustees individually liable. In so ruling, the court spoke as follows (107 App. Div. 401, 95 N. Y. S. 408, page 412):

" 'The purpose of the statute is limited to putting the payee of such a note in possession of the knowledge that in its execution and delivery no personal liability was intended to be assumed by the makers, and where, as in this case, the payee knows that the makers are trustees, and the object and purposes of their trust, as well as their powers thereunder, has contracted with them in their representative capacity, and furnished certain property to be used in furtherance of their trust duties, and requests a note as an evidence of the indebtedness so created, it is not necessary, as to him, and the makers are not required, to relieve themselves from personal liability on such note, to repeat to him in writing upon the face of the instrument, or orally, information that he already possesses. If it could be held that such a requirement was necessary, the evidence of Raunheim establishes that when the note was given the plaintiff was informed substantially that the defendants would not incur personal liability, and would not give their individual notes or indorsements, because they were acting as trustees only, which brings the case within the decision of First National Bank v. Wallis, 150 N. Y. 455, 44 N. E. 1038. These facts furnish a complete defense to plaintiff's claim of individual liability, and abundantly satisfy the requirements of the negotiable instruments law.'

"This ruling followed the views expressed in a similar case, Megowan v. Peterson, 173 N. Y. 1, 65 N. E. 738.

"It is asserted by plaintiff that in these cases the trustees were merely agents for the creditors. But the trustees in the cases cited, like those in the case at bar, were vested with the legal title and had entire control of the business in hand. While they were managing the property for the benefit of the creditors and the trustors, yet they, and not the creditors or the trustors, were the real masters. Thus in Megowan v. Peterson, 173 N. Y. 1, 6, 65 N. E. 738, 739, it is said:

" 'The creditors selected the defendant, and then Johnson conveyed all the property of the firm to him as trustee for the creditors, thereby vesting the title to the property in him as such trustee. We think, therefore, that, notwithstanding the fact that the word "agent" is used in the paper signed by the creditors, under the latter instrument the defendant became a trustee for the creditors, and that it was in such character that he took possession of the property and undertook the liquidation of the assigned estate.'

"In American Trust Company v. Canevin (C. C. A.) 184 F. 657, suit was brought in Pennsylvania on a note signed on behalf of St. Thomas Roman Catholic Congregation by its treasurer and pastor, and also endorsed in the name of the congregation by the pastor, below whose name was written 'Regis Canevin, Trustee.' Regis Canevin was the bishop of the diocese and, as such trustee of the church properties therein. Suit was brought against him alone in an effort to obtain a personal judgment.

"Speaking of the Negotiable Instruments Law, with quotations from section 20, the court said at page 663:

" 'The negotiable instruments law has been enacted in a large number of our states. Its uniform construction is most desirable. We are not dealing now with the indorsement of an executor, or administrator, or testamentary trustee, who, ordinarily at least, had no power to bind his trust estate by a contract enforceable in a court of law, but with the indorsement of one who holds, in trust, the property of a religious society which, observing the rules and regulations of the society, he may sell or mortgage, or subject to liability for the payment of debts incurred by him in his representative capacity.'

"And the court held that since the evidence showed that the bishop intended to sign in his representative capacity only and that the payee and indorsee had knowledge of that fact, and gave credit to the property represented by the bishop as trustee and not to him personally, it would be contrary to the intent of section 20 of the Negotiable Instruments Law and of the parties to construe the endorsement as a personal obligation.

"A similar situation, with like outcome, is exhibited also in Chelsea Exchange Bank v. First United Presbyterian Church, 89 Misc. Rep. 616, 152 N. Y. S. 201.

"Discussing the liability of a trustee as affected by such language, the supreme court of Kansas in Hamilton v. Young, 116 Kan. 128, 132, 225 P. 1045, 1046, 35 A. L. R. 496, expressed itself thus:

" 'Plaintiff says a trustee always acts as principal, there is no person, natural, or artificial, for whom he can be agent, a trust estate cannot promise, and consequently any obligation of the trustee is a personal obligation. Pressed to its logical conclusion, this doctrine would forbid a trustee from contracting that he shall not be personally liable, something which he may always do. The statute, however, does not stop with the relation of principal and agent in the technical and legal sense, but includes relations involving distinction between capacities.

" 'In business, a person will always act in one of two capacities: First, in his personal capacity, whereby he binds himself and his own estate; and, second, the capacity in which he stands for some civil interest other than his own individual interest. There was no object in inserting the words "or in a representative capacity" in the statute, unless something other than the strict relation of principal and agent were meant. There could have been no purpose to include, for example, an executor of a will, who represents creditors, devisees, legatees, and distributees, and to exclude a testamentary trustee, who represents beneficiaries of the trust; and a trustee in the proper exercise of his authority acts in a representative capacity, within the meaning of the Negotiable Instruments Law. Megowan v. Peterson, 173 N. Y. 1, 65 N. E. 738 (trustee for creditors); American Trust Co. v. Canevin, 184 F. 657, 107 C. C. A. 543 (Roman Catholic Bishop, trustee of property in his diocese, for his congregation); Wilson v. M. E. Zion Church, 138 Tenn. 398, 198 S. W. 244 (trustee of unincorporated religious society).'

"In regard to contracts for the benefit of an estate, the position of an executor is not essentially different from that of a trustee. And in First National Bank of Salem v. Jacobs, 85 W. Va. 653, 102 S. E. 491, the question arose as to the liability of an executrix upon a note to the bank which the defendant had signed thus: 'Winnie M. Jacobs, Exec. of Geo. M. Jacobs, deceased.'

"The note did not create a new obligation, but was in renewal of a previous obligation of the decedent; and in view of certain language in his will, it was held that the executrix had authority to execute a new note to take the place of the note of her testator.

"With such power in the executrix, the court was of the opinion that the form of the signature was sufficient under the Negotiable

Instruments Act to indicate that payment was to be had only from funds of the estate. Thus the court said at page 656 of 85 W. Va., 102 S. E. 491, 493:

" 'Whatever the liability of the representative may have been at the common law, the provisions of section 20, c. 98A * * * commonly designated the Negotiable Instruments Law, relieve him from personal liability if he signs in a representative capacity, disclosing his principal or the estate represented, and possesses the authority to execute the instrument.'

"In like manner in Wolff v. Flateau, 206 App. Div. 134, 200 N. Y. S. 646, a note payable to 'Henry M. Flateau, Executor,' and endorsed by him in the same style to a legatee in satisfaction of a legacy, was treated as importing only the transfer of an asset of the trust estate without assumption of any personal liability by the executor.

"The distinction between the personal and the representative capacity is emphasized also in Olpherts v. Smith, 54 App. Div. 514, 66 N. Y. S. 976, 978, affirmed in 173 N. Y. 593, 65 N. E. 1120. There, a draft was drawn for goods purchased by a receiver authorized to carry on the business of a corporation. The draft was addressed 'To Receiver, Worcester Cycle Mfr. Co.'; and when presented, was accepted by writing across the face these words: 'Accepted, Frank Smith Sullivan, Receiver, Lewis F. Wilson, Attorney.'

"The draft not being paid when due, suit was brought against the receiver personally. At the trial verdict was directed, however, in the receiver's favor, and the judgment was sustained on appeal, the court saying:

" 'We are therefore of the opinion that the defendant was expressly authorized to make the purchase, and that the Wilmot & Hobbs Manufacturing Company knew it was made by the defendant as receiver, and not individually, and with this knowledge sold and delivered the merchandise to him, and drew the draft in question, intending to give credit to the receivership alone. If we are correct in this conclusion, then it necessarily follows that the defendant did not personally obligate himself to pay the purchase price or the draft.'

"In the present case, the evidence leaves no doubt in my mind that the Sunset Lumber Company, the payee of the note in suit, knew of the limitation of liability set forth in the trust agreement, and was definitely informed also that for payment of its lumber it must look to the trust property alone; and that in fact credit was given to the trusteeship and not to the trustees. Plaintiff contends, however, that even if the Sunset Lumber Company itself had remained the holder, the unconditional terms of the body of the note could not be varied by evidence of limitations embodied in an independent instrument or by verbal communications made at or before the time of the execution of the note.

"But the law itself makes section 3101, Civil Code, part of the note, and that section is to be liberally construed in the interest of harmony. Hence, when the note and the statute are read together, with a liberal interpretation given to the word 'principal', there is no variance of the terms of the note. The statute, liberally construed, says in substance that when the estate (or principal) is disclosed either in the body of the instrument or in the form of the signature, exemption from personal liability follows as effectually as if, after signing his name, the trustee had added, 'as trustee but not individually' or 'as trustee but not otherwise.'

"In Shoe & Leather National Bank v. Dix, 123 Mass. 148, 25 Am. Rep. 49, the court had before it a note (secured by mortgage) beginning, 'We as trustees but not individually promise to pay,' and signed by three individuals, opposite whose names was written the word 'Trustees.' The makers acted as trustees of a business association known as Brookline Avenue Association; and in an action on the note the attempt was made to charge the trustees personally.

"Referring, however, to the form of promise, the court said at pages 150, 151:

" 'The construction contended for by the plaintiffs would require us to strike out the words "but not individually;" although in so doing we should not only alter the contract, but should impose upon them a liability which apparently they took special pains to avoid.

" 'It is to be borne in mind that this was not a case of agents acting for an undisclosed or unknown principal. * * * Neither was it an attempt by the defendants to bind property over which they have no legal control. By the terms of the deed they had power to mortgage, lease and manage the property at their discretion, but for the benefit and on the account of the equitable owners, namely, the members of the Brookline Avenue Association. * * *

" 'It often has happened that an agent for another person, or the treasurer of a corporation, had made himself personally responsible, by the form of words in which he has expressed himself in a written contract, when he may have intended to bind his principal only. * * * But we believe no case can be found in which a promise "as trustee," etc., accompanied with an express disclaimer of personal liability, would fail to exempt him.

" 'It is contended that if these defendants are not liable upon the contract as a note, then nobody is liable. Even if such were the fact, it would not be in the power of the court, as we have already seen, to alter the contract for the purpose of giving it validity.'

"In Bank of Topeka v. Eaton (C. C.) 100 F. 8, affirmed (C. C. A.) 107 F. 1003, the note was

made by 'the trustees of Topeka Land & Development Company, as such trustees under deed of trust dated May 23, 1887, and not otherwise.' The deed of trust contained a provision that stipulation exempting trustees and members from liability should be inserted in all contracts. Such stipulation was omitted from the note in suit; but the court held that liability attached only to the trust property.

"Likewise in Thayer v. Wendell, 1 Gall. 37, Fed. Cas. No. 13873, the court reached the conclusion that a covenant of an executor 'in my capacity aforesaid but not otherwise' showed that he contracted in a particular and not a personal capacity, and hence could not be held privately responsible.

"There expounding the law, Judge Story said at page 40 of 1 Gall., Fed. Cas. No. 13873:

" 'Now the clear exposition of the contract * * * is: "I covenant in my capacity as executor, and as far as I can legally bind the estate of Erving, but I hereby expressly exclude myself from all personal responsibility, in any event." Now it is quite too plain for argument, that if the words have been, as I have stated, there would have been no personal remedy. Can there be, when the words used require precisely the same exposition? We are not at liberty to reject any words, which are used in a contract, when they are sensible in the place where they occur; much less have we any authority to change the entire nature of a contract from a particular to a general responsibility.' See, also, Morehead Banking Co. v. Morehead, 116 N. C. 413, 21 S. E. 190; Schmittler v. Simon, 114 N. Y. 176, 21 N. E. 162, 11 Am. St. Rep. 621; Printup v. Trammel, 25 Ga. 240; In re Robinson's Settlement, L. R. (1912), 1 Ch. 717, 728–729.

"In the interest of commerce, it has been the policy of the law to exercise great tenderness toward the holders of commercial paper. Yet, after all, there is nothing sacrosanct about a promissory note; and section 20 of the Negotiable Instruments Act was meant to banish some of the extreme technicality which had led to confusion and incongruities in adjudicated cases in different jurisdictions. The provision granting personal exemption when the note indicates on its face that it was made on behalf of a disclosed principal, or by one filling a disclosed representative character and acting in his representative capacity, effectuates the desuetude of a vast array of technical and confusing precedents.

"Decisions, for example, may easily be found declaring that unless disclosure of the principal is made in the body of the note, the agent, whatever his powers, does not succeed in avoiding liability for himself by words of designation or description annexed to his signature. But the statute now provides that if proper indication of the representative capacity of the signer is given either in the note or in the signature, the disclosure is sufficient for his relief. Any phraseology which 'indicates' to the ordinary mind that the signature is made in a representative capacity will suffice for the purpose; and all persons dealing with the note are bound to take cognizance of its indications and disclosures.

"In the note before us it would be vain to deny that the signature indicated the representative character of the signers, and at the same time met fully the requirements of the law in disclosing 'the principal' to be bound. The signature gave the business name of the principal, and that principal was specifically designated as 'A trust.' Consequently, when the Charles Nelson Company accepted transfer of the note from the payee, The Charles Nelson Company was charged with notice that Morton and Loser, describing themselves respectively as president and secretary of the 'Trustees of Greater San Francisco Speedway Association, a Trust,' were acting not as principals, but in alieno jure for a named trust, and that by force of the statute they were exempted from personal liability as fully as if the note had formally stated in its body that the obligation was that of the trustees 'in their capacity as trustees and not otherwise' or 'as trustees but not as individuals.'

"While they are not agents, the trustees have their duties to perform; and the effect of the statute is to charge them in respect of the property to which their representative duties attach: and not to require payment out of their private funds, in the event that the trust property should prove insufficient. In a case of agency, there is a principal to be charged; and in the case of a trusteeship there is the trust estate. The representative character in both cases has such kinship that under the broad language of the statute no well-founded distinction can be made as to the exemption from liability.

[2, 3] "The plaintiff contends, however, that if such a construction is given to section 3101 as to make only the trust property applicable to payment, that construction defeats its purpose, in that the note, it is said, would then be a note payable out of a particular fund and hence nonnegotiable, whereas section 3101 deals solely with negotiable instruments.

"I do not think, however, that a note, negotiable in its general form, is rendered nonnegotiable because executed by a trustee in a way to relieve him from personal liability. When a note is executed by trustees in their trust capacity exclusively, it carries the general credit of the trustees as such; and resort is not confined to any particular fund or portion of the trust estate. All the existing trust property as well as future acquisitions and accumulations may be subjected to payment The promise made on behalf of the estate, or

principal, is as unconditional in its relation to the estate represented as that of an individual in relation to himself.

"In the case at bar the complaint alleges, and the agreement in evidence shows, that the trustees had power to bind the trust property for indebtedness incurred in the conduct of the business; and the note evidenced an indebtedness so incurred. It is asserted in the complaint that the trustees executed this particular note without authority, because they omitted to include the stipulation of personal exemption of the trustees, the certificate-holders and the trustors. According to my way of thinking, however, the power to incur indebtedness is wholly independent of the inclusion of the stipulation in the contract."

[4] Two important rules of statutory construction in our judgment combine to require us to adopt the construction of section 20 of the Uniform Negotiable Instruments Law announced in the cases of Kerby v. Ruegamer, Megowan v. Peterson, American Trust Co. v. Canevin, Hamilton v. Young, and First National Bank v. Jacobs, cited supra. The first of these rules is laid down in Utah State National Bank v. Smith, 180 Cal. 1, at page 3, 179 P. 160, 161, where referring to the Uniform Negotiable Instruments Law, our Supreme Court said: "It is generally held that it is the duty of the courts in construing this law to have in mind the purpose of securing uniformity in the law of commercial paper." Whatever may be said of the decisions above referred to as a matter of strict logic they represent the overwhelming weight of authority in this country upon the construction of section 20 of the Negotiable Instruments Law when applied to notes executed by trustees of strict trusts. "As we view it, therefore, it is our plain duty to follow the numerous decisions that have directly passed upon the negotiable instruments law, and have construed it in accordance with the majority rule. The question is one of business expediency, and not of logic or equity as applied to an individual case." Utah State National Bank v. Smith, supra, at page 4 of 180 Cal., 179 P. 160, 161.

[5] The second rule is thus stated in Ocean Acc., etc., Co. v. I. A. C., 173 Cal. 313, 317, 159 P. 1041, 1042, L. R. A. 1917B, 336: "Under familiar principles, when a statute which has received judicial construction by the courts of one state is adopted and re-enacted by another state, it is so adopted and re-enacted in consonance with the construction put upon it by the courts of the first sovereignty. The common sense of this rule of construction is so apparent that it needs in its support nothing more than the obvious suggestion that if the later lawmakers did not design that the construction put upon any given language should obtain, they would modify and change that language to express their different intent." When the Negotiable Instruments Law was enacted in California section 20 had been construed to apply to the case of a strict trustee in Kerby v. Ruegamer, Megowan v. Peterson, and American Trust Co. v. Canevin, cited supra. We must presume that our Legislature had those decisions in mind and was content to have the section so interpreted, else they would have modified the language to express their different intent.

We have not been unmindful in the citation of the foregoing cases that in Hamilton v. Young, the supreme court of Kansas held that under the peculiar provision of the Constitution of that state a business trust is a corporation. But the court first took up and decided the case from the point of view of its being a pure or strict trust with no separate legal entity and concluded: "The result is that, on plaintiff's theory of a pure trust, he cannot recover on the note against Charles and Young as individuals." This was not, as claimed by counsel for appellant, mere obiter dictum; for "where the court bases its decision on two or more distinct grounds, each ground so specified is, as much as any of the others, one of the grounds, a ruling upon questions involved in the case, and not 'mere dictum.'" King v. Pauly, 159 Cal. 549, 555, 115 P. 210, 212, Ann. Cas. 1912C, 1244.

The case of Schuling v. Ervin, 185 Iowa, 1, 169 N. W. 686, largely relied on by counsel for appellant, is not in point on the question here involved. There the Second Christian Church was an incorporated society as is clearly pointed out in the able dissenting opinion at page 689 and hence the trustees were not trustees of a strict or pure trust at all.

The argument of counsel for appellant that as so construed the note ceases to be a negotiable instrument because payable out of a particular fund, and therefore that section 20 would not be applicable to it may be further answered by pointing out that the same argument would be equally applicable to the cases from other jurisdictions which we have cited and relied upon. That question must be taken to be concluded by the decisions of those cases if the uniformity of decision sought to be obtained by the adoption of the Negotiable Instruments Law is not to be destroyed.

We believe it is sufficient to dispose of the cases of Conner v. Clark, 12 Cal. 168, 73 Am. Dec. 529, and Hall v. Jameson, 151 Cal. 606, 91 P. 518, 12 L. R. A. (N. S.) 1190, 121 Am. St. Rep. 137, to point out that they were decided before the adoption of the Uniform Negotiable Instruments Law in this state. In the interest of uniformity of decision, we consider it our duty to follow the majority rule in other jurisdictions in the construction of section 20 of the Negotiable Instruments Law rather than decisions of our own state which antedate the adoption of that law. To do otherwise would be to create anew the same condition of "anarchy of the authorities"

which the uniform law was designed to correct.

While realizing fully that a trustee of a pure trust has no principal in a strict technical sense, we feel bound to follow the construction of section 20 adopted in the cases hereinabove cited, and we do so the more willingly because such construction is in our judgment in full accord with what would be the common interpretation of such an instrument so executed by business men and merchants among whom such instruments are commonly circulated and who are not generally versed in the nice refinements of the law. It was largely because of the introduction of the quibbles of judicial logicians into the construction of a common medium of exchange in the business world that the Uniform Negotiable Instruments Law was framed and adopted.

[6] From another point of view and without regard to section 20 of the Negotiable Instruments Law we feel that the judgment of the trial court should equally be sustained. It has always been the law that by the insertion of apt words into the contract such as "as trustee but not individually" or "as trustee but not otherwise" the liability would be limited to the assets of the trust estate. (Cases cited supra). In this case the note was signed:

"Trustees of Greater San Francisco
Speedway Association (a Trust)
"Frew Morton, Pres.
"C. C. Loser, Sec."

On its face it is not the note of Morton and Loser but of the "Trustees of Greater San Francisco Speedway Association (a Trust)." Morton and Loser as agents or officers of the trustees sign the note in the name of the trustees as principals. By designating the makers as "Trustees" without otherwise or individually naming them it would seem that they had indicated an intention to bind the trustees solely as trustees and not as individuals as effectually as if they had inserted in the body of the note the words "solely as trustees" or some similar language. In other words the signature, "Trustees of Greater San Francisco Speedway Association (a Trust)," cannot be construed as mere descriptio personarum, as those words might be construed if appended to the signatures of the individuals. The signature on its face is the signature of and purports to bind "Trustees" and only the trustees and not the individuals who compose the trustees; and under the findings of the court this is precisely the sense in which the note was understood by the payee at the time it was executed and delivered. In this connection the trial judge said: "Morton and Loser had power to sign for the trustees and the trustees had power to incur the indebtedness evidenced by the note. Hence from a technical standpoint it may be said that Morton and Loser in so signing were exhibiting themselves, not as trustees or principals, but rather as agents of the trustees of the trust named."

For the reasons given, we conclude that the judgment should be, and it is, affirmed.

I concur: NOURSE, P. J.

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106 Cal. App. 95

Ex parte PARR.

Cr. 1944.

District Court of Appeal, Second District, Division 2, California.

May 27, 1930.

1. Courts ⟹97(2).

Federal decisions sustaining constitutionality of federal statutes are conclusive.

2. Intoxicating liquors ⟹224.

Under state statute, possession of intoxicating liquor does not presumptively prove illegality; prosecution having burden of proving unlawful possession (Const. U. S. Amend. 18; National Prohibition Act tit. 2, §§ 3, 29, 33 [27 USCA §§ 12, 46, 50]; St. Cal. 1921, p. 79, §§ 1, 2).

Under National Prohibition Act tit. 2, § 3 (27 USCA § 12), the possession of any intoxicating liquor is prohibited, except as expressly authorized, and under section 33 (27 USCA § 50) the possession of liquors is prima facie evidence of violation of law, and burden of proof is upon possessor to prove lawful acquisition and possession. St. Cal. 1921, p. 79, §§ 1, 2, declare that acts or omissions made "unlawful" by Const. U. S. Amend. 18 or by the Volstead Act are prohibited, and to that end the penal provisions of the Volstead Act are adopted.

3. Intoxicating liquors ⟹236(6½).

Under state statute, possession of intoxicating liquor establishes prima facie case, which may be disproved by opposing evidence (Const. U. S. Amend. 18; National Prohibition Act tit. 2, §§ 3, 29, 33 [27 USCA §§ 12, 46, 50]; St. Cal. 1921, p. 79, §§ 1, 2).

It was conceded by defendant that intoxicating liquors of various kinds had been found in a cabinet in the dining room of his residence, but it was argued that mere possession without further proof of its illegality was insufficient to justify a conviction in view of National Prohibi-

tion Act tit. 2, § 33 (27 USCA § 50), which provides: "But it shall not be unlawful to possess liquors in one's private dwelling, * * * provided such liquors are for use only for the personal consumption of the owner," etc., and under St. Cal. 1921, p. 79, §§ 1, 2, which prohibit only acts which are declared "unlawful" by the Volstead Act.

4. Intoxicating liquors ⟹224.

Although mere possession of intoxicating liquor even in residence established prima facie case, "burden of proof" was not thereby shifted to defendant (Const. U. S. Amend. 18; National Prohibition Act tit. 2, §§ 3, 29, 33 [27 USCA §§ 12, 46, 50]; St. Cal. 1921, p. 79, §§ 1, 2).

5. Intoxicating liquors ⟹236(6½).

Possession of intoxicating liquors in dining room of defendant's residence was sufficient to authorize conviction under state statute, where defendant offered no evidence (Const. U. S. Amend 18; National Prohibition Act tit. 2, §§ 3, 29, 33 [27 USCA §§ 12, 46, 50]; St. Cal. 1921, p. 79, §§ 1, 2).

Proof of possession did not, as contended, shift the burden of proof to defendant, since he had the right if he wished, to go to the jury upon the state's proof alone and to argue that it was insufficient under all the circumstances of the case, but defendant would take the risk in choosing that course instead of introducing evidence.

Application by William Parr for a writ of habeas corpus against the Sheriff of Los Angeles County.

Writ denied.

MacDonald & Thompson, of Los Angeles, for petitioner.

Lloyd S. Nix, City Prosecutor, and F. W. Fellows and Joe W. Matherly, Deputy City Prosecutors, all of Los Angeles, for respondent.

CRAIG, Acting P. J.

The petitioner seeks release after conviction and sentence to imprisonment by the municipal court of the city of Los Angeles upon a charge of having committed a misdemeanor, in that on the 7th day of October, 1929, he unlawfully possessed intoxicating liquors. It appears without contradiction that intoxicating liquors of various kinds, containing more than one-half of one per centum by volume of alcohol, were found in a cabinet in the dining room of petitioner's residence, and that he "stated it was his own liquor and that he had had it in the house for a long time."

[1] It is contended that mere naked possession of intoxicating liquors is not sufficient to sustain a conviction in such cases, and that, since the Eighteenth Amendment to the Constitution of the United States does not so declare, no power was conferred upon the Congress to make possession unlawful. With the constitutionality of federal statutes which have been upheld by federal courts, we need not deal further than to observe that it is fundamental that their decisions are final and authoritative declarations of the proper construction to be placed upon the Constitution and laws of the United States. Elmendorf v. Taylor, 10 Wheat. 152, 6 L. Ed. 289; U. S. v. Reynolds, 235 U. S. 133, 35 S. Ct. 86, 59 L. Ed. 162. That the Congress is vested with such power has been decided in the affirmative. Riggs v. U. S. (C. C. A.) 14 F.(2d) 5.

The Eighteenth Amendment to the Constitution and the National Prohibition Act (U. S. Stats., Oct. 28, 1919, vol. 41, p. 307, title 2, ch. 85, 27 USCA) have so frequently and thoroughly been analyzed during a period of more than ten years, that quotation at length from them is unnecessary. By section 3 of title 2 of said act (27 USCA § 12) it was ordained: "No person shall * * * possess any intoxicating liquor except as authorized in this chapter, and all the provisions of this chapter shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

Section 33 of title 2 (27 USCA § 50), reads, in part: "After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept * * * in violation of the provisions of this title. * * * But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only * * *; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used."

Concurrently with the enactment of the foregoing provisions, our Legislature declared (Stats. 1921, p. 79):

"California hereby recognizes the requirements of the eighteenth amendment to the constitution of the United States for its concurrent enforcement by the congress and the several states. To that end, the penal provisions of the Volstead act are hereby adopted as the law of this state. * * *" Section 1.

"All acts or omissions prohibited or declared unlawful by the eighteenth amendment to the constitution of the United States or by the Volstead act are hereby prohibited and declared unlawful; and violations thereof are subject to the penalties provided in the Volstead act." Section 2.

[2] That possession, except as authorized by chapter 85, title 2, of the United States statutes, is an unlawful act, is manifest. That the legislation adopted only the penal provisions of said chapter, and omitted rules of evidence and procedural provisions, is also a settled question, and mere possession of intoxicating liquors in the ordinary acceptation of the term is not presumptive proof of a violation of law, but is an element of the offense, and the burden also lies with the prosecution in such a case to establish the unlawful character of possession. People v. Mattos, 67 Cal. App. 346, 227 P. 974; People v. Arnarez, 68 Cal. App. 645, 230 P. 193; People v. Buttulia, 70 Cal. App. 444, 233 P. 401; People v. Gatlin, 92 Cal. App. 42, 267 P. 564; People v. Medalgi, 94 Cal. App. 543, 271 P. 552.

Hence, it is argued by the petitioner that possession of intoxicating liquor in the dwelling is expressly authorized, and is not unlawful; that, since the California statute denounces only unlawful acts under the prohibition act as violations of the state statute, proof of an admission of possession, as disclosed by this record, without further showing of its illegality, is insufficient to establish an offense. There are certain specified exceptions contained in the original act, concededly legalizing possession of intoxicating liquors generally by virtue of the holding of a license or permit. The petitioner bases his plea in this proceeding upon the theory that, having violated no provision, as he contends, requiring such authorization to possess liquors, and being free from the burden of proving lawful acquisition or possession, he need do no more than rest upon the permissive clause of section 33, above quoted. The result of this reasoning would lead to the doubtful conclusion that possession by one not claiming rights requiring the precedent issuance of a license or permit is not classed among the exceptions to those provisions, and that, if the prosecution furnish no proof of the character of his acquisition or ownership of liquors, he is not shown to have committed any offense, because "it shall not be unlawful to possess liquors in one's private residence." It is to be observed that the National Prohibition Act embraces all of the following provisions: "No person shall * * * possess any intoxicating liquor except as authorized in this chapter. * * * Any person violating the provisions of any permit, or * * * any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined. * * * But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein." In reference to the application of these provisions no decision in this state to which our attention has been called goes further than to hold defendants unfettered by the evidentiary or procedural clause generally that "the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used." Title 2, §§ 3, 29, 33 (27 USCA §§ 12, 46, 50). At no time has it been indicated that ordinary rules of evidence should not apply to the proviso as to possession in a dwelling contained in the National Prohibition Act when that proviso is involved in a prosecution under the state law, or that one charged with the violation here in question need offer no evidence in response to a prima facie case.

Our courts have heretofore seen fit in this respect to adopt the construction placed upon the section in controversy by the Supreme Court of the United States. In Cunard Steamship Co. v. Mellon, 262 U. S. 100, 43 S. Ct. 504, 508, 67 L. Ed. 894, 27 A. L. R. 1306, consolidated suits wherein the scope of the National Prohibition Act was exhaustively discussed, it was said: "Other provisions show that various penalties and forfeitures are prescribed for violations of the act, and that the only instance in which the possession of intoxicating liquor for beverage purposes is recognized as lawful is where the liquor was obtained before the act went into effect and is kept in the owner's dwelling for use therein by him, his family, and his bona fide guests."

In decisions of the District Court of Appeal, approved by the Supreme Court, the question has been determined upon the authority of the foregoing rule, and of cases wherein it was held that the prosecution need not negative exceptions. In People v. Avila, 78 Cal. App. 415, 248 P. 693, 695, it was stated: "The only question presented to the jury for determination was whether the defendant had unlawful possession of the intoxicating liquor under the provisions of section 33 of title 2 of the Volstead Act * * * which reads: 'But it shall not be unlawful to possess liquors in one's private dwelling, while the same is occupied and used by him as his dwelling only * * *.' This section must be read in connection * * * with section 3 thereof, making it unlawful to manufacture, barter, sell, or possess intoxicating liquor for beverage purposes after the date therein mentioned. While this point has not been expressly decided in this state, the matter has been passed upon in a civil case by the Supreme Court of the United States, wherein it is held that the only instances where intoxicating liquors can be lawfully possessed for beverage purposes is where the intoxicating liquors were obtained prior to the date mentioned in section 3 of title 2 of the Volstead Act. * * * Cunard Steamship Co. v. Mellon, 262 U. S. 100, 27 A. L. R. 1306, 67 L. Ed. 894,

43 S. Ct. 504. We think that section 33 of title 2 of the Volstead Act, relative to the possession of intoxicating liquors for beverage purposes, which may be lawful, refers to and must be held to refer to intoxicating liquors procured prior to the date mentioned in section 3. We find no provision of the Volstead Act making lawful the possession of intoxicating beverages commonly known as and called 'bootleg whisky' and 'jackass brandy.' If this interpretation of the Volstead Act is correct, then by the admission of the defendant of the possession for beverage purposes of the intoxicating liquor found in his residence, and also the intoxicating character thereof, as admitted by his counsel in open court, the case for the prosecution was practically established."

[3, 4] People v. Jones, 78 Cal. App. 554, 248 P. 964, also approved by our Supreme Court, quoted the same language of Cunard Steamship Co. v. Mellon, supra, in disapproving a requested instruction, which was held too broad without more than the statement that the defendant had a right to possession in his dwelling, in the language of the statute. If it be held that the proof showed unlawful possession, prima facie this would shift the burden of proof to the defendant, but, in view of the foregoing authorities, it presents merely such evidence of a violation of law as might be offset. He was not, as he contends, thereby deprived of any right, or compelled to testify against himself, nor was the burden of proof shifted upon his shoulders. He was entitled to go to the jury upon the state's proof alone, and to combat it in argument as being insufficient proof of the ultimate fact under all the circumstances of the case; but he would take the risk in so doing instead of introducing evidence. Brock v. Metropolitan Life Ins. Co., 156 N. C. 112, 72 S. E. 213. Although not expressly defined by authorities in this state, the rule has been frequently stated in other jurisdictions. In State v. Hardelein, 169 Mo. 579, 70 S. W. 130, 131, the Supreme Court of Missouri used the following language: "Making out a prima facie case does not necessarily or usually change the burden of proof. A prima facie case is that amount of evidence which would be sufficient to counterbalance the general presumption of innocence, and warrant a conviction, if not encountered and controlled by evidence tending to contradict it, and render it improbable, or to prove other facts inconsistent with it. But the establishment of a prima facie case does not take away from a defendant the presumption of innocence, though it may, in the opinion of the jury, be such as to rebut and control it; but that presumption remains, in aid of any other proofs offered by the defendant to rebut the prosecutor's prima facie case."

[5] A similar rule was applied in McCombs v. State, 50 Tex. Cr. R. 490, 99 S. W. 1017, 9 L. R. A. (N. S.) 1036, 123 Am. St. Rep. 855, 14 Ann. Cas. 72. Because procedural provisions and rules of evidence enacted by the Congress were omitted from the legislative act of this state, it does not follow that by such silence the Legislature ignored or abridged well-recognized and long-existing general rules of evidence. While none of our statutes or decisions cast the burden upon a defendant of proving matters descriptive of the offense, the right to possession of generally prohibited liquors in a residence is established by the interpretation of federal courts, adopted by our own tribunals through the application of established principles, and under these he may need to produce some evidence if he would counterbalance a prima facie case made out by the prosecution. It follows that the introduction in evidence of liquors admittedly the property of one shown to have possessed them in his residence was sufficient in the absence of anything more from which the court might lawfully conclude that the offense charged had been committed; or, on the other hand, it might have believed that the possession was legitimate; and to so hold is not to set at naught the presumption of innocence or to shift the burden of proof, but rather to maintain and apply all of these rules harmoniously.

The writ of habeas corpus is denied.

We concur: IRA F. THOMPSON, J.; GATES, Justice pro tem.

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106 Cal. App. 67

ALLEN et ux. v. STELLAR et al.

Civ. 4099.

District Court of Appeal, Third District, California.

May 26, 1930.

1. Pleading ⟹352.

Allegations of complaint that agreement attached thereto contains specific matters, not in the attached agreement, *held* properly stricken.

2. Specific performance ⟹114(3).

Complaint for specific performance of agreement to convey "West ½ of Lot 17, Tract 1000," to be obtained from others, *held* demurrable for insufficient description (Code Civ. Proc. § 453).

Complaint sought specific performance of agreement wherein defendant covenanted to sign contract describing proper-

ty as "When I will have procured deed to West ½ of Lot 17, Tract 1000, from" named parties and did not allege that such parties owned no other tract except tract described, nor indicate that tract of land was located in town where contract was executed.

3. Pleading ⟹312.

Complaint alleging agreement to convey property to be procured from husband and wife, alleging deed from husband only, *held* demurrable for variance from agreement.

4. Appeal and error ⟹918(1).

Appellate court cannot assume permission was asked to amend request not appearing in transcript.

5. Appeal and error ⟹195.

Plaintiffs not requesting leave to amend, nor showing facts overcoming objection, could not claim court abused discretion in denying leave.

Record showed that demurrer to complaint was sustained and judgment entered for defendants, but that no request for leave to amend was made and did not recite any facts which plaintiffs might have set forth to obviate objections urged by defendants, though plaintiffs had opportunity to ask leave to file an amended complaint.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by J. E. Allen and wife against E. A. Stellar and wife and another. Judgment for defendants, and plaintiffs appeal.

Affirmed.

G. Roy Garnett and Samuel M. Bernard, both of Los Angeles, for appellants.

Errol O. Shour, of Los Angeles, for respondents.

PLUMMER, J.

This cause is before us upon the plaintiff's appeal from the judgment of the trial court sustaining the defendants' demurrer, wherein the plaintiffs sought specific performance of the following contract:

"Van Nuys, Calif. 7/26/'24

"J. E. Allen: When I have procured deed to the West ½ of Lot 17—Tract 1000 from Richard W. Koehler et ux, I hereby agree to sign contract to you selling you on undivided ½ interest in the above ten acres, more or less, for the sum of $6250.00 on which you will receive a credit of $1250.00 leaving balance of $5000.00. Said property being acquired subject to encumbrances amounting to $7250.00, ½ of which the said Allen agrees to pay.

"E. A. Stellar."

The record shows that the complaint contains the following allegations:

"That on or about the 25th day of July, 1924, the plaintiff, J. E. Allen, and the defendant, E. A. Stellar, made their contract in writing whereby it was mutually agreed that said defendant E. A. Stellar would sell to the plaintiff, J. E. Allen, and said plaintiff, J. E. Allen would buy from said defendant certain real estate situate in the City of Los Angeles, County of Los Angeles, State of California, described as follows, to-wit: An undivided ½ interest in and to the West ½ of Lot 17 Tract 1000, as per map thereof recorded in Book 19 page 1 of Maps in the office of the County Recorder of said Los Angeles County, for the sum of $6250.00. A copy of which contract is hereto attached, marked Exhibit 'A' and made a part thereof."

"That said E. A. Stellar did procure a deed from said Koehler which was recorded on the 6th day of September, 1924, in Book 4219, page 139, Records of said Los Angeles County, but failed and refused to convey an undivided ½ interest in said property to said J. E. Allen, although often requested so to do."

Other portions of the complaint contained allegations that the sum of $6,250 was a fair, just, and reasonable value for said property, and that the plaintiffs have always been ready and willing to do and perform everything in said contract on their part to be performed, and offered to deposit the sum of $5,000, or such sum as the court might adjudge to be remaining due on said contract.

To this complaint the defendants interposed a motion to strike out all those portions of the complaint appearing in paragraph II thereof, which we have quoted, which are not contained within the written agreement, and also interposed a demurrer: (1) That said complaint does not state facts sufficient to constitute a cause of action, and (2) that the complaint is uncertain in that it cannot be ascertained from the agreement, which was made a part of the complaint, where the property therein attempted to be described is located.

The court granted the motion to strike out and also sustained the defendants' demurrer. The demurrer was sustained without leave to amend. In due time thereafter judgment was rendered in favor of the defendants.

[1, 2] An examination of the agreement and the complaint discloses a striking disparity between the pleading and the agreement. The complaint states that the agreement was in writing, containing certain particulars relative to the description of the

property. An examination of the agreement reveals that it contains nothing of the kind. The complaint does not set forth the agreement as it is written and then follows with a statement of what was intended, or what lands were understood to be described, but it sets forth that the writing contains specific matters which are not found therein. Under such circumstances, and in that state of the pleadings, the court necessarily had to grant the motion to strike out. With the portion stricken out the court had before it a complaint seeking specific performance of an agreement wherein the defendant E. A. Stellar covenants to sign a contract, etc., giving a description of the property, as follows: "When I will have procured a deed to the West ½ of Lot 17, Tract 1000, from Richard W. Koehler, et ux," etc. It is manifest that this writing does not locate the premises about which the contract to sell is later to be made. It is possible that Richard W. Koehler et ux own no other tract or parcel of land known as the west ½ of lot 17, Tract 1000, but it does not so appear from the complaint. It is possible that there is another tract that is so designated. The contract bears the following words and figures: "Van Nuys, Calif., 7-26-24." In this particular plaintiffs call attention to the following found in 36 Cyc., page 592, to wit: "Ordinarily, the town, county and state need not be mentioned, since it is an inference that the property is in the town, county and state in which the instrument is dated, or where the parties were dealing. But this is not necessarily true in all cases. There may be cases in which failure to give the town, county or state will render the description uncertain." There is nothing in the contract, other than just what we have stated, from which it may be concluded that the contract was actually entered into at Van Nuys.

In the cases of Joyce v. Tomasini, 168 Cal. 234, 142 P. 67; McKevitt v. Sacramento City, 55 Cal. App. 117, 203 P. 132; Carr v. Howell, 154 Cal. 372, 97 P. 885; Towle v. Carmelo, etc., Co., 99 Cal. 397, 33 P. 1126, relied upon by the appellants, additional circumstances appear in all of them which show that the court did not in any instance rely simply upon the name of the place given and the date indicated on the paper wherein the agreement or contract was thereafter written.

[3] Again, there is a variance between the agreement and the allegations of the complaint which necessitated a sustaining of the demurrer, because it is not shown that the defendant E. A. Stellar had yet acquired the deed called for in the agreement. Thus, the agreement specifies when a deed has been acquired from Richard W. Koehler et ux., and the allegation of the complaint is only that said E. A. Stellar did procure a deed from said Koehler. "Et ux." relates to the wife of Koehler, and there is no showing in the complaint that any deed from her has ever been obtained, or that it was unnecessary to obtain a deed from her, or any facts excusing or rendering unnecesssary the procuring of such a deed, before the defendant E. A. Stellar would be charged with the duty of signing a contract to sell the land mentioned in the agreement.

As the agreement and the pleadings appear in this case, we think the case of Craig v. Zelian, 137 Cal. 105, 69 P. 853, applies. It is there said: "An agreement for the sale of real property must not only be in writing and subscribed by the party to be charged, but the writing must also contain such a description of the property agreed to be sold, either in terms or by reference, that it can be ascertained without resort to parol evidence. Parol evidence may be resorted to for the purpose of identifying the description contained in the writing, with its location upon the ground, but not for the purpose of ascertaining and locating the land about which the parties negotiated, and supplying a description thereof which they have omitted from the writing."

There is nothing in the complaint identifying the description contained in the writing, with its location upon the ground. There is nothing in the complaint showing that the description refers to a particular tract of land, which can be identified from the description given. The description in the writing which we have set forth is less certain and more indefinite than the description contained in the case of Eaton v. Wilkins, 163 Cal. 742, 127 P. 71, wherein it was held that the description was insufficient.

The cases having to do with defective or uncertain agreements or writings relative to the description of the lands about which the parties are attempting to contract are so numerous that we need not cite them, but will content ourselves with referring to 23 California Jurisprudence, pages 435 to 437, §§ 14 and 15. From one of these sections we may quote the following as bearing upon the issues here involved, to wit: "Ordinarily, a description is not sufficiently certain to authorize a decree of specific performance, when it does not show the state or county in which the land is situated." The only authority we need to cite in support of the court's action in granting the motion to strike out is found in section 453 of the Code of Civil Procedure.

[4, 5] If we grant the contention of the appellants of a possibility of supplying the defects in the agreement, the action of the trial court must nevertheless be sustained. The record shows that the demurrer was argued on the 4th day of January, 1925; that on the 14th day of January, 1925, the court made

its order sustaining the defendants' motion to strike out, and also sustaining the defendants' demurrer, and that on said day appellants were given notice thereof; that thereafter, and on the 16th day of January, 1925, judgment was entered in favor of the respondents. The record is silent as to the appellants having asked leave to amend; nor is there any showing in the record of any facts which the appellants might have set forth to obviate the objections urged by the respondents. It is true that in one of the briefs filed in this court we find the following: "In the case at bar plaintiffs filed a brief in which they asked the trial court to allow an amendment, if the said court was inclined to sustain the demurrer." It does not appear from the transcript that such permission was asked, and, so far as the brief is concerned, we cannot assume that something was done which does not appear in the transcript, duly certified.

Having information of the ruling of the court and an opportunity to ask leave to file an amended complaint, and not having done so, it is too late now to complain of any abuse of discretion on the part of the court. The rule is well stated in 21 California Jurisprudence, page 119, § 77, as follows: "Upon sustaining a demurrer to a complaint, the trial court has discretion either to allow an amended complaint to be filed or to give judgment forthwith for the defendant, and its action either way will not be interfered with upon appeal unless it is made to appear by the record that there has been an abuse of discretion. A plaintiff may not amend as a matter of right, and in order to be in a position to complain upon appeal of an abuse of discretion in sustaining a demurrer without leave to amend, he must ask permission to amend and indicate in some manner how the objection raised can be met. It is improper arbitrarily to refuse permission to amend a complaint after sustaining a special demurrer." This does not appear to have characterized the action of the trial court in the case at bar.

In Hogan v. Horsfall, 91 Cal. App. 37, 266 P. 1002, 1003, this question was presented to the district court of appeal of the First district, and the following language appears in the opinion: "At the outset it may be stated that appellants, by failing to ask leave to amend, waived any abuse of discretion on the part of the court in denying such leave"—citing Buckley v. Howe, 86 Cal. 596, 25 P. 132; Durrell v. Dooner, 119 Cal. 411, 51 P. 628; Prince v. Lamb, 128 Cal. 120, 60 P. 689; Williamson v. Joyce, 140 Cal. 669, 74 P. 290. "We will therefore discuss the complaint as though it contained all matters which possibly could have been alleged by appellant." The opinion then goes on to discuss the deficiencies or the defects in the complaint.

In Farber v. Greenberg, 277 P. 534, 538, this court, on passing upon the failure of a party to ask leave to amend, held as follows: "Appellant also complains that the trial court abused its discretion in denying him the right to amend. The record does not show in what manner appellant desired to amend—what changes or additions he proposed to make to his complaint. There is nothing in the record to indicate that he specified in the trial court the nature of the proposed amendment or amendments. Under these circumstances, we cannot say that the court below abused its discretion in denying leave to amend"—citing a number of authorities.

We do not need to follow the argument of counsel further in this case, as it satisfactorily appears, from what has been stated, that the judgment of the trial court must be affirmed, and it is so ordered.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

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105 Cal. App. 694

LEYMEL v. JOHNSON et al.

Civ. 275.

District Court of Appeal, Fourth District, California.

May 16, 1930.

Rehearing Denied June 9, 1930. Hearing Denied by Supreme Court July 14, 1930.

1. Officers ⟹30.

Member of state Legislature *held* not prohibited by Constitution from drawing salary as high school instructor during term of office (Const. art. 4, § 19).

Const. art. 4, § 19, provides no senator or member of assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this state, provided that this provision shall not apply to any office filled by election by the people. The member of state Legislature could draw salary, since he did not "hold office under this state," and while an employee because of his status as a teacher he was not in "employment under this state."

[Ed. Note.—For other definitions of "Office Under the State," see Words and Phrases.]

2. Officers ⟹1.

One of necessary characteristics of "public officer" is that he perform public function for public benefit and in so doing he be vested with exercise of some sovereign power of state.

[Ed. Note.—For other definitions of "Officer," see Words and Phrases.]

3. Words and phrases.

"Law" is a rule of civil conduct.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Zygmunt S. Leymel against Newton A. Johnson and others for a writ of mandate to compel payment of salary as a high school instructor. Judgment for defendants, and plaintiff appeals.

Reversed, with directions.

Claude L. Rowe, L. Powers, Jr., and Percy Church, all of Fresno, for appellant.

Glenn M. DeVore, Dist. Atty., and Rae B. Carter, Deputy Dist. Atty., both of Fresno, for respondents.

MARKS, Acting P. J.

At all times material to this appeal appellant was instructor in the Fresno High School, and respondents composed the board of trustees of the high school district. In July, 1928, the parties hereto executed a written contract employing appellant as an instructor in the Fresno High School for the year 1928-1929. This was a renewal of a former contract and the services of appellant were entirely satisfactory. At the general election held in 1926 appellant was elected a member of the state Legislature. He qualified and served during the session of 1927 and was re-elected in 1928, serving during part of the 1929 session. Appellant performed his duties as instructor during the month of September, 1928, and on October 1st demanded payment of his salary of $205 which was then due under the terms of his contract of employment. Payment was refused upon the ground that he, as a member of the Legislature, was prohibited by section 19 of article 4 of the Constitution of California from drawing his salary as a teacher in a public school of the state. He brought this action to compel payment of this salary, and the trial court found against him and rendered judgment accordingly.

[1] The sole question to be decided on this appeal is whether or not a member of the state Legislature can draw a salary as instructor in a high school during his term of office. Section 19 of article 4 of the Constitution provides as follows:

"No senator or member of assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this state; provided, that this provision shall not apply to any office filled by election by the people."

It is conceded that the position of instructor in a high school is not a "trust under this state," so this particular phrase of the Constitution will not be considered. It remains for us to determine whether or not the position is an "office under this state" or an "employment under this state." We will consider these two questions in the order in which we have stated them.

The purpose of the adoption of this section of the Constitution was stated in the case of Chenoweth v. Chambers, 33 Cal. App. 104, 164 P. 428, 429, as follows:

"The amended section is much more sweeping than its progenitor, for it applies to all offices, other than elective offices, and forbids the holding or accepting by a senator or assemblyman of any office, trust, or employment under this state 'during the term for which he shall have been elected.' The purpose of the amendment, as stated by one of its proponents in the official argument addressed to the electors, was to bring the Constitution into harmony with the American theory of government that 'those who execute the laws should not be the same individuals as those who make the laws,' and for the further reason 'that a legislator who is holding a position on the state pay roll is too apt to allow the wishes of the one responsible for his appointment to decide the manner in which his vote shall be cast. A man in such a position is, to say the least, not in that independent frame of mind which should be possessed by the ideal legislator.' "

Also in the case of Satterwhite v. Garrison, 34 Cal. App. 734, 168 P. 1053, 1054, it was said:

"Upon the merits of the whole case we are of the opinion that the intent and purpose of the framers in proposing, and of the people in adopting, this constitutional provision was the preclusion of members of the law-making branch of the state government from seeking or holding any appointive office or employment in or under any department or subdivision of the general state government, by the seeking or holding of which his independent action as such member of the Legislature might be in any wise influenced or affected."

The words "office" and "public office" have been variously defined by the decisions throughout the nation, so that, seemingly, an exact definition of the terms is difficult. In 21 California Jurisprudence, pp. 819, 820, we find the following:

"The words 'public office' are used in so many senses that the courts have affirmed that it is hardly possible to undertake a precise definition which will adequately and effectively cover every situation. Definitions and application of this phrase depend, not upon how the particular office in question may be designated nor upon what a statute may name it, but upon the power granted and wielded, the duties and functions performed, and other circumstances which manifest the

nature of the position and mark its character, irrespective of any formal designation. But so far as definition has been attempted, a public office is said to be the right, authority, and duty, created and conferred by law—the tenure of which is not transient, occasional, or incidental—by which for a given period an individual is invested with power to perform a public function for public benefit.

"The individual who occupies such an office is a public officer. He is a public agent and as such acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give to acts performed by the officer the authority and power of a public act or law. An 'incumbent' is one who is in the present possession of an office. The terms 'officer' and 'office' are paronymous, and in their original and proper sense are to be regarded as strictly correlative. They may be used in a sense other than the proper one, but the presumption is, unless the contrary appears, that the proper sense was intended.

"Of the various characteristics attached to public office by definition, some are regarded as indispensable, and others, while not in themselves conclusive, are yet said to indicate more or less strongly the legislative intent to create or not to create an office. One of the prime requisites is that the office be created by the Constitution or authorized by some statute. And it is essential that the incumbent be clothed with a part of the sovereignty of the state to be exercised in the interest of the public."

We find an exhaustive definition of the terms in the case of Curtin v. State of California, 61 Cal. App. 377, 214 P. 1030, 1033, as follows:

" 'The most essential characteristic [of an office] is * * * "that the incumbent, in his independent capacity, is clothed with some part of the sovereignty of the state, to be exercised in the interest of the public, and required by law," and that the duties are of a continuous character, as opposed to a mere temporary employment.' Barker v. State, 69 Ohio St. 68, 72, 68 N. E. 575, 576, citing State v. Brennan, 49 Ohio St. 33, 29 N. E. 593; State ex rel. Armstrong v. Halliday, 61 Ohio St. 171, 55 N. E. 175.

"In Robertson v. Ellis County, 38 Tex. Civ. App. 146, 84 S. W. 1097, the action was by an official stenographer of the district court of said county to recover a sum of money alleged to be due him for services rendered as such stenographer. The important question in the case was whether the position of stenographer for said court as created by an act of the Legislature of the state of Texas was an office. The Texas Court of Appeals held that the position was not an office within the meaning of the word 'office' as used in a certain section of the Constitution of that state, and as it is commonly used in all the Constitutions throughout the United States. The reasoning of the court in that case is so pertinent to the situation here that we quote from the opinion therein in extenso as follows:

" 'The definition of the term "office," as given by Mr. Mechem in his work on Public Officers, is quoted with approval by our Supreme Court in the case of Kimbrough v. Barnett, 93 Tex. 301, 55 S. W. 120, and is as follows: "A public office is the right, authority, and duty created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public." ' "

In Walker v. Rich, 79 Cal. App. 139, 249 P. 56, 59, the term "public office" was defined as follows:

" 'The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer.' The cases generally have approved and accepted the definition of 'public office' and 'public officer' thus given by Mr. Mechem."

[2] It would seem, therefore, that one of the necessary characteristics of a public officer is that he perform a public function for the public benefit and that in so doing he be invested with the exercise of some of the sovereign powers of the state. No matter how highly we regard the profession of teaching, we cannot conclude that the teacher is exercising some of the sovereign powers of the state in performing the arduous duties of his profession. He must be paternal in endeavoring to correct the faults of the young. He must be the moralist in instilling into their minds the high ideals of rectitude that will enable them to develop into the type of citizenship which should be the ambition of all. He must be a disciplinarian to teach them that to obey the rules of conduct and life prescribed by society and the state is not only a duty but a pleasure to the upright citizen. He must be an educator to feed into their minds the learning of the past and prepare them to receive the developments of the ever-approaching future. In doing these things he can accomplish them as the man and the citizen, and for success in his endeavors he does not need to be clothed with any of the sovereign functions of the state. The nearest approach that he has to this sovereignty is

when he negotiates his contract of employment with his board of trustees. The art of teaching came into being with the human race and preceded the existence of the state. The aboriginal father and mother, out of their crude experiences of life, became the first teachers of their offspring and from this small beginning has developed the modern profession of teaching. In fact, the modern state to a great extent is the result of the devotion and labors of the teachers and thinkers of the ages. A thinker is a teacher in the broadest meaning of the term, and the state is to a degree dependent upon its teachers for its stability, continuation, and upbuilding. While the education of the youth of the land is a most important governmental duty and function, the teacher is not clothed with any of the sovereign powers of the three great divisions of government, the legislative, executive, or judicial, in performing the important duties of his employment. He is not, therefore, holding an "office under this state." This conclusion has the approval of the Supreme Court in the case of Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042, 1045, in both the opinion of the court and the dissenting opinion of Mr. Justice Fox. In this dissenting opinion he said:

"The position of a teacher is distinctly defined by the Code (Pol. Code, § 1617) to be that of an employee. If the statutes and rules of the board determine his duties, powers, and rights, all that remains to complete the contract is his selection for the place; and it makes no difference whether that selection is made by a vote of the board, commonly called an 'election,' by appointment, or by specially negotiated contract. It does not change the fact that he is still an employee, and that his rights are based upon his contract of employment."

The views we have expressed find further support in the case of Mitchell v. Board of Education, 137 Cal. 372, 70 P. 180. In this case the board of education was the appellant and failed to file an undertaking on appeal as required by the Code of Civil Procedure. On a motion to dismiss the appeal because of the lack of this undertaking, the appellant attempted to excuse this failure under the provisions of section 1058, Code of Civil Procedure, which are as follows:

"In any civil action or proceeding wherein the state, or the people of the state, is a party plaintiff, or any state officer, in his official capacity or on behalf of the state, or any county, city and county, city, or town, is a party plaintiff or defendant, no bond, written undertaking, or security can be required of the state, or the people thereof, or any officer thereof, or of any county, city and county, city, or town."

The appeal was dismissed, the court thereby holding by implication that the members of the board of education were not acting as state officers in their official capacity nor were they acting as such in behalf of the state nor were they officers of any county, city and county, city, or town.

We must pass to the question of whether or not appellant was engaged in an occupation which was included within the terms of the phrase "employment under this state" in performing his duties as instructor at the Fresno High School during the month of September, 1928.

It must be conceded that generally speaking an office includes an employment. It is also generally true that an employment does not necessarily imply an office. The distinction between an employment and an office is well drawn in 21 California Jurisprudence, at page 824, as follows:

"It is true that, in a sense, every office is an employment, and that all public officers are 'servants' of the people; but it by no means follows that every public employment is an office. As has been pointed out in another article, the most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and entrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting; while an employment is, as a rule, based upon a contract with the employee, defining his duties, fixing his compensation and determining the period of his employment. One so employed is not an agent of the state; he is the servant or employee of the person or persons employing him, although the latter may be public officers and the employment may be in and about a public work or position. There are other incidents which ordinarily distinguish a public officer, such, for instance, as a fixed tenure or position, the exaction of an oath and, perhaps, an official bond, the liability to be called to account as a public offender for misfeasance or nonfeasance in office, and the payment of a salary from the general treasury."

In Curtin v. State of California, supra, this distinction was made as follows:

"As said by Chief Justice Marshall, 'Although an office is an employment, it does not follow that every employment is an office.' Mr. Mechem, in his work on Public Officers, says: "The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer.' "

This distinction has been recognized in many California cases. Cunning v. Carr, 69 Cal. App. 230, 230 P. 987; Walker v. Rich, supra; Kennedy v. Board of Education, supra; Patton v. Board of Health, 127 Cal. 388, 59 P. 702, 78 Am. St. Rep. 66.

The conclusion that the status of a teacher is that of an employee is irresistible. The position is secured by selection by the board of trustees, and the terms of the employment are fixed by contract, the authority for which is found in the Political Code (section 1609). Under its general powers the board of education is authorized to enter into contracts with teachers and fix their compensation and terms of employment. Marion v. Board of Education, 97 Cal. 606, 32 P. 643, 20 L. R. A. 197. It may make reasonable rules governing vacations of teachers and providing their duties where such rules do not conflict with a statute. Fairchild v. Board of Education, 107 Cal. 92, 40 P. 26; Loehr v. Board of Education, 12 Cal. App. 671, 108 P. 325.

[3] The contract of employment of a teacher produces the relation of employer and employee; the first, the board of education, and the second, the teacher. The very relation implies the right of the employer to regulate the activities of the employee within the bounds prescribed by law. Of course, the powers of the board are limited by statutes, but does this fact alone render this employment under the state? We think not. Under the present complex system of society and organization of government, the activities of every citizen are circumscribed and limited, of necessity, by the laws of the land. Were it otherwise, we could not have organized government. Law is a rule of civil conduct and in our every activity of life we are constantly coming into the shadow of some law that limits the freedom of our movements. Are the activities of a teacher more limited by law than those of the banker, the building and loan association, the public service corporation, the barber, the lawyer, the doctor, the dentist, and many professions, trades, and callings? We think not. The statutes governing the employment, duties, and privileges of the teacher are rules of contract and regulation defining the duties, privileges, and obligations of the profession.

It is argued that part of the money which pays the salary of the teacher and maintains the educational system of California is provided from state funds. This is true. It is also true that in recent years part of the money expended by counties in construction of certain highways comes from the state. This fact alone would not make a laborer employed in the building of such a road an employee under the state. The state does not reserve to itself or use the power and authority of the employer to hire and discharge and regulate and direct the duties of such a laborer. The furnishing of funds by the state to local bodies to assist in the maintenance of schools and the construction of good roads is merely the exercise of that benevolent authority given it to expend certain state funds for the common good of all its citizens. We are of the opinion that the position of instructor in a high school is not an "employment under this state."

Returning again to the purposes of the people in adopting the section of the Constitution under consideration as set forth in Chenoweth v. Chambers, supra, and Satterwhite v. Garrison, supra, is a teacher, by virtue of his employment and the state of mind arising therefrom, in such a position that he would be incapable of independent action as a member of the Legislature? We do not believe that his voice and vote on legislation would be any more influenced by the bare fact of his contract to teach than they would if he had no present contract of employment. It may be admitted that from the nature of his profession he would have a considerable interest in those measures affecting education. He should have a knowledge and experience that should make his advice valuable on such matters. This is as it should be for every legislator should possess some knowledge of certain activities of government. He cannot be familiar with them all. Legislators are, or should be, selected by the people because of a familiarity with governmental affairs and because they possess a knowledge of the needs and desires of their constituents and the state at large. In the Legislature we find members drawn from all callings, and from the combined knowledge and experience of all, the people at large should hope for legislation resulting in the common good.

The case of Curtin v. State of California, supra, decided under the constitutional provision preceding the one we are considering, goes much farther than we are required to go in holding that appellant is not prohibited by the Constitution from drawing his salary as instructor in the Fresno High School for the month of September, 1928, by the fact that he was then serving a term as a member of the Legislature of the state of California. J. B. Curtin was a state senator and during his term of office was appointed by the Governor as a "person versed in the matters of taxation" to investigate and report on measures affecting taxation in the state, the authority for which appointment was an act of the Legislature passed and approved in 1905. He performed the duties of his appointment and brought suit against the state for the reasonable value of his services which, under the decision, he was permitted to recover. If the provisions of section 19 of article 4 of the Constitution as it then existed did not bar Curtin's recovery, the reasoning of the court leads us to the conclusion that the present constitutional provisions are not a bar to a recovery in the case before us.

All the material facts in the case were either admitted by the pleading, or stipulated to by the parties in the trial court. A new trial would serve no purpose. The judgment appealed from is reversed, with directions to the trial court to enter judgment for appellant and issue the writ of mandate as prayed for.

I concur: BARNARD, J.

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106 Cal. App. 126

KARLIK v. PETERS.

Civ. 64.

District Court of Appeal, Fourth District, California.

May 28, 1930.

1. Mechanics' liens ⚷271(15).

Subcontractor's complaint failing to plead contents of claim of lien did not state cause of action against owner (Code Civ. Proc. §§ 1183–1203).

The complaint alleging contract entered into with general contractor failed to allege that original contract was in writing or that same or any plans and specifications for doing of work was filed for record with county recorder as prescribed by Code Civ. Proc. § 1183, and although alleging the filing of a claim of lien as prescribed by sections 1183–1203 did not set out contents of the claim of lien or legal effect thereof, nor did plaintiff seek to foreclose purported lien, the prayer of complaint being for money judgment only against owner.

2. Pleading ⚷248(4).

Permitting amendment to complaint by subcontractor to show owner's agreement to personally assume and pay claim *held* erroneous as stating separate cause of action.

The original complaint sought recovery against owner on theory of agency of general contractor to enter into arrangement for construction of certain unit and cause of action set up in amended complaint based on alleged agreement on part of owner to pay subcontractor was entirely new, distinct, and independent cause of action against owner and not against general contractor and did not arise out of the same transaction as that out of which original cause of action arose.

3. Appeal and error ⚷1041(2).

Error in permitting amendment to complaint to show promise by owner to personally assume claim of subcontractor was not prejudicial.

Findings of court adopting allegations of amended complaint and finding the same to be true disclosed a meritorious cause of action in favor of plaintiff and against owner so that errors affecting only matters of pleading and procedure were not prejudicial.

4. Appeal and error ⚷907(2).

Appellate court, in absence of evidence, must assume that evidence was sufficient to support findings and that trial was fairly conducted.

5. Pleading ⚷208.

Special demurrer failing to state grounds on which it was made was defective in form (Code Civ. Proc. §§ 430, 431).

6. Pleading ⚷238(4).

Order granting leave to file amended complaint pursuant to oral application at time parties were in court in response to notice of motion for judgment on pleadings was not erroneous.

Court, in case plaintiff through error or inadvertence failed to state cause of action in original complaint, had not only the right, but duty to permit him to file an amendment to original pleading, even though no notice had been originally given.

7. Pleading ⚷350(3).

Court, in case plaintiff has just cause of action which through accident or mistake he has failed to set out, should, on motion for judgment on pleadings, permit amendment.

8. Appeal and error ⚷959(1).

Action of trial court in permitting amendment to complaint will be sustained in absence of gross abuse of discretion.

9. Judgment ⚷251(1).

In subcontractor's action judgment requiring plaintiff to supply certain fixtures claimed to be defective *held* beyond issues.

The amended complaint setting out owner's agreement to personally assume and pay claim of subcontractor in consideration of promise to forbear suing on claim of lien, and on further promise to furnish at owner's convenience and on notice from her certain new materials and replace certain fixtures which had been installed, did not invoke any equitable remedy, and was merely an action at law based on promise of owner in which court had no jurisdiction to render judgment other than for recovery of money.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by John P. Karlik against E. Rosamond Peters, also known as E. Rosamond Peters Kurfurst, and others. From the judgment, defendant named appeals.

Modified, and, as modified, affirmed.

Charles B. DeLong, of San Diego, for appellant.

Alfred T. Roark, of San Diego, for respondent.

AMES, Justice pro tem.

This action was commenced by filing a complaint against appellant, E. Rosamond Peters, as the sole defendant. The complaint alleges in substance that on a certain date appellant entered into a contract with H. L. McFarland and Claude Swope, copartners doing business under the firm name of McFarland & Swope, as general contractors for the erection and construction for her of a bungalow court on certain real property belonging to her in the city of San Diego, and that said McFarland & Swope were authorized by defendant, E. Rosamond Peters, to act as her agents and as such to enter into arrangements with contractors and subcontractors for the construction of certain units or portions of said bungalow court. That thereafter, pursuant to such authority, respondent entered into a contract with McFarland & Swope, by the terms of which he agreed to furnish materials and labor and install in said bungalow court certain plumbing and gas-heating fixtures for a money consideration therein named. There is no allegation in the complaint that the original contract was in writing, or that the same or any plans and specifications for the doing of said work were filed for record with the county recorder as prescribed by section 1183 of the Code of Civil Procedure. The due performance of the contract on the part of respondent is then alleged, together with the fact that, after a certain credit had been given, a balance remained due and unpaid. This is followed by an allegation of the filing, on the second day of December, 1926, of a claim of lien, as prescribed by the provisions of chapter 2, title 4, part 3, of the Code of Civil Procedure (sections 1183–1203) which time of filing was more than 90 days prior to the filing of the complaint in said action. The complaint does not set out the contents of the claim of lien, nor the legal effect thereof, nor does the respondent seek to foreclose his purported lien, the prayer of the complaint being for a money judgment only against the appellant.

By the answer of the appellant, which was filed in due time, she admits the furnishing of certain labor and materials used in the doing of said work, but denies the allegations of agency under said contract, and all indebtedness accruing by virtue thereof.

Thereafter, and pursuant to notice theretofore served on counsel for respondent, appellant moved for judgment on the pleadings, and upon the hearing of the motion the court, upon the oral application of respondent, and over the objection of the appellant, permitted respondent to file a second-amended complaint, in which McFarland & Swope, the general contractors employed by respondent, were joined as parties defendant. The second-amended complaint, so filed, contained two counts, the allegations of the first one of which followed substantially the allegations contained in the original complaint, omitting, however, the allegations with respect to agency, and there was added thereto a copy of the respondent's claim of lien.

The second cause of action adopts, by reference, all allegations in the first cause of action, and then pleads a promise made by defendant E. Rosamond Peters, alleging that she agreed that she would personally assume and pay the claim of respondent, in consideration of respondent's promise to forbear from suing on his claim of lien, and on his further promise to furnish, at appellant's convenience and upon notice from her, certain new materials and replace certain fixtures which had been installed in the structures involved, but no demand or notice for installing such fixtures is alleged. No decree of foreclosure is sought, the prayer of the second-amended complaint being for a money judgment only. Appellant demurred to the amended complaint generally and upon the ground "That two causes of action not arising out of the same transaction and not affecting all the parties to the action have been pleaded in one complaint," and also moved to strike from the files the second cause of action in the second-amended complaint upon the ground that "said second cause of action states a new and different cause of action than that pleaded in the plaintiff's original complaint." The court overruled appellant's demurrer and denied her motion to strike. Defendant Peters in due time filed her answer to the so-called second-amended complaint, by which she put in issue certain material allegations in both causes of action in the second-amended complaint. In its findings the court found that all of the material allegations in both causes of action in said second-amended complaint were true and ordered judgment against all of said defendants for the balance found to be due upon said contract, and judgment was entered accordingly. The court further found that respondent had agreed to furnish and supply certain new fixtures for appellant to replace certain defective fixtures theretofore installed, whenever so requested by appellant. No request or demand for such installation is found to have been made, but the court in

its judgment ordered that respondent supply defendant Peters with such fixtures in exchange for those which were claimed by her to have been defective.

From this judgment, defendant, E. Rosamond Peters, has appealed upon the judgment roll alone.

[1, 2] The appellant contends that the court erred in overruling her objection to filing the second-amended complaint, and overruling her demurrer thereto, and denying her motion to strike the second cause of action therefrom. Obviously, the original complaint, in failing to plead the contents of the claim of lien, failed to state a cause of action against appellant, and the cause of action therein alleged, if any was stated, was against McFarland & Swope, who were not parties thereto. The second cause of action in the second-amended complaint constitutes a cause of action arising after the claim of lien of respondent had been filed and was based upon her separate and independent promise, to which defendants McFarland & Swope were not parties, and does not pretend to state a cause of action against them. The second cause of action in the second-amended complaint was based upon an obligation, entirely separate and distinct from that upon which the original complaint was founded, and we are convinced, without the citation of authorities, that the court erred in permitting respondent to file his second-amended complaint and denying her motion to strike. Assuming that the original complaint stated a cause of action, such cause of action was against McFarland & Swope upon their contract with respondent. It did not purport to foreclose the lien as to appellant's property, and not even a remote compliance with our lien law is disclosed by its allegations. The second cause of action in the second-amended complaint states a cause of action against appellant, not arising, however, out of any statutory liability created by law, but upon her separate, distinct, and independent promise to pay an obligation which had ripened into a lien against her property, supported by respondent's agreement of forbearance to enforce his lien by process of law.

[3] This is an entirely new, distinct, and independent cause of action against appellant and not against her codefendants; it does not arise out of the same transaction as that out of which the first cause of action arose, but was a cause of action which could not with propriety have been joined with the first cause of action, and we are convinced that, in permitting the second-amended complaint to be filed and denying appellant's motion to strike the same from the files, the court erred. But were these errors so prejudicial to the rights of appellant that a reversal of the judgment is necessary? In the case of Grossetti v. Sweasey, 176 Cal. 793, 169 P. 687, 688, the Supreme Court says:

"The matter of pleading becomes unimportant when a case is fairly tried, as this one apparently was, upon the merits and under circumstances which indicate that nothing in the pleadings misled appellant to its injury."

In Connell v. Higgins, 170 Cal. 541, 150 P. 769, 773, the Supreme Court holds that in overruling a demurrer for misjoinder of causes of action the lower court erred, but says:

"We do not think that the defendant was seriously prejudiced thereby, and if this were the only error, we should not feel warranted in reversing the judgment for this cause."

In Bollinger v. Bollinger, 154 Cal. 695, 99 P. 196, 201, it is said:

"Judgment should not be reversed for errors that do not affect the substantial rights of the parties."

In Angell v. Hopkins, 79 Cal. 181, 21 P. 729, 730, it is said:

"Error in overruling a demurrer for misjoinder of causes of action is immaterial, if it does not affect the substantial rights of the parties."

In Asevado v. Orr, 100 Cal. 293, 34 P. 777, 779, the Supreme Court says:

"In the present case, however, the cause of action alleged against Orr is different from the cause of action alleged against these appellants; and, where the substantial rights of the parties have not been affected by a misjoinder of causes of action, a judgment that is rendered after a trial of the case upon its merits should not be reversed because the court overruled a demurrer for such misjoinder." Hirshfeld v. Weill, 121 Cal. 13, 53 P. 402; Trask v. Garza, 51 Cal. App. 739, 197 P. 807.

[4] Since the evidence introduced at the trial is not before us, we are bound to assume that the evidence was sufficient to support the findings, and that the trial was fairly conducted. That the second cause of action of the second-amended complaint states a cause of action against appellant is not questioned by her. The findings of the court adopt the allegations of the second-amended complaint, and find the same to be true. They also disclose a meritorious cause of action in favor of the respondent and against the appellant, and since the errors complained of affect only matters of pleading and procedure in the court below, we are unable to see how appellant has been prejudiced in any of her substantial rights.

It is, however, but fair to say that the judge who ruled on the motions which we have criticized was not the judge before whom the case was tried.

[5] The special demurrer was defective in form in not complying with the provisions

of section 431 of the Code of Civil Procedure, in failing to state the grounds upon which it is made. Section 430 of said code enumerates the grounds upon which a demurrer to a complaint must be based. The special demurrer does not state any of them, and the court would have been justified in disregarding the same for this reason, but the disposition of the case on other grounds renders this objection unimportant.

[6] Appellant next contends that the court erred in granting respondent leave to file his amended complaint with no notice of his motion having been previously given. From the minutes of the court, which are incorporated in the reporter's transcript, it appears that respondent was then in court in response to appellant's notice of motion for a judgment on the pleadings, and at that time made an oral application for and was granted leave to file his amended complaint. We fail to see any error in this order. If it appears that, through error or inadvertence the respondent failed to state a cause of action in his original complaint, it was not only the right, but the duty of the court, to permit him to file an amendment to his original pleading, even though no notice had been originally given. Fitzgerald v. Neustadt, 91 Cal. 600, 27 P. 936, 937; Kelley v. Kriess, 68 Cal. 210, 9 P. 129.

[7, 8] It is next contended by appellant that, at the time the motion for judgment on the pleadings, which were framed by the original complaint and the appellant's answer thereto, was argued and submitted, the only question before the court was whether or not the defendant could be personally charged with responsibility to the plaintiff for the value of labor and services rendered by respondent, when the same had been ordered by her general contractors. She argues that because it then appeared upon the face of the pleadings that no cause of action existed against appellant, the court erred in denying her motion. But in all applications for amendments to pleadings, the court should be extremely liberal, and if it appears that the plaintiff has a good cause of action, which by reason of accident or mistake he has failed to set out in his complaint, the court, on motion for judgment on the pleadings should, on his application so to do, permit him to amend. As it was said in Fitzgerald v. Neustadt, supra: "There was no error in denying the motion for judgment upon the pleadings, and allowing the plaintiff to amend his complaint. Such action of the lower court will always be sustained, unless there is a gross abuse of discretion." Felch v. Beaudry, 40 Cal. 439. There was no error in denying appellant's motion for judgment on the pleadings.

[9] In incorporating in the judgment an order to the respondent, directing him to supply the appellant with certain fixtures in exchange for others, claimed by her to be defective, the court went beyond the issues framed by the pleadings. The conditions precedent to the furnishing of said fixtures, as the agreement is set out in the second amended complaint, viz.: The convenience of the appellant and notice to the respondent are not alleged in any of the pleadings, nor found by the court to have been complied with. Nor did the court, from its findings, deduct any conclusions of law upon which this portion of the judgment was or could be based. The second cause of action in the second-amended complaint, upon which the respondent's recovery is based, did not invoke any equitable remedy, and was merely an action at law, based upon the promise of appellant, in which the court had no jurisdiction to render a judgment other than for the recovery of money.

It is therefore ordered that the judgment be modified by striking therefrom the following sentence:

"It is further ordered and adjudged that plaintiff shall supply the defendant, E. Rosamond Peters, with one new lavatory and one new bathtub in exchange for one lavatory and one bathtub already installed in the property of the said E. Rosamond Peters, and claimed by her to be defective, at such future time as the defendant, E. Rosamond Peters, may demand the same." And, as so modified, the judgment is affirmed.

We concur: CARY, P. J.; MARKS, J.

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106 Cal. App. 135

KIENLEN et ux. v. HOLT.

Civ. 214.

District Court of Appeal, Fourth District, California.

May 28, 1930.

Rehearing Denied June 23, 1930.

1. Automobiles ⟹171(2).

"Intersection" within statute relating thereto means area bounded by prolongation of property lines along two streets (California Vehicle Act, § 23).

California Vehicle Act, § 23 (St. 1923, p. 517), provides that "intersection" of public highways shall be area embraced within prolongation of boundary or property lines of two or more public highways which join one another at an angle, wheth-

er or not such public highway crosses the other.

[Ed. Note.—For other definitions of "Intersect; Intersection," see Words and Phrases.]

2. Trial ⟹395(3).

Finding that automobile driver was not guilty of negligence in operating automobile, following general allegations of pleadings, was sufficient.

The finding was that at and just prior to the time of collision plaintiff was driving and operating his automobile in a careful, prudent, and lawful manner, and neither of plaintiffs were guilty of any negligence contributing proximately or at all to accident or injuries resulting therefrom.

3. Appeal and error ⟹996, 1010(1).

Findings of trial court sustained by any evidence or any reasonable inference to be drawn therefrom cannot be disturbed on appeal.

4. Automobiles ⟹245(80), 245(88).

Neither automobile driver nor passenger *held* guilty of contributory negligence as matter of law in collision at intersection (California Vehicle Act, § 113).

5. Automobiles ⟹171(13).

Automobile driver reaching intersection first while approaching automobile was considerable distance away had right to assume approaching car would yield right of way (California Vehicle Act, § 113).

Though right to assume that automobile driver approaching intersection would exercise due care in operation of automobile, as required by California Vehicle Act, § 113, would not excuse contributory negligence, it furnishes a ground for reasonable inference which would support finding that neither automobile driver nor passenger were guilty of any negligence which contributed to collision or to injury.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Felix Kienlen and another against J. P. Holt. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Gray, Cary, Ames & Driscoll, Harden & Green, and J. P. Holt, all of San Diego, for appellant.

Sweet, Stearns & Forward, and Elwin L. Eckert, all of San Diego, for respondents.

MARKS, Acting P. J.

On the 30th of November, 1926, parties to this action were involved in an automobile collision in the intersection of El Cajon avenue and Oregon street in the city of San Diego, Cal. El Cajon avenue is a public street of the city of San Diego of a width of 110 feet between curbings. There are two roadways for vehicular traffic, each 35 feet in width, separated between intersecting streets by a parking 40 feet in width. Oregon street is 52 feet in width between its curb lines. The parkings on El Cajon avenue are set back from the curb lines of Oregon street, produced so that there is a total width of 81 feet between the curbings of the parkings where Oregon street and El Cajon avenue intersect.

A little after 4 o'clock on the afternoon of November 30, 1926, the respondents, who are husband and wife, were traveling west along and upon the north driveway of El Cajon avenue and approaching its intersection with Oregon street. Felix Kienlen was driving the automobile, and signaled a left-hand turn onto Oregon street. At this time he saw the appellant approaching from the west on the south driveway of El Cajon avenue at a point about 335 feet west from the west line of Oregon street. There being no other traffic in sight, Felix Kienlen made his left turn, and proceeded across El Cajon avenue and southerly on the street intersection to a point about 15 feet east and 7 feet north of the southwest intersection of the curb lines on the two streets. At this point his car was struck on the right rear half by the right front spring and fender of appellant's automobile. Kienlen testified that he did not look for nor see appellant's automobile after his first view of it, until just before the impact, when about 6 feet separated the two automobiles. He testified that all he could do to avoid a collision "was to step on the gas" and attempt to get out of the path of appellant's car. He further testified that, after he first saw appellant's car, his own automobile traveled about 110 feet, while appellant's automobile traveled about 335 feet up to the point of impact. Mrs. Kienlen testified that, when the car which her husband was driving had proceeded on its turn to the left, to a point approximate to the medial line of El Cajon avenue, she was looking to the west, and saw appellant approaching in his car on the south traffic lane of El Cajon avenue about 165 feet west from the west line of Oregon street, and that she did not call her husband's attention to the approach of this car, and did not again see it until about the time of the impact.

Appellant testified that he was driving his car easterly on the south traffic lane of El Cajon avenue, and did not see respondents' automobile until an instant before the impact. The intersection was unobstructed, and there was nothing to prevent the occupants of either car from seeing the other.

The court found in favor of the respondents,

and rendered judgment against appellant in the sum of $837.94. No serious question is raised as to the amount of the judgment.

Appellant relies upon three grounds for a reversal of the judgment, as follows: The first, involving a construction of the definition of an intersection under the terms of section 23 of the California Vehicle Act (St. 1923, p. 517). The second is based upon the language used in the findings of the court in which the court held that respondents were not guilty of contributory negligence. Under the third he asserts that respondents are guilty of contributory negligence as a matter of law.

[1] Appellant argues that, since there are two traffic lanes separated by a wide parking on El Cajon avenue, there are two separate street intersections, the centers of which are fixed by the medial line of Oregon street and the medial lines of the two traffic lanes of El Cajon avenue. In support of this contention, he relies on the case of Bartlett v. Hammond, 76 Colo. 171, 230 P. 109, in which the Supreme Court of Colorado held in accordance with the contention of appellant. This case, however, furnishes no authority for reaching a like conclusion under the laws of the state of California. Section 1958 of the Municipal Code of the city of Denver, of 1917, under the language of which the Colorado case was decided, provides as follows:

"The term 'street' shall apply to that part of the public highway intended for vehicles. The term 'street intersection' shall apply to any street which joins another at an angle, whether it crosses the street or not."

Section 23 of the California Vehicle Act, in force at the time of the accident in question, provided as follows:

" 'Intersection of public highways.' The area embraced within the prolongation of the boundary or property lines of two or more public highways which join one another at an angle, whether or not one such public highway crosses the other."

This definition of an intersection is plain, and free from any ambiguity. It must be held to mean just what it says; that at the intersection of El Cajon avenue and Oregon street, in question here, there was but one intersection which was bounded by the prolongation of the property lines along the two streets.

[2] The finding complained of by appellant is as follows:

"That at and just prior to the time of said collision plaintiff, Felix Kienlen, was driving and operating his automobile in a careful, prudent and lawful manner and neither of plaintiffs were guilty of any negligence contributing proximately or at all to said accident or the injuries resulting therefrom."

In this finding the court followed the general allegations of the pleadings, and our courts have held such findings sufficient. In the case of Talbot v. Ginocchio, 18 Cal. App. 390, 123 P. 223, the court held as follows:

"It is urged that the findings are insufficient to support the judgment, in that, as it is claimed, the 'finding that "the servant and employee of defendant in charge of said horse and wagon was driving the same carelessly and negligently" is a finding upon a mixed question of law and fact.' Appellant cites no authority in support of this assertion. In an action to recover damages resulting from the negligence of the defendant, 'a general allegation of negligence upon the part of defendant is sufficient.' In such a case, 'the negligence is the ultimate fact to be pleaded, and is not a legal conclusion.' House v. Meyer, 100 Cal. 592, 35 P. 308. The finding in question is of an ultimate fact, and is unobjectionable."

To the same effect is the case of Frederick v. Terminal Railways, 48 Cal. App. 336, 191 P. 1020, 1022, in which the following language was used:

"Appellants' final point is that the findings do not cover the material issues, the two principal objections urged being that, while the court negatives the specific acts of negligence charged in the complaint, it fails to find the facts which would explain the real cause of the overturning of the car, and that the court fails to affirmatively find that respondent at the time of the accident was exercising the highest degree of care in the operation of the car. There is no merit in these objections. The court did find that respondent was free from all of the acts of negligence charged against it in the complaint. The negligence pleaded in the complaint was the ultimate fact, and, having negatived the acts of negligence pleaded, the court was compelled to go no further. Todd v. Orcutt, 42 Cal. App. 687, 183 P. 963."

Under the language of these decisions we are of the opinion that the finding of the trial court which we have quoted was sufficient.

[3] The last ground for reversal, relied upon by appellant, presents more difficulties. The trial court might have easily found that both parties were negligent in the operation of their automobiles. The intersection was clearly unobstructed. Neither car was traveling at an excessive rate of speed, and, if it had been held that each driver was guilty of negligence in not looking and seeing the other, there would have been ample evidence to support such a finding, and this court would certainly not have disturbed it. However, the trial court found that the respondents were free from any negligence, and that appellant was guilty of the negligent operation of his automobile and solely responsible for the accident and the ensuing damage. If there is any evidence in the record, or any reasonable inference to be drawn from such evidence, to sustain the findings of the trial court they cannot be disturbed here. Witherow v. Unit-

ed American Insurance Co. of Pennsylvania (Cal. App.) 281 P. 668.

[4] We must here determine whether or not the evidence shows that the respondents, or either of them, were guilty of negligence as a matter of law under the evidence before us. In the case of White v. Davis (Cal. App.) 284 P. 1086, 1090, it was held as follows:

" 'Contributory negligence "is a question of law only when the evidence is of such a character that it will support no other legitimate inference than that in the one case the plaintiff was guilty of contributory negligence. * * * When the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from those facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, then, and only then, does the law step in and forbid plaintiff a recovery. * * * Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury." Zibbell v. Southern Pac. Co., 160 Cal. 237, 240, 116 P. 513; Wing v. Western Pac. Co., 41 Cal. App. 251, 182 P. 969. And the question of contributory negligence must be determined without regard to any negligence on the part of defendant. Hutson v. Southern Cal. Ry. Co., 150 Cal. 701, 703, 89 P. 1093.' In Mann v. Scott, 180 Cal. 550, 182 P. 281, 282, where there was a city ordinance requiring automobiles to stop while a street car was receiving or discharging passengers, and where the plaintiff was injured while attempting to board a car, the court said: 'The question of negligence under the usual rule of ordinary care that devolves upon foot travelers, must be examined in the light of all the attendant circumstances, one of which may be knowledge of the existence of a statute or an ordinance prescribing certain fixed regulations for observance by automobile drivers. And it may be that if the jurors in this case rejected, as improbable, respondent's testimony that she looked and saw no approaching automobile, they, nevertheless, concluded—as well they might—that if she did not see the automobile before leaving the sidewalk, she reasoned that its driver would comply with the city ordinance, referred to in the court's instructions, requiring an automobile traveling behind a street car to stop 10 feet in the rear of the car if it stops to let off or take on passengers, until the passengers have safely alighted from or boarded the car. Whether, if she saw the automobile, respondent would have been warranted in going toward the street car without further watching the automobile approach, relying upon a compliance by the appellants with the requirements of the ordinance, was a question upon which men's minds might well differ, and hence it was properly a case for the jury. * * *' In Carbaugh v. White Bus Line, 51 Cal. App. 1, 195 P. 1066, 1067, the plaintiff at an intersection saw the defendant's stage approaching, but proceeded to cross into the intersection. In discussing the question of contributory negligence, the court said: 'The first contention of the appellant herein is that the plaintiff D. C. Carbaugh, as the driver of said automobile, was guilty of contributory negligence as a matter of law in entering upon and attempting to cross said boulevard after observing the defendant's stage approaching its point of intersection with the Mission drive. This contention is absolutely without merit. The plaintiff D. C. Carbaugh, as he approached the intersection of these two streets, was driving upon the right side of Mission drive at a rate of speed permitted by law, and had, under the provisions of the Motor Vehicle Act, the right of way across Pomona Boulevard in advance of defendant's stage approaching thereon. Whether or not after observing the approach of said stage and its position upon said boulevard, and the rate of speed at which it was traveling, the said plaintiff was justified in proceeding upon his rightful way across said boulevard in advance of said stage was clearly a question of fact for the jury. Zibbell v. Southern Pac. Co., 160 Cal. 237, 116 P. 513; Scott v San Bernardino Valley, etc., Co., 152 Cal. 604, 93 P. 677; Commonwealth Bonding, etc., Co. v. Pacific Electric Ry. Co., 42 Cal. App. 573, 184 P. 29; Robinson v. Clemons, 46 Cal. App. 661, 190 P. 203; Baker v. Western Auto Stage Co., 48 Cal. App. 283, 192 P. 73.' The question as to whether a given state of facts constitutes contributory negligence, as a matter of law, or whether it is a matter that should go to the jury, as a question of fact, is often a close one. The solution depends entirely upon the existing circumstances in each particular case. Unusual circumstances may determine in a given case whether or not reasonable minds might legitimately draw different conclusions on the question of negligence. There seems to be a general rule running through the cases where a pedestrian, or one standing on a highway, is injured by an automobile, which usually determines whether the question of contributory negligence is one of law, or of fact. Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or, in other words, where he takes no precaution at all for his own safety, it is usually a question for the court. Where he looks but does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury."

[5] We are of the opinion that under these rules of law governing the question of contributory negligence, as a matter of law, the

contention of appellant cannot be sustained. Respondents looked and saw the automobile of appellant approaching. When Kienlen saw the automobile, he was just entering the intersection, and had about 110 feet to travel to a point of safety, while appellant had about 335 feet to travel before reaching the point where a collision would be imminent. When Mrs. Kienlen looked and saw appellant's automobile, the car in which she was riding was about on the medial line of El Cajon avenue, and had approximately 55 feet to travel before passing out of the intersection, while appellant's car was then about 165 feet from the intersection. Under these circumstances it cannot be said that they failed to look and failed to take any precautions for their safety. Respondents, being in the intersection first, while appellant was a considerable distance away, had the right to assume that appellant would yield the right of way to them, they also had the right to assume that appellant would operate his car "at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway," and that he would not drive his "vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person." Section 113, California Vehicle Act. While the right to assume that appellant would exercise due care in the operation of his automobile would not excuse contributory negligence on the part of respondents, it furnishes a ground for a reasonable inference by the trial court, which supports the finding that neither of the respondents was guilty of any negligence which contributed to the accident in question, or to their injury. As was said in the case of Robinson v. Clemons, 46 Cal. App. 661, 190 P. 203, 204:

"Any one, the most careful, about to cross a highway and observing another vehicle approaching at a distance of from 100 to 150 feet, would not deem it necessary to stop or to do any particular thing to avoid a collision. He would properly assume and have a right to assume that the other car was not violating all rules of prudence by excessive speed; that he had plenty of time to cross and act accordingly. This would be the attitude of any reasonable man under the circumstances, and therefore the plaintiff was not guilty of a want of ordinary care in pursuing his journey."

Under the evidence before us and the well-established rules of law which we have cited, we cannot disturb the findings of the trial court, as there is a reasonable inference from all the evidence supporting these findings.

Judgment affirmed.

We concur: BARNARD, J.; AMES, Justice pro tem.

105 Cal. App. 770

In re WAHLEFELD'S ESTATE.

WAHLEFELD v. WAHLEFELD et al.

Civ. 7372.

District Court of Appeal, First District, Division 1, California.

May 21, 1930.

1. Witnesses ⟹181.

After 24 pages in record of direct examination and 16 pages of cross-examination, objection to admissibility under statute was not timely (Code Civ. Proc. § 1880).

Practice of permitting examination without interposing objection, or merely interposing general objections when specific ones should be mentioned, is improper, since it gives litigant opportunity to weigh testimony and if unsatisfactory to present belated objection or motion.

2. Witnesses ⟹133.

On petition for order declaring property not separate property of deceased but community property, widow's testimony respecting conversations and agreements with deceased *held* admissible (Code Civ. Proc. § 1880, subd. 3).

Code Civ. Proc. § 1880, subd. 3, provides that parties to action cannot be witnesses if action is against executor or administrator on claim, or demand against estate of deceased person.

3. Frauds, statute of ⟹4, 139(2).

Husband and wife ⟹29(5).

Husbands and wives may contract before marriage to change property from community to separate or from separate to community, if contract is written, or oral contract fully executed.

4. Frauds, statute of ⟹139(2).

Where contract changing property from separate to community is completely executed, third parties cannot attack it on ground it was oral.

5. Husband and wife ⟹266.

Where there was meeting of minds respecting change of property from separate to community, any form of express words that property should be considered community property was sufficient.

6. Husband and wife ⟹273(12).

On widow's petition to have property declared community property, variance *held* not fatal (Code Civ. Proc. § 1868).

The petition alleged that the contract under which property became community property was made after marriage, while

the proof showed that it was made before marriage and ratified thereafter. This was not such a variance as to be misleading on hearing.

7. Pleading ⟹430(1).

Where there is variance, objection to admissibility of evidence or motion for nonsuit should be granted.

The objection to the admissibility of the evidence, however, must be on ground that there is variance between proof and allegations.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

In the matter of the estate of Heinrich Otto Wahlefeld, also known as H. Otto Wahlefeld, deceased. Petition for distribution by Lillian Wahlefeld, opposed by Paul Wahlefeld and another. From an adverse decree, Paul Wahlefeld and another appeal.

Affirmed.

J. W. Henderson, of San Francisco, for appellants.

Snook, Snook & Chase, of Oakland, for respondent.

WARD, Justice pro tem.

H. Otto Wahlefeld died intestate on the first day of September, 1927, leaving him surviving as his only heirs at law his mother, Wilhelmine Wahlefeld, and his wife, Lillian Wahlefeld. The mother died in August, 1928, testate, bequeathing her estate to appellants herein, her son and daughter, Paul Wahlefeld and Mimi Wulf. The respondent presented her report as administratrix of the estate of H. Otto Wahlefeld and a petition for final distribution. The estate was appraised at $13,441.91. The appellants filed a demurrer which was overruled and thereupon an answer. The court made an order distributing the whole of the estate to the widow.

Appellants first contend that the general and special demurrers should have been sustained. The special demurrer raised points of uncertainty, ambiguity, etc., but the petition was sufficient to proceed to a hearing. The general demurrer raised the main point in dispute in this proceeding, namely, Was the property the separate property of H. Otto Wahlefeld or the community property of Wahlefeld and his wife, the respondent herein? The same question is raised on the final order and we may therefore save time by passing this point for the present.

[1] Appellants next contend that the court erred in admitting the testimony of respondent as to conversations and agreements claimed to have been entered into between the deceased and respondent in his lifetime concerning the subject-matter of this action, the transmuting of separate estate into community property. The court's attention was called to the provisions of section 1880 in the following manner: "Mr. Henderson: I would like to call your attention to section 1880.

"The Court: The order denying the motion may be vacated then.

"Mr. Henderson: Yes, I want to call your attention to section 1880 of the Code of Civil Procedure.

"The Court: This is not an action upon a claim.

"Mr. Snook: No.

"Mr. Henderson: I think it is nothing else. It is a claim against the estate.

"The Court: Anything further, to submit on the motion to strike out.

"Mr. Henderson: I move to strike out all the testimony on the grounds that I have enumerated and the cases cited.

"The Court: The motion is denied. * * *"

The objection was not timely; in fact, there was no objection at all. The record shows 24 pages of direct examination and 16 pages of cross-examination before any reference is made to section 1880. The practice of permitting an examination without interposing objection or merely interposing general objections when specific ones should be mentioned is improper. It gives a litigant an opportunity to weigh the testimony and if unsatisfactory to present a belated objection or motion. This same observation may be made upon the next contention of appellants, namely, that the court erred in admitting testimony as to any agreement and understanding as to disposing of property after death.

[2] The evidence having been admitted without proper objection, we will nevertheless discuss its admissibility and sufficiency to sustain the order distributing the estate to respondent. This is not a claim or demand against the estate of a deceased person but a petition for an order declaring that the property was not the separate property of the deceased. It was not a claim for an amount due prior to the death of the deceased. It was not against the administrator upon a claim or demand against the estate of the deceased. In Maguire v. Cunningham, 64 Cal. App. at pages 548, 549, 222 P. 838, 843, an action by a surviving husband against the estate of his deceased wife for the purpose of procuring a decree, first, quieting title to real property; second, quieting title to personal property; and third, for money had and received in which it was contended, first, that a claim against the estate should have been filed (which is also claimed in this proceed-

ing), and, second, that the court erred in permitting the respondent to testify; the court said: "Appellants also insist that the trial court erred in overruling objections made to the competency of respondent as a witness under the language of Code of Civil Procedure, § 1880, subd. 3, providing that parties to an action cannot be witnesses if the action is 'against an executor or administrator upon a claim, or demand against the estate of a deceased person.' * * * These two points may be treated together, as they are both concluded by Bollinger v. Wright, 143 Cal. 292, 76 P. 1108. The legal question in that case was identical with the last of the two which we have just stated—that is, the one arising under Code of Civil Procedure, § 1880 and the case was in principle like the present one. The court said: 'We are of opinion that the witness was competent and the evidence properly admitted. The controversy is not concerning a claim or demand against the estate of deceased within the meaning of the section. It is concerning the property of plaintiff and to quiet a claim or demand or title asserted by the estate to such property. The question to be determined is as to whether or not the interest held by deceased under the deed is the property of the estate or the property of plaintiff. If it is not the property of the estate, then the action does not involve a claim or demand against the estate. To hold that the claim or demand in controversy here was a part of the estate, and thus render the witness incompetent, would be to determine in advance the very question at issue.' The point in the case cited, it is true, relates specifically to the question presented here under section 1880, only, but the reason of the opinion is directed as clearly at the point raised under section 1500. This is shown by the sentence: 'If it (the property involved) is not the property of the estate, then the action does not involve a claim or demand against the estate.' We are aware that the question of the applicability of section 1500 has often been held to turn on the question whether a money judgment was sought to be obtained in the action in which the application was attempted to be made. This fact would seem to lend some plausibility to a contention that the section applies to so much of the present action as relates to the sum of $3,000 in cash. It is to be remembered, however, that the action, considering now the second count of the complaint, is to quiet title to the sum named, as personal property. Under all the authorities, and especially under Bollinger v. Wright, supra, the section cannot apply to actions to quiet title to real property. With equal reason it cannot apply to an action to quiet title to personal property in the shape of a herd of cattle. It seems to follow clearly, as well, that it cannot apply to an action to quiet title to personal property in the form of cash. The reasoning of Bollinger v. Wright seems to fit all three classes of cases, or, rather, to show that there are not three classes, but only one. No claim need have been filed prior to the commencement of the action. Respondent was a competent witness to all the matters concerning which he testified." There is no difference in principle between an action to quiet title to real and personal property and a petition to have the whole of the estate distributed as community property, so far as the provisions of subdivision 3 of section 1880, Code of Civil Procedure, is concerned.

H. Otto Wahlefeld, the deceased, for about fifteen years prior to 1925, had been engaged in the lumber business in San Francisco, from which he obtained at the time of its discontinuance approximately $10,000 in cash, notes, and lumber. The deceased, in April of 1925, started a new business in Berkeley under the name of the Pacific Hardwood Lumber Company. For a period of over five years prior to the inception of the Pacific Hardwood Lumber Company the deceased had been betrothed to Lillian Boedefeld, whom he married in November, 1925, and who is the respondent herein. Between April and November, 1925, Lillian Boedefeld invested in the Pacific Hardwood Lumber Company $16,000, and, after November, as Lillian Wahlefeld, an additional $1,000. H. Otto Wahlefeld died on October 21, 1927, and as the administratrix of his estate, respondent filed her report and petition for final distribution which set forth that the real property consisted of the lot and improvements of the Pacific Hardwood Lumber Company and certain accounts due the company; that the property was acquired through money paid deceased by respondent to be invested for her in the business, and that the title to the real property was taken in the name of deceased for convenience only and that said property was held for respondent; that deceased contributed certain stocks of hardwood and panels; that respondent after marriage, as per agreement, gave her time and attention to the conduct of the business and that it was agreed before marriage and ratified thereafter that all of the personal and real property of the business should become the community property of deceased and respondent; that no money was drawn out of the business except for the personal account of the deceased and the living expenses of H. Otto Wahlefeld and the respondent.

[3-5] Appellants contend that the court erred in finding that upon the marriage all property theretofore invested by deceased and respondent in real property and all other property invested by them became and was at all times thereafter community property. Husbands and wives may contract to change property from community to separate or from separate to community property and this may

be done before marriage if the contract is in writing or if an oral contract is fully executed. Such action is not assailable by third parties on the ground that it was not in writing if the contract is completely executed. Hussey v. Castle, 41 Cal. 242, and Martin v. Pritchard, 52 Cal. App. 724, 199 P. 846. In the present case there was a meeting of minds and any form of express words, either spoken or written, that the property was to be considered community property was sufficient. Vieux v. Vieux, 80 Cal. App. 227, 251 P. 640. We can see no objection to parties prior to marriage agreeing that certain properties shall be community property upon marriage when such an agreement is not a prerequisite to the marriage contract and when the oral agreement is fully executed. Counsel for appellants relies upon the case of Graves v. Graves, 48 Wash. 664, 94 P. 481. But the decision in that case is not in conformity with the decisions in California. The case of Hagan v. McNary, 170 Cal. 141, 148 P. 937, L. R. A. 1915E, 562, has also been called to our attention, but that was a case wherein complete performance could not take place until after death, but in the present case the agreement was completed, firstly, by marriage and, secondly, by ratification as to separate property contributed to the business after marriage. The contract before marriage or the ratification thereafter did not provide that the property was to become community property upon the death of either party, but it did provide that it was to become community property after marriage. Upon divorce it would have been subject to disposition by the courts. Vieux v. Vieux, supra.

[6] There is a variance between the pleadings and the proof, as appellants claim, but not such a variance as to mislead appellants upon the hearing. The vital issue was whether respondent was entitled to the estate as community property. The petition alleged that the contract was made after marriage. The proof was that it was made before marriage and ratified thereafter. The proof was not wholly outside the pleadings and the evidence corresponded in substance to the allegations and was relevant to the question in dispute (Code Civ. Proc. § 1868). The finding followed closely the main issue and not being at cross purposes with either pleadings or proof we think they are sufficient. The cases cited by appellants are matters wherein there was a direct conflict between the pleadings and the proof.

[7] Appellants contend that when there is a variance, an objection to the admissibility of the evidence or a motion for a nonsuit should be granted. With this we agree. The objections made by counsel were along the line that the testimony was inadmissible because there was no written contract and at no place in the transcript do we find any objection that there was a variance between the proof and the allegations. Likewise, the record fails to disclose a motion for a nonsuit, if such motion would have been proper in this proceeding.

There was no error in the order overruling appellants' demurrer, nor in the admission of testimony as to the agreement between the parties to the effect that their separate property should become community property, nor in the finding that there was upon the marriage of the parties a fully completed agreement transmuting all separate property of both parties into community property, and that upon the death of the deceased his wife was entitled to the distribution of the whole of the estate.

Judgment and decree affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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105 Cal. App. 784

PEOPLE v. SMINK et al.

Cr. 26.

District Court of Appeal, Fourth District, California.

May 21, 1930.

Rehearing Denied June 4, 1930.

Hearing Denied by Supreme Court June 19, 1930.

1. Criminal law ⟹951(2).

Under statutes, motions for new trials, not made until after judgment, were properly denied (Pen. Code, §§ 1181, 1182).

2. Criminal law ⟹940, 958(1).

Under statutes, motions for new trials because of newly discovered evidence not involving defendants' innocence or guilt, unsupported by affidavits of witnesses or request for postponement, were properly denied (Pen. Code, §§ 1181, 1182).

3. Criminal law ⟹940.

"Newly discovered evidence" contemplated by statutes as ground for new trial is evidence material to defendant's guilt (Pen. Code, §§ 1181, 1182).

[Ed. Note.—For other definitions of "Newly Discovered Evidence," see Words and Phrases.]

4. Criminal law ⟹274.

Although under statute plea of guilty may be withdrawn before judgment, court ordina-

rily has discretion to allow such withdrawal even after judgment (Pen. Code, § 1018).

5. Criminal law ⟹1149.

Trial court's refusal to allow plea of guilty to be changed after judgment will not be disturbed, barring clear abuse of discretion (Pen. Code, § 1018).

6. Criminal law ⟹264.

Court's inquiring before arraignment whether defendants desired counsel and waived time for pronouncing judgment *held* substantial compliance with law (Pen. Code, §§ 987, 1018).

The evidence showed that defendants, in response to inquiries by the court when they were arraigned, stated they desired to proceed without an attorney, and that, after they had pleaded "guilty," they were willing to waive the statutory interval otherwise necessary between the pleas and the pronouncement of judgment.

7. Criminal law ⟹273.

Court was not required to tell defendants, who pleaded guilty when arraigned without counsel, what punishment would be (Pen. Code, §§ 987, 1018).

8. Criminal law ⟹274.

Evidence showed that defendant arraigned without counsel, when he pleaded guilty and waived time for pronouncing judgment, was not deaf as contended (Pen. Code, §§ 987, 1018).

The record disclosed that defendant answered the court's questions directly and concisely, with one exception, when defendant said, "I am sorry, but I did not hear just what you said."

9. Criminal law ⟹274.

Evidence consisting chiefly of counsel's hearsay statement *held* to show defendant was not, as contended, induced to plead guilty by promise of immunity (Pen. Code, §§ 987, 1018).

10. Criminal law ⟹1158(2).

Denying motion to change plea of guilty, allegedly induced by false promise of immunity, cannot be disturbed except upon clear and convincing proof (Pen. Code, §§ 987, 1018).

11. Criminal law ⟹274.

Court properly denied motion to change plea of guilty allegedly induced by promise of immunity, offer of proof revealing neither facts nor witnesses (Pen. Code, §§ 987, 1018).

In asking permission to furnish proof in support of the motion, counsel said, "My representation is based upon a motion with the right and permission to file the necessary affidavits * * * or the right to take oral testimony * * * of the respective witnesses whom I see fit to call." Counsel did not disclose what facts he expected to show, nor what witnesses he would bring, nor what their evidence would be, nor did he give the court any information by which it could tell whether any of the expected proof was material or important.

12. Criminal law ⟹265, 977(3).

That arraignment, pleas of guilty, and pronouncement of judgment occurred in one day, did not prove deprivation of legal rights (Pen. Code, §§ 987, 1018).

13. Criminal law ⟹322.

Information as filed is presumed valid (Pen. Code, §§ 995, 996).

14. Criminal law ⟹1032(1).

After arraignment, pleas of guilty, and judgment, defendants on appeal could not attack informations on ground of improper preliminary examination (Pen. Code, §§ 995, 996).

15. Criminal law ⟹977(3).

Court properly sentenced defendants within two days after pleas of guilty, where they waived statutory time for judgment pursuant to court's explanation.

16. Criminal law ⟹1032(5).

That informations charging sex offense, although closely following statute, omitted sex and name of persons offended against, could not be first raised on appeal (Pen. Code, §§ 288a, 950, 951, 995, 996, 1012).

Appeals from Superior Court, Riverside County; O. K. Morton, Judge.

Frank Smink and another pleaded guilty to the commission of a felony, and from the judgments, and from orders denying their motions for new trials and motions to set aside the judgments and permit changes of plea, each defendant appeals.

Affirmed.

Joseph W. Ryan and Frank J. Ryan, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Albert Ford, Dist. Atty., and W. Earl Redwine, Deputy Dist. Atty., both of Riverside, for the People.

BARNARD, Acting P. J.

Each of the defendants herein was accused under a separate information filed by the district attorney of Riverside county of the commission of a felony, to wit, violation of section 288a of the Penal Code, committed as set

forth in the respective informations. There was also a third defendant who has not appealed. Each information was filed on February 7, 1930. Each defendant was separately arraigned in the superior court of Riverside county on the same day, February 7, 1930. The record shows that each defendant was furnished with a copy of the information. With reference to representation by an attorney, the record shows the following as to the two appellants:

"The Court: Are you represented by an attorney?

"Mr. Smink: No, sir.

"The Court: Do you desire time to procure an attorney, or for the court to appoint an attorney, or to proceed without an attorney?

"Mr. Smink: I am sorry, but I did not hear just what you said.

"The Court: Do you desire time to procure an attorney, or for the court to appoint an attorney, or to proceed without an attorney?

"Mr. Smink: I will proceed without a lawyer.

"The Court: Let the record show that the defendant waives an attorney. You may proceed with the arraignment, Mr. Clerk."

"The Court: Are you represented by an attorney?

"Mr. McDonald: No, sir.

"The Court: Do you desire the court to appoint an attorney for you or to proceed without an attorney?

"Mr. McDonald: Proceed without one.

"The Court: Let the record show that the defendant desires to proceed without an attorney. You may proceed with the arraignment, Mr. Clerk."

Each defendant was then arraigned, and each pleaded "guilty." After the arraignment the record shows the following, in reference to the time of pronouncing judgment:

"The Court: I will ask all three of you to arise. Mr. McDonald, Mr. Smink and Mr. Anker, the court cannot pronounce judgment upon you in less than two nor more than five days unless you waive time. Do you desire to waive time and have judgment pronounced now, or to wait for at least two days? Do you understand what I mean?

"Mr. McDonald: No, sir.

"The Court: The court cannot pronounce judgment upon you unless you waive time. If you want judgment pronounced on you at this time, it will be necessary for you to waive the time. The defendant can waive that time and have judgment pronounced at once.

"Mr. McDonald: If we had judgment, would we get out on bond?

"The Court: That is a different matter entirely. It is just a question of whether you want the court to pronounce judgment at this time or Monday.

"Mr. McDonald: Yes, sir, I will waive it.

"The Court: Mr. Smink, do you want to waive the time and have judgment now?

"Mr. Smink: I will take judgment now.

"The Court: Mr. Anker, do you want to waive the time and have judgment now?

"Mr. Anker: I will take judgment now.

"The Court: Mr. McDonald, do you want judgment pronounced now?

"Mr. McDonald: Yes, sir."

The defendants were then separately arraigned for judgment. Thereafter, the district attorney made a lengthy statement concerning the circumstances surrounding the commission of the crimes. Following that the court asked: "Is there anything that any of you young men want to say?" Defendant McDonald replied: "It has been a lesson to us. We are changed. Things were not exaggerated a bit. It is mostly true, but I am sure it will never happen again." The court proceeded to pronounce judgment and sentenced the defendants to imprisonment in the state penitentiary.

On February 10, 1930, defendants Smink and McDonald again appeared in court with an attorney. A motion was made in behalf of each of these defendants to set aside the judgment of conviction and the sentence and for permission to withdraw the former plea of guilty and enter a plea of "not guilty." On the theory that the court was without right to pass judgment on February 7, 1930, additional motions for new trials were made on the ground that new evidence had been discovered, material to the defendants, which could not, with diligence, have been found prior to their appearance in the superior court. In presenting these motions, counsel for defendants made a long statement of circumstances in connection with these cases from the time of the arrest of the defendants, up to and including the proceedings in the superior court, on February 7, 1930, based upon representations he said had been made to him. At the close of his statement and argument, counsel for defendants requested permission to be allowed to file affidavits or make proof. This request was denied by the court, and thereupon the court denied the motions for new trials and the motions to set aside the judgments and permit changes of plea. Each defendant has appealed from the orders denying both of said motions.

[1, 2] There was no error in refusing to grant the motions for new trials. These motions were made on February 10, 1930, three days after the date on which judgment was pronounced. Section 1182 of the Penal Code provides: "The application for a new trial must be made before judgment, and the order granting or denying the same must be

immediately entered by the clerk in the minutes." Not only that, but no showing was made to justify the granting of the new trial. Section 1181 of the Penal Code provides, in part: "When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all the circumstances of the case, may seem reasonable."

[3] The newly discovered evidence contemplated under section 1181 is evidence material to the question of guilt of the defendant. Not only did each of the defendants fail to support the motion with affidavits of the witnesses whose evidence was expected to be given, but no time was requested for the purpose of securing such affidavits. The only request for time for producing affidavits or making proof was made in connection with the statements made by counsel in support of his motion to change the plea in each case, all of which related to events subsequent to the arrest of the defendants. No statement was made therein of any matter or thing going to the guilt or innocence of the defendants. Not only was no proof presented at that time, and no proper request for time within which to prepare affidavits so far as the motion for new trial is concerned, but counsel neither named any witness nor set forth any expected evidence which would have been material to the question of guilt or innocence of either of the defendants. Under such circumstances, the motion for new trial was properly denied.

[4, 5] Appellants urge that the court committed prejudicial error in refusing to permit them to withdraw their pleas of guilty and substitute therefor pleas of not guilty. Section 1018 of the Penal Code provides that the court may, at any time before judgment, permit a plea of guilty to be withdrawn and a plea of not guilty substituted. It has, however, been held in a number of cases that the court has the power to permit this change of plea after judgment has been pronounced, and should exercise the same where a sufficiently strong showing is made. Permission to so change a plea is ordinarily within the discretion of the trial court, and its action will not be disturbed unless an abuse of discretion clearly appears. People v. Manriquez, 188 Cal. 602, 206 P. 63, 65, 20 A. L. R. 1441; People v. Bostic, 167 Cal. 754, 141 P. 380, 383. In People v. Schwarz, 201 Cal. 309, 257 P. 71, 73, the court said:

"It may be stated from the above authorities that it is now well settled in this state that where on account of duress, fraud, or other fact overreaching the free will and judgment of a defendant he is deprived of the right of a trial on the merits, the court in which he was sentenced may after judgment and after the time for appeal has passed, if a properly supported motion is seasonably made, grant him the privilege of withdrawing his plea of guilty and of reassuming the situation occupied by him before a plea of any kind was entered. It should be noted, however, that where statutory remedies are provided this method of relief may not be resorted to, and that this exceptional remedy applies only where no trial has been had on the merits and only upon a strong and convincing showing of the deprivation of legal rights by extrinsic causes."

In that case it was held that where a defendant made a full statement or confession to a district attorney, in consideration of a promise of immunity and later entered a plea of guilty in reliance upon that agreement, and where the agreement was not kept, it was the duty of the court to permit him to change his plea. A similar holding is found in People v. Grant (Cal. App.) 274 P. 1005, and the same case in (App.) 275 P. 838. In that case, not only was such a definite promise made, but it was shown that under the admitted facts, the defendant was not guilty as charged in the information, and if guilty at all, was guilty of a minor offense under the California Vehicle Act (St. 1923, p. 517, as amended). His only offense had consisted in failing to give the number of his automobile to two parties in another car, although he had seen one of these parties write down the correct number, which was called out to him by the only other occupant of the car. With these rules of law in mind, we will examine the various contentions of appellants under which they claim to come within such rules.

[6] Several of these contentions may be grouped under the general statement that the court failed to properly advise the appellants of their legal rights, that they acted without legal advice, and that they did not understand the legal consequences of the pleas entered by them. We think there is no merit in this contention. In People v. Bostic, supra, the court said:

"There was a substantial compliance with section 987 of the Penal Code when the defendant was taken into court for arraignment. While he was not informed in the exact language of the statute that he was entitled to have the aid of counsel 'before being arraigned,' he was told that the court was ready to appoint a legal adviser who would serve without compensation. He had not then been arraigned, and the court's readi-

ness to appoint counsel then was sufficient notice to him that he was entitled, if he so wished, to the aid of counsel at all stages of the prosecution against him. The court explained with scrupulous care that he might have two days between arraignment and plea if he so desired. No advantage was taken of him, and he was given every fair opportunity allowed by statute for obtaining legal advice, and for time to deliberate upon the course to be pursued by him."

[7] In the instant case we think there was also a substantial compliance with the law. The court asked each defendant if they desired to have an attorney appointed for them, or to proceed without an attorney. Each defendant stated positively and clearly that he would proceed without a lawyer. The court also clearly explained to each defendant that he was entitled to wait at least two days before having judgment pronounced, and each defendant stated his willingness to have judgment pronounced at once. We think that the record, as heretofore quoted, is sufficient to establish not only that these matters were clearly stated to the appellants, but that they understood the same. It is true, of course, that they were not told exactly what the punishment would be, but there is no law requiring this. The record shows that the defendant Smink was thirty-four years of age, had spent three years at Lehigh University, and at the time of the commission of the crime was engaged in business at Palm Springs. It further shows that the defendant McDonald was twenty-one years of age and a partner in business with Smink at Palm Springs. The answers of each defendant show that they understood what they were doing.

"But where, as in this case, the plea of guilty was made and entered under circumstances which showed that the accused person was neither surprised nor cajoled, we cannot say that the discretion vested in the trial court under section 1018 of the Penal Code was abused. The court must be upheld in the exercise of such sound discretion, unless abuse of discretion is clearly shown." People v. Bostic, supra.

[8] Closely allied with this contention is the next one that appellant Smink is deaf and was unable to hear and understand the court. The evidence above set forth sufficiently refutes this argument.

[9, 10] It is next urged that the appellants were misled by the deputy district attorney and induced to plead guilty by his representations that they would be released. It may first be noted that this claim relates only to appellant McDonald. The record shows no claim that any such representation was made by the district attorney to defendant Smink. We are of the opinion, however, that nothing is shown by the record to bring appellant McDonald within the rules laid down in the cases above cited. Counsel for the defendants in arguing the motion orally stated to the court his version of the surrounding circumstances. In his argument counsel told the trial court that what he said to the court was based upon what had been told him by Smink; that Smink was told by a deputy district attorney that McDonald had made a confession regarding the charges against Smink; that Smink then denied everything; that later McDonald was told by the deputy district attorney that Smink had made a complete statement involving him (McDonald) in the matters charged in the information; and that thereafter McDonald made a declaration and statement. Counsel then went on to say that the deputy district attorney told McDonald that he was desirous of learning certain facts and conditions then existent in Palm Springs, and that after he (McDonald) had made a declaration and statement, that is all there would be to the matter. In making this statement to the court, after describing the conferences between appellants and the deputy district attorney, above referred to, counsel said to the court: "That the district attorney at that time did not inform either defendant by word or by act, counsel or otherwise, that his official capacity was that of a prosecuting officer." If no word or act of the district attorney disclosed that he was acting in an official capacity, how can it be claimed that he made an official agreement? Nothing more than this exists to support the claim of an agreement of immunity. Apparently counsel did not consider it as such when he argued the motion in the trial court, as he then said: "I do not state that Mr. Redwine held any inducements or promises other than the inference that the defendant might draw; no inducement specific in form or character was made to him." Nowhere in the record is there any claim that McDonald ever said or would say that any such statement was made to him by the deputy district attorney, or by any one else. It appears only in the oral statement of counsel, who stated that he made it on the representation of Smink, and under no circumstances would it be more than hearsay. So far as appears from counsel's statement to the trial court, it also appears that this statement was made by the deputy district attorney, after McDonald had already made his declaration and statement. Subsequently, each appellant admitted his guilt in open court. If the facts contained in counsel's statement to the court, without additions, had been properly presented to the court, they would have fallen far short of furnishing proof of an agreement within the rules above cited. The action of the court in the respect complained of may not be set aside except upon clear and convincing proof,

and it requires something more than hearsay evidence of a vague and indefinite statement, apparently made after the confession, to comply with the rules above set forth.

[11] Nor was there a proper offer of proof in any event. In asking permission of the court to be allowed to furnish proof in support of the motion, counsel for appellants stated: "My representation is based upon a motion with the right and permission to file the necessary affidavits to support the motion or the right to take oral testimony in court, under oath, of the respective witnesses whom I see fit to call." In making his request, counsel neither disclosed to the court what facts he proposed to show, what witnesses he would bring, nor what their evidence would be, and no information was furnished to the court by which it could tell whether or not any proof desired to be made was material or important. Counsel only stated he would bring in such witnesses as he saw fit to call. At no time was anything said or even intimated to the court that any evidence existed or could be secured that would in the slightest degree throw any doubt upon the guilt of appellants, or tend to show any mitigating circumstances. At the time of denying the motions the court said: "The court very fully recalls all that transpired at the time each of these defendants in these two cases were arraigned and plead and were sentenced. * * * I feel that at the time the parties were in court, they fully understood all the proceedings; they entered their pleas after consideration; they freely admitted their guilt, and after carefully explaining to them the effect of waiving the time for pronouncement of judgment they waived the time, and the court pronounced judgment accordingly. Therefore I feel that the only proper thing to do is to deny both motions, and they are denied." No such strong and convincing showing as is required by the rule laid down in People v. Schwarz and the other cases has here been made. It does not appear that either of these defendants have been deprived of a trial on the merits by any duress, fraud, or other fact overreaching their free will and judgment. Under the circumstances disclosed by the record, the action of the trial court was not only within its discretion, but was eminently proper.

[12-14] The contention is also made that all of the proceedings were so fast and hurried as to deprive appellants of their rights, and that appellants were informed that the proceeding in the superior court was to be only a preliminary examination. We have carefully gone over the record and find nothing to support these contentions. The mere fact that these proceedings were all had in one day, with the defendants pleading guilty, is not sufficient to establish irregularity or deprivation of legal rights. There had previously been some proceedings in the justice's court and the above-quoted answers in the superior court show an understanding that judgment was to be pronounced. The entire record discloses a disappointment at the sentence, rather than a misunderstanding of the nature of the proceedings. Some claim is made that the preliminary in the justice's court was not properly held. While there is nothing in the record to show what was done there, it was admitted by counsel for appellants in a statement to the trial court that the defendants had been taken before a justice of the peace on that morning. Not only is the presumption in favor of the information as filed, but the defendant is precluded from now raising such an objection. Pen. Code, §§ 995 and 996.

[15] It is next claimed that the trial court was in error in passing sentence in less than two days after the plea. The record shows that each defendant waived time for judgment, after the trial court had carefully explained that sentence could not be pronounced until the expiration of two days, unless this was done. The law is set forth in People v. Manriquez, supra:

"It has long been settled that one may waive a right created by statute for his benefit, and that the rule applies to the time for pronouncing the judgment of the court in criminal cases. People v. Robinson, 46 Cal. 94, 96; People v. Mess, 65 Cal. 174, 3 P. 670; People v. Johnson, 88 Cal. 171, 174, 25 P. 1116."

[16] It is finally urged that the informations do not state a public offense, in that they do not comply with sections 950 and 951 of the Penal Code. It is admitted by respondent that the informations were faulty, in that they failed to allege the sex and the name of the persons upon whom the crimes were committed. Each information, however, was in almost the identical language of the statute. See 14 Cal. Jur. p. 49, § 37. No objection to the sufficiency of each information was raised, either by demurrer or motion in arrest of judgment. The matter was not mentioned by counsel in presenting any motion, and so far as is shown by the record, it was never in any manner called to the attention of the trial court. It first appears in appellants' opening brief. This objection cannot be raised for the first time on appeal. Pen. Code, § 1012; People v. Welton, 190 Cal. 238, 211 P. 802; People v. Schwarz, supra; People v. Fuski, 49 Cal. App. 4, 192 P. 552.

Not only was there no showing of the facts relied on before the trial court, and no proper offer to show the same, but nowhere in the record is there any showing of any evidence, newly discovered or otherwise, that would or might tend to prove the innocence of the defendants, or either of them, or that would

or might tend to prove any mitigating circumstances. Nor does the record disclose any offer to make such a showing. After a careful examination of the entire cause, including the evidence, we are not of the opinion that any existing error has resulted in a miscarriage of justice. Const. of California, art. 6, § 4½.

All of the judgments and orders appealed from are therefore affirmed.

We concur: MARKS, J.; OWEN, Justice pro tem.

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106 Cal. App. 162

BURROWS SHOE CO., Inc., v. BROTHERTON et al.

Civ. 7270.

District Court of Appeal, First District, Division 2, California.

May 29, 1930.

1. Corporations ⟹34(4).

Surety signing note payable to named company is estopped to deny company's corporate capacity in action brought by company under same designation.

2. Principal and surety ⟹35.

Signing of note by surety required by payee for extension of credit to principal which was extended *held* not without consideration.

3. Principal and surety ⟹108(1).

Agreement by payee to monthly payments on note made without new consideration did not release surety on note.

4. Principal and surety ⟹123(1).

Presentment, demand, and notice of dishonor *held* not required to fix liability of surety on note (Uniform Negotiable Instruments Law).

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by the Burrows Shoe Company, Inc., against Amelia C. Brotherton and others. Judgment for defendant A. A. Irish, as administrator of the estate of B. M. Spencer, deceased, and plaintiff appeals.

Reversed.

Bicksler, Smith, Parke & Catlin, of Los Angeles, for appellant.

L. E. Dadmun, of Los Angeles, for respondents.

DOOLING, Justice pro tem.

In a suit upon a promissory note, judgment went for defendant A. A. Irish as administrator of the estate of B. M. Spencer, deceased.

The note was signed as makers by Amelia C. Brotherton, Louis M. Brotherton, and the decedent, Spencer, in favor of Burrows Shoe Company, Rochester, N. Y., as payee. The evidence showed that the Brothertons were engaged in the retail shoe business and were refused credit by plaintiff, a wholesale shoe dealer, unless they would give a promissory note as security with some responsible third person as a comaker. Accordingly they procured the decedent, Spencer, to join with them in making the note in question.

[1] The trial court found that it was not proved that plaintiff was a corporation. This finding is attacked on appeal; appellant claiming that, by giving the note payable to Burrows Shoe Company, respondent is now estopped to deny its corporate capacity. Respondent answers that there can be no estoppel because the name "Burrows Shoe Company" is not necessarily that of a corporation, but might equally be that of a partnership, unincorporated association, or individual doing business under a fictitious name. There is respectable authority on both sides of this question (Fletcher on Private Corporations, vol. 1, § 336, p. 699 et seq.), and the precise point seems never to have been squarely decided in California. We do not think it necessary in this case to decide between these opposing views, but prefer to stand on the middle ground taken by the Supreme Courts of Tennessee and Kansas in Ingle System Co. v. Norris & Hall, 132 Tenn. 472, 178 S. W. 1113, 5 A. L. R. 1578, and Lowell-Woodward Hardware Co. v. Woods, 104 Kan. 729, 180 P. 734. That position is so well stated in the following quotation from the latter case that we adopt it as expressive of our views:

"One who enters into a written contract with a party described therein as a corporation is precluded, in an action brought thereon by such party under the same designation, from denying its corporate existence. 7 R. C. L. 105, 106; 10 Cyc. 521. Here the payee was styled in the note—'The Lowell-Woodward Hardware Company,' a title which prima facie imports a corporation. 3 Encyc. of Ev. 599; 7 R. C. L. 699; note, Ann. Cas. 1912A, 969, second column. There is some difference of opinion as to whether one contracting with an organization styling itself a 'company,' there being nothing further in the language used to indicate its character, the term 'corporation' not being employed, can be heard to deny its corporate capacity when sued by it upon the contract. The cases bearing on the question are collected in Ingle System Co. v. Norris & Hall, 132 Tenn.

472, 178 S. W. 1113 [5 A. L. R. 1578], which holds, in accordance with what it regards as the weight of authority, that such defense cannot be made. See, also, Toledo Computing Scale Co. v. Young, 16 Idaho, 187, 101 P. 257; Bremen Foundry & Machine Works v. Boswell, 22 Ga. App. 434, 96 S. E. 182; Grande Ronde Lumber Co. v. Cotton, 12 Colo. App. 375, 55 P. 610. In the leading case to the contrary (Welland Canal Co. v. Hathaway, 8 Wend. [N. Y.] 480, annotated in 24 Am. Dec. 51), the decision turns upon the fact that some of the elements of equitable estoppel, according to the accepted definition, are lacking. We agree that no full, formal, technical estoppel to deny corporate existence arises from such a state of facts, but we think it accords with modern views of good practice and tends to promote substantial justice to hold, and we do hold, that one who has signed a promissory note running to a payee described by a name appropriate to a corporation, although not employing that term, cannot, in an action brought against him thereon by such payee under the same name, in which it alleges itself to be a corporation, be heard to question the plaintiff's corporate existence, unless upon a showing that his obligation to make payment would be thereby affected. The defendant, having given his promise to pay the sum indicated to the payee named, should not be permitted to escape or delay performance by raising an issue as to the character of the organization to which he is indebted, unless his substantial rights might be thereby affected, which would only be under exceptional conditions. It is thoroughly settled that in such a situation the defendant cannot attack the regularity of the plaintiff's organization, or take any advantage of the fact that it has no legal standing as a corporation. No good reason is apparent why, having explicitly promised to make payment to the concern by which he is sued, he should be permitted to question its de facto any more than its de jure character—to inject into the case an issue having no bearing on his obligation to make payment."

[2] The court further found that decedent, Spencer, signed the note as a surety, without consideration, and that time of payment was extended by agreement with the Brothertons without Spencer's consent. The finding that Spencer signed the note without consideration cannot stand, since it appears that plaintiff insisted on his signature to the note before it would ship further shoes to the Brothertons on credit, and afterwards made such shipments on the strength of the note as security.

[3] The finding that time of payment was extended is based on evidence that after the note became due, an agent of plaintiff agreed to its payment by the Brothertons at the rate of $100 per month. But there was no new consideration for this promise, and the finding must fall, under the authority of Stroud v. Thomas, 139 Cal. 274, 72 P. 1008, 96 Am. St. Rep. 111, which is an identical case.

[4] Finally respondent's contention that his decedent's liability was not fixed because of the lack of presentment, demand, and notice of dishonor is answered by the fact that these are not required under the uniform negotiable instruments law to fix the liability of a surety. Colvin v. Glover, 143 Ark. 498, 220 S. W. 832; Albaugh-Dover Co. v. Napieralski, 205 Ill. App. 457; Nortonville Bank v. Williams, 164 Ky. 143, 175 S. W. 10; Rouse v. Wooten, 140 N. C. 557, 53 S. E. 430, 111 Am. St. Rep. 875, 6 Ann. Cas. 280; Citizens' Bank v. Hendrix, 187 Iowa, 1192, 175 N. W. 17; Farmers' Bank v. Forsstrom, 89 Or. 97, 173 P. 935; Schoenwetter v. Schoenwetter, 164 Wis. 131, 159 N. W. 737.

The portion of the judgment appealed from is reversed.

I concur: NOURSE, P. J.

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106 Cal. App. 47

PEOPLE v. LA BOW et al.

Cr. 1921.

District Court of Appeal, Second District, Division 2, California.

May 23, 1930.

Rehearing Denied June 7, 1930.

Hearing Denied by Supreme Court June 19, 1930.

1. Indictment and Information ⟹196(5).

That indictment failed to allege conspiracy "unlawfully" to sell, etc., intoxicating liquor "for" beverage purposes, was waived by failure to demur (Pen. Code, § 1185).

The indictment in question charged that defendants "did wilfully, unlawfully and feloniously agree, conspire and combine together that they would sell, possess and transport intoxicating liquor fit for beverage purposes." The sufficiency of the indictment was not challenged until a motion in arrest of judgment. Pen. Code, § 1185, declares that an objection which is waived by failure to demur is not tenable as ground for a motion in arrest of judgment.

2. Conspiracy ⟹24.

That defendants were jointly engaged in unlawfully selling intoxicating liquors authorized verdict of guilty under indictment charging conspiracy thereto.

3. Criminal law ⟹829(9).

Refusing proper instruction that defendants' failure to testify did not infer guilt *held* harmless, being substantially covered by others (Pen. Code, § 1096).

Part of the requested instruction in question, which the court refused, stated that "defendants may rely for their acquittal upon the evidence offered without testifying." The court in another instruction declared that the burden was upon the state to establish guilt beyond all reasonable doubt and that "a defendant in a criminal case is never required or expected to prove his innocence." The remaining portion of the requested instruction told the jury "to draw no inference of guilt from the fact that the defendants do not testify." The court, although refusing this instruction, informed the jury they were "not to be prejudiced against any defendant by reason" of his failing to take the stand, and also read to the jury Pen. Code, § 1096, which provides that defendant is presumed innocent until contrary is proved, and must be acquitted in case of reasonable doubt of his guilt.

4. Criminal law ⟹1173(2).

Refusing instruction that evidence of mere relationship between defendants did not establish alleged conspiracy to violate prohibition law *held* not prejudicial under evidence.

In addition to the fact that the jury had been given to understand that the conspiracy was to be proved as any other fact and beyond a reasonable doubt, the evidence clearly showed that defendants were at least jointly engaged in the business of selling and delivering intoxicating liquors contrary to law, and was sufficient to disclose with reasonable certainty that an understanding and agreement for that purpose existed.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Saul La Bow and another were convicted of a conspiracy to sell, possess, and transport intoxicating liquor, and they appeal.

Affirmed.

Mark F. Jones and Joseph L. Fainer, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, J.

The defendants were convicted of a conspiracy to "sell, possess and transport intoxicating liquor fit for beverage purposes, containing more than one-half of one per cent. of alcohol by volume." They appeal from the judgment and an order denying their motion for a new trial.

[1] The first ground assigned for a reversal is that the indictment does not charge a public offense, and we shall at this time direct our attention to their argument in this particular. We have quoted that portion of the indictment claimed to be insufficient. It is insisted that it should have charged that the defendants conspired together that they would "*unlawfully*" sell, possess, and transport intoxicating liquor, etc., and also that it fails to state that the liquors were *for* beverage purposes. The Attorney General asserts that the appellants waived the point relied upon by failing to demur to the indictment, and by waiting to urge it before the trial court until argument upon a motion in arrest of judgment. We think this contention must be sustained. It may be assumed that had a demurrer been interposed the indictment would have been fatally defective. But section 1185 of the Penal Code by its terms provides that an objection which is waived by a failure to demur, is not tenable as a ground for a motion in arrest of judgment. It is here to be noted that the indictment charges that the defendants "did willfully, unlawfully and feloniously agree, conspire and combine together that they would sell, etc." Some meaning must be attached to this language. They could not unlawfully and feloniously conspire to lawfully sell, possess, and transport. We are therefore brought to a point parallel with the case of People v. Mead, 145 Cal. 500, 78 P. 1047, 1048, where a similar objection to an information was attempted to be urged for the first time upon a motion in arrest of judgment and wherein it was held that the objection was waived, the court saying: "If the defendant before the trial had presented a demurrer to the information, and had then urged the defect therein which he now suggests, there would have been an apportunity for the court to have directed an amendment of the information, curing the defect. Instead of raising the question at that point in the case, he seeks to gain an advantage by taking the chances of an acquittal upon the trial, and, after conviction, attempting to get a new trial by reason of the defect which he should have urged before." Again in People v. Rodley, 131 Cal. 240, 63 P. 351, 355, a case involving a charge of perjury, it was urged that the indictment failed to allege the falsity of all the sworn statements of the defendant, the court said: "However, it seems plain here that the indictment states facts constituting an offense, and the worst that can be said of it is that it is not as specific and certain as it should have been in its allegations as to the falsity of the numerous statements of defendant

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

charged to have been perjurous; and perhaps the indictment for that reason does not conform to the requirements of sections 950, 952, Pen. Code. But an uncertainty of such a character would be waived by the defendant's failure to demur. He cannot, under our system, lie by until he shall see the result of a trial of his case on its merits, and then be permitted to take advantage of a mere uncertainty in the indictment by motion in arrest of judgment." To the same effect, see People v. Norcross, 71 Cal. App. 2, 234 P. 438, and 8 Cal. Jur. § 466, with cases there cited.

[2] The appellants also contend that the evidence is insufficient to justify the verdict. We deem it unnecessary to set forth the testimony in detail for the reason that therefrom it plainly appears that, at least, the two appellants were jointly engaged in the business of selling and delivering intoxicating liquors contrary to law, and the jury were authorized to conclude that they had agreed and conspired together, as they no doubt had, to violate the prohibition laws. The evidence amply sustains the verdict.

[3] It is next insisted that the court erred in failing to give certain instructions requested by the defendants. The first instruction proposed is the usual one, as follows: "The defendants may rely for their acquittal upon the evidence offered without testifying, you are to draw no inference of guilt from the fact that the defendants do not testify." However, the court did tell the jury in another instruction that "a defendant in a criminal case is never required or expected to prove his innocence," the burden being upon the state to establish guilt beyond all reasonable doubt and that they were "not to be prejudiced against any defendant by reason" of his failing to take the stand. The court also read section 1096 of the Penal Code to the jury, wherein it is said that the defendant "is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. * * *" Undoubtedly the proposed instruction was proper and should have been given, but under all the circumstances of the instant case we cannot believe that the rights of the defendants were seriously or at all impaired or prejudiced. In view of the instructions given the jury must have understood that it was the duty of the prosecution to produce proof of guilt beyond a reasonable doubt and that in its determination of that question the defendants were not to be prejudiced by their failure to testify. The present case involves a situation quite different from that presented in People v. Emmons, 13 Cal. App. 487, 110 P. 151. In the cited case the court by its instruction directed the attention of the jury to the fact that had the defendant offered himself as a witness he would have exposed himself to the perils of cross-examination. The difference was noted in People v. Russo, 85 Cal. App. 672, 259 P. 1020.

[4] Appellants also complain because the court failed to give an instruction requested by them to the effect that a conspiracy cannot be established by mere suspicion nor by evidence of a mere relationship between the parties. Aside from the fact that the jury was given to understand that the fact of conspiracy was to be proven as any other fact and beyond a reasonable doubt, there remains the evidence which is sufficient to convince any reasonable person that the defendants had in fact an understanding and agreement for the purpose of dealing in intoxicating liquors. It is difficult to conceive any possible prejudice to their rights.

Judgment and order affirmed.

We concur: CRAIG, Acting P. J.; GATES, Justice pro tem.

KIPP v. DANIELSON.*

Civ. 46.

District Court of Appeal, Fourth District, California.

May 22, 1930.

Rehearing Granted June 20, 1930.

1. Taxation ⟹430.

Extension of tax by auditor was no part of assessment, and lots were assessed separately, though total valuation and items of taxes were listed in one sum.

The two lots involved were listed on page of assessment book under one name as owner, one lot below the other, and followed by separate valuations. Thereafter on such page the total valuation and items of taxes were listed in one sum in each item.

2. Taxation ⟹788(1).

Deed to state is conclusive evidence of regularity of extension of tax by auditor (Pol. Code, § 3787).

Pol. Code, § 3787, provides that tax deed duly acknowledged and proved is conclusive evidence of regularity of all other proceedings from assessment by the assessor inclusive up to actual execution of deed.

3. Taxation ⟹667.

Tax sale, where excessive as much as the smallest fractional coin authorized by law, is void.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing granted 292 P. 155.

4. Taxation ⟹667.

Where delinquent list showed tax of $5.76, whereas published notice gave amount as $5.77, tax sale was void.

Appeal from Superior Court, San Diego County; Douglas L. Edmonds, Judge.

Suit by Sylvester Kipp against Laura C. Danielson to quiet title. From the judgment, plaintiff appeals.

Affirmed.

Virgil S. Kipp, of San Diego, for appellant.

Lon A. Brooks, of Los Angeles, and Turrentine & Wright, of San Diego, for respondent.

OWEN, Justice pro tem.

The action is an ordinary suit to quiet title; the answer being a denial of plaintiff's title and a claim of title by defendant. It was stipulated by the respective parties on trial that the defendant is the owner of the premises in litigation in fee simple, unless her title thereto has been divested by plaintiff's tax title. It was further stipulated that plaintiff had paid the amount of purchase money recited in the tax deed, and all of the delinquent taxes to the date of sale.

The premises involved consisted of lots 39 and 40, in block 52, University Heights, San Diego county, being contiguous lots. The defendant offered in evidence the tax assessment book of said county for the year 1917; the delinquent tax list for the same year, a published notice of sale of the premises, and an addenda to the delinquent tax list.

The court found that the tax deed was and is void, and that the defendant is the owner in fee and entitled to the possession of the property.

It appears from an examination of a copy of a page of the assessment book for the year 1917, submitted with the bill of exceptions, that the two lots were listed under one name as owner, one lot below the other, and followed by a separate valuation. Thereafter on the said page the total valuation and items of taxes were listed in one sum in each item. On the page of the delinquent assessment book submitted the method just described followed, with identical amounts, except there was carried out the items of penalty for the second installment, the advertising costs and the total tax and penalties, which last item was listed as $5.76. The published notice of sale listed the total taxes, penalties, and costs as $5.77.

[1,2] (1) In the case of Gottstein v. Holmes, 89 Cal. App. 145, 264 P. 310, involving the same assessment book for the same year, for taxes for the year 1917, and the same addenda list, it was determined by the Appellate Court that the two lots were valued and assessed separately, and that the extension of the tax by the auditor is no part of the assessment of the property, and, even if it were not so, it is one of the proceedings, the regularity of which section 3787 of the Political Code provides that the deed to the state shall be conclusive evidence. We are in accord with the reasoning in this case.

[3] (2) There remains the one cent difference between the delinquent list as shown on the books and as published. The rule laid down in Treadwell v. Patterson, 51 Cal. 637, and quoted approvingly as late as Jacoby v. Wolff, 198 Cal. 667, 247 P. 195, is set forth as follows:

"The rule, as stated by Judge Cooley in his late work on Taxation (p. 344), is that 'a sale for anything more than is lawfully chargeable, is a sale without jurisdiction, and therefore void.' On the same point see Bucknall v. Story, 36 Cal. 67. In such cases the maxim 'de minimis non curet lex,' does not apply, except in a limited sense. The rule, as established by the authorities, is, that if the excess be as much as the smallest fractional coin authorized by law, the sale is void."

[4] We have been unable to find in any case where the difference between the sum due and the amount as published has been as little as the smallest fractional coin authorized by law. Here we have an opportunity to apply Judge Cooley's rule. The delinquent list in the instant case shows the sum due to be $5.76. The published notice gives the amount as $5.77. It is true that in the Treadwell v. Patterson Case, supra, the property was sold for the amount as published, and that in the case under consideration the sale was for the correct sum, $5.76, and not for the sum as published. But it has been held that the publication of the delinquent list, setting forth the amount due for taxes, penalties, and costs, is as prerequisite to a valid sale as are the description of the property and the name of the owner. Fox v. Wright, 152 Cal. 59, 91 P. 1005; Warden v. Broome, 9 Cal. App. 172, 98 P. 252, 253. In Warden v. Broome, the court said:

"It is immaterial that the property was sold to the state for the correct amount. This result might have been accomplished equally well in the absence of any advertisement of the amount due. The effect of the proceeding is to divest the owner of his title by virtue of statutory proceedings. In such proceedings the provisions of the statute should be strictly followed."

There can be no rule laid down that can permit a variance from a strict construction of the statute by reason of the triviality of the sum involved. The notice is a demand for payment from the owner, and, if he does not

pay, his land will be taken by the state. Clearly an excessive demand, whether one cent or any greater sum, is a violation of the plain import and terms of the statutory provision. In demanding the right to sell land, however valuable, for the nonpayment of taxes, however trivial, the state in protection of the citizen must be held to a full and exact compliance with the law. To hold otherwise it would follow that any sum might be demanded in the notice. If the correct sum be not required, it must follow that no notice ought to be required or given. This situation was never contemplated by the framers of the statute.

The judgment is affirmed.

We concur: BARNARD, Acting P. J.; MARKS, J.

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106 Cal. App. 51

RAFFO v. FOLTZ et al.

Civ. 3938.

District Court of Appeal, Third District. California.

May 24, 1930.

Rehearing Denied June 23, 1930. Hearing Denied by Supreme Court July 21, 1930.

1. Trusts ⟹1.

"Trust" is any arrangement whereby property is transferred with intention that it be administered by trustee for another's benefit.

[Ed. Note.—For other definitions of "Trust," see Words and Phrases.]

2. Garnishment ⟹32.

Property held under trust is not subject to garnishment.

3. Garnishment ⟹29.

Pledges ⟹1.

Separation agreement, whereby wife deposited money with attorneys as security for covenant to protect husband against her creditors, created "pledge," subject to garnishment (Civ. Code, §§ 2986, 2993).

Under the separation agreement in question, the wife agreed that $1,500 might be deposited in a certain bank, to be evidenced by a certificate of deposit held jointly by the attorneys for the respective parties, and in case the covenant were faithfully performed, the money should be paid to the wife "not later than 6 months from date hereof, unless otherwise mutually agreed upon between the aforesaid" attorneys. Under Civ. Code, § 2986, a "pledge" is a deposit of personalty as security for the performance of another act, and under section 2993, the pledgor and pledgee may agree upon a third person with whom to deposit the pledged property, who is called a pledge holder.

[Ed. Note.—For other definitions of "Pledge," see Words and Phrases.]

4. Pledges ⟹21.

Under pledge, as distinguished from trust, title does not pass (Civ. Code, §§ 2986, 2993).

5. Execution ⟹35.

Garnishment ⟹29.

Wife's depositing money with attorneys as husband's security on covenant to protect husband against her creditors in separation agreement, being "pledge," was subject to garnishment or execution by wife's creditors, to extent of wife's interest (Civ. Code, §§ 2986, 2993).

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by John Raffo against E. P. Foltz and another, in which R. H. Dodd as trustee in bankruptcy and others intervened. From an adverse judgment, plaintiff appeals.

Reversed.

A. H. Carpenter, of Stockton, for appellant.

C. P. Rendon, Charles H. Epperson, Jr., L. J. Smallpage, and McNoble, Parkinson & Coblentz, all of Stockton, for respondents.

TUTTLE, Justice pro tem.

Action brought to recover the sum of $1,500 from defendants Foltz and Smallpage, which sum, it is alleged, defendants refused to pay over when an execution was levied.

December 21, 1926, an agreement was entered into by Charles N. Newman and Celia Newman, his wife. This was a separation agreement. Paragraph 17 of this agreement provided as follows:

"17. And whereas, certain creditors who have claims for merchandise purchased by said second party on and after the aforesaid date now demand payment from said first party; second party agrees that she will hold first party harmless from the payment of any and all of said claims, or of any damage resulting unto plaintiff therefrom, and that she will, within sixty days from date hereof, either pay and discharge all of said indebtedness and claims, or furnish unto said first party, documents evidencing his release therefrom. As security for the faithful performance of this covenant on the part of second party, the latter agrees that there

may be deposited in the Stockton Morris Plan Bank, evidenced by a certificate of deposit thereof, drawing six per cent. per annum interest, in the joint names of E. P. Foltz, attorney for said second party, and Lafayette J. Smallpage, attorney for first party, the sum of Fifteen Hundred ($1500.00) Dollars. No charge shall be made by the said Lafayette J. Smallpage and/or E. P. Foltz for any services rendered or to be rendered her in connection with said escrow. In the event that all of said obligations are paid and discharged as herein agreed, and first party is held harmless from any loss or damage resulting from any of said claims hereby assumed and agreed to be paid by said second party, including costs of suit and a reasonable allowance for attorney fees that may be incurred by him after this date in defending his liability upon any of said claims, or in enforcing any of his claims against second party on account of her covenants herein, then the aforesaid moneys shall be paid unto the second party not later than six months from date hereof, unless otherwise mutually agreed upon between the aforesaid E. P. Foltz and Lafayette J. Smallpage, provided, however, that prior to the termination of said six months' period, if any judgment of any trial court be rendered against first party by reason of any alleged liability of his upon any of said claims, then said E. P. Foltz and Lafayette J. Smallpage shall deduct from the said moneys so on deposit, the amount of such judgment and pay the same in discharge thereof, and provided further, that in case, prior to the termination of the six months' period, an action be pending against said first party upon any of said indebtedness or claims, a sufficient amount shall be withheld by the said E. P. Foltz and Lafayette J. Smallpage, to cover the amount so claimed, together with costs and reasonable counsel fees, which said amount shall be paid by them in the discharge of any judgment that may be rendered in said action against said first party."

January 13, 1927, John Raffo, appellant herein, commenced suit against Celia Newman, through his attorney, A. H. Carpenter, praying for a judgment in the sum of $1,500 costs and interests (such amount by coincidence being the same amount as the fund above set forth), upon an alleged cause of action on a promissory note signed by Celia Newman, the consideration of which was alleged to be money loaned by Raffo to her. On that date attachment was issued in the action and served with notice of garnishment on defendants Foltz and Smallpage. Smallpage at that time held in his possession three $500 investment certificates in Stockton Morris Plan Company in which he had invested the $1,500. He refused to surrender these certificates to the sheriff and retained possession of them until they were deposited in court under order of court later. Following Raffo's attachment, Powers, Ross, and other creditors of Celia Newman likewise brought suit and garnished Foltz and Smallpage.

March 14, 1927, appellant served execution and notice of garnishment on Foltz and Smallpage, Celia Newman having suffered default. Smallpage again refused to surrender the certificates. June 27, 1927, Celia Newman, through her attorney, A. H. Carpenter, filed petition in voluntary bankruptcy, was shortly thereafter adjudicated, and R. H. Dodd was appointed trustee of her estate and at all times thereafter was the qualified and acting trustee. May 9, 1927, appellant brought this action against Foltz and Smallpage to compel application of investment certificates to satisfaction of judgment against Celia Newman, basing his complaint upon his attachment and subsequent execution. August 4, 1927, Foltz and Smallpage deposited the certificates in court to wait the outcome of the litigation. Thereafter R. H. Dodd as trustee in bankruptcy of estate of Celia Newman, Powers, Ross, and various others, filed petitions in intervention. Answers, cross-complaints, etc., were filed freely, the pleadings being somewhat voluminous, but in none of them were any issues raised controverting the foregoing statement of facts which appear fully alleged in the pleadings.

When the garnishment was served by appellant, suits were pending against C. N. Newman and Celia Newman for merchandise bought by Celia Newman after September 18, 1925, to the amount of $1,100, plus interest and costs. At the same time there were other unpaid merchandise claims against the Newmans for goods bought after September 18, 1925, which, added to the amounts in suit, give a total of over $1,500 at the time of attachment herein. At the time of judgment herein merchandise bills of above character, plus costs of the trustees to a total of $1,435, remained unpaid and subject to payment from the fund from which the investment certificates were derived.

The foregoing facts are a compilation of the totals shown by the various exhibits introduced by defendant and interveners, to the introduction of which appellant stipulated that no objection would be raised as to the form, or upon the ground that in such form they were not the best evidence; appellant objecting solely upon the ground of their materiality.

The record further shows that when said property settlement was executed, Charles N. Newman paid over to his wife the sum of $6,000 cash, and that the wife thereupon paid over to defendants Foltz and Smallpage the said sum of $1,500 mentioned in said agreement.

The purpose of the foregoing clause in said contract was not, as counsel seem to infer, to protect the creditors of the parties, or either

of the parties. It was formulated for the benefit of the husband, as security for the faithful performance of certain covenants of the agreement, and not out of solicitude for creditors.

Defendants contended that said sum was not subject to attachment or execution at the hands of plaintiff in this action. The trial court so found and adjudged.

The judgment of the trial court was predicated and based upon the theory that the said personal property was a trust fund, and, as such, could not be reached by attachment or execution, and that the purported levies were void.

Appellant contends that the said separation agreement did not create a trust, and that said sum of $1,500 should be applied in satisfaction of his judgment.

[1, 2] A "trust" may be defined as any arrangement which exists where property is transferred with an intention that it be held and administered by the transferee or trustee for the benefit of another. Estate of Reith, 144 Cal. 318, 77 P. 942. Property held under a trust is not subject to garnishment or attachment. 28 C. J. 102.

[3, 4] It will be observed that said sum of $1,500 was merely deposited with the two attorneys, as security for the performance of certain acts on the part of the wife. There was no transfer of the ownership of this fund. It belonged to and was the property of the wife at all times. We are of the opinion that under the contract the relations of the parties were as follows: The wife was the pledgor; the husband, the pledgee; and the attorneys, pledge holders; and that the transaction may be designated as a pledge. "Pledge" is a deposit of personal property by way of security for the performance of another act. Civ. Code, § 2986. A pledgor and pledgee may agree upon a third person with whom to deposit the property pledged, who, if he accepts the deposit, is called a pledge holder. Civ. Code, § 2993. A pledge has sometimes been spoken of as in the nature of a trust, but strictly it has not the characteristics of a trust and is particularly distinguishable therefrom in that in the case of an assignment in trust the title to the property passes, whereas, in the case of a pledge, it does not. 49 C. J. 898. "A transfer of personal property to trustees, as security for a debt, under an agreement that said trustees are to conduct the business of the grantors, through one of the latter as their agent, for six months, when, if found unprofitable, they are to sell the goods, and providing that, when certain creditors shall have received 50 per cent. of their claims, and all costs and expenses, then the trust shall be terminated, and the assets remaining shall be transferred to the said grantors, is a pledge. * * *" Lilienthal v. Ballou, 125 Cal. 183, 57 P. 897; Kerr's Digest, vol. 7, p. 7447.

[5] It has been held in this state that property held as a pledge is subject to attachment, and in this connection the Supreme Court has said:

"It is contended for respondent, however, that the Byrne note, in possession of the bank as a pledge, was not subject to attachment, and that only the money realized therefrom by the bank was attachable, and, therefore, that Carter acquired no lien on the money collected by the bank after the service of his garnishment; and this theory seems to have been adopted by the judge who heard the motion and made the order.

"But this theory is unsound. All debts and credits of a defendant in possession of another are attachable by garnishment. The Byrne note, in possession of the bank as collateral security for a debt of the defendant in attachment, Richardson-Kimball Company, was a 'credit,' and the defendant's interest in it was attachable by garnishment of the bank (Gow v. Marshall, 90 Cal. 565, 27 P. 422); and the lien of Carter's attachment not only fastened itself upon the note, but transferred itself to the money, when collected thereon by the garnishee (Robinson v. Tevis, 38 Cal. 614)." Deering & Co. v. Richardson-Kimball Co., 109 Cal. 74, 41 P. 801, 803.

As the property held by Foltz and Smallpage was a pledge, we hold that it was subject to garnishment and execution. The lien of the garnishment and execution would fasten itself upon the personal property in question and any balance remaining, after the pledge-holders had fully performed the acts required of them under the contract, should be delivered to the sheriff under the levy of the execution herein. Deering & Co. v. Richardson-Kimball Co., supra.

It follows that the finding of the court "that the levies of the garnishment and execution are void and of no effect and constitute no lien upon said personal property" is not supported by the evidence, and the judgment based upon the same is erroneous.

The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

209 Cal. 524

FRIESEN et ux. v. CITY OF GLENDALE et al.

L. A. 9773.

Supreme Court of California.

June 2, 1930.

1. Deeds ⟹171(2).

Deed restrictions that premises should be used for residential purposes only *held* in nature of negative easement or equitable servitude.

2. Injunction ⟹62(3).

When physical conditions in vicinity of land burdened by building restrictions have changed so as to render it unconscionable to enforce restriction, equity will refuse enforcement.

3. Deeds ⟹170.

Provisions of deed creating equitable servitude will be strictly construed.

4. Deeds ⟹170.

Rule that deed creating equitable servitude will be strictly construed *held* especially applicable where title to land is acquired by municipality for street purposes.

5. Statutes ⟹233.

Law providing for building restriction is not binding on sovereign unless it appears that sovereign consented to be bound.

6. Dedication ⟹53.

Conveyance of land for public purpose will ordinarily vest in grantee same rights as though land had been acquired by condemnation.

7. Eminent domain ⟹85.

Property owners for whose benefit building restrictions were imposed in deed *held* not entitled to compensation on application of restricted property to public use for street purposes (Const. art. 1, § 14).

8. Deeds ⟹174.

Building restrictions contained in deed *held* not binding on municipality contemplating public use of property.

In Bank.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by H. J. Friesen and wife against the City of Glendale and others, including W. H. Andrews and Maude E. Andrews. Judgment for plaintiffs, and defendants, except defendants Andrews, appeal.

Reversed.

Superseding opinion of District Court of Appeal in 281 P. 93.

Arthur M. Ellis, of Los Angeles, for appellant Charles U. Heuser.

Bernard Brennan, former City Atty., W. Turney Fox, former City Atty., Ray L. Morrow, City Atty., and Frank M. Moody, Deputy City Atty., all of Glendale, for appellant City of Glendale.

U. S. Webb, Attorney General for the State of California, Everett W. Mattoon, County Counsel, and Claude H. McFadden, Deputy County Counsel, both of Los Angeles, for County of Los Angeles, Walter F. Dunn, City Attorney, of Monrovia, for City of Arcadia and City of El Monte, Richard C. Waltz, City Attorney, of Beverly Hills, for City of Beverly Hills, James H. H. Mitchell, City Attorney, of Burbank, for City of Burbank, Joseph A. Allard, City Attorney, of Pomona, for City of Claremont, City of La Verne and City of Pomona, Nowland M. Reid, City Attorney and George W. Trammell, Jr., Assistant City Attorney, both of Long Beach, for City of Long Beach, Preston Higgins, City Attorney, and C. Stanley Wood, Assistant City Attorney, both of Oakland, for City of Oakland, R. C. McAllaster, former City Attorney, and Harold P. Huls, City Attorney, both of Pasadena, for City of Pasadena, Hugh B. Bradford, City Attorney, and Joseph L. Knowles, Assistant City Attorney, both of Sacramento, for City of Sacramento, Fred A. Wilson, City Attorney, of San Bernardino, for City of San Bernardino, M. W. Conkling, City Attorney, of San Diego, for City of San Diego, Charles D. Swanner, City Attorney, of Santa Ana, for City of Santa Ana, Earl Warren, District Attorney, of Oakland, for County of Alameda, H. Ray Bailey, District Attorney, and W. A. McGinn, Deputy District Attorney, both of Bakersfield, for County of Kern, Neil R. McAllister, District Attorney, Alex J. Ashen, Assistant District Attorney, both of Sacramento, for County of Sacramento, George H. Johnson, District Attorney, of San Bernardino, for County of San Bernardino, Stephen Connell, District Attorney, and E. S. Lovett, Deputy District Attorney, both of San Diego, for County of San Diego, Guard C. Darrah, District Attorney, of Stockton, for County of San Joaquin, amici curiæ for appellants.

H. L. Watt, of Los Angeles, for respondents.

SHENK, J.

This is an appeal from a judgment permanently enjoining the city of Glendale and its officers, agents, etc., from constructing a public street across any portion of lot 2 of tract 4335 in said city, and from making any use of said property other than for residence purposes.

The plaintiffs, husband and wife, are and have been since April 3, 1925, the owners of the south seventy feet of lot 1 of said tract. When the tract was laid out all of the deeds conveying lots therein contained, among others, the restriction: "That said premises shall be used for residence purposes only." All of the lots in the tract were laid out under a general residential plan and deeds to purchasers thereof contained similar restrictions, each inuring to the benefit of the other lots in the tract. The defendants, Andrews and wife, acquired said lot 2, and the same was accepted by them subject to said restrictions. On the 29th day of March, 1929, they delivered a deed conveying to the city of Glendale for public street purposes the south fifty feet of said lot 2. The plaintiffs did not join in the dedication. The city accepted the offer of dedication and, by proceedings duly taken under the "Improvement Act of 1911," proceeded to order the improvement and make available to the public for street purposes a strip fifty feet in width and about five hundred feet in length to be known as Pleasant View Terrace and to provide a connecting link between Highland avenue and Virginia avenue and having one of its termini in each of the last-mentioned streets. The defendant Charles U. Heuser is the contractor to whom the defendant city proposes to let the contract for the street improvement.

It is the contention of the plaintiffs that so long as the restriction on said lot 2 for residential purposes remains in force the owner of each lot in the tract laid out under the general plan has a proprietary interest in the portion of the lot so proposed to be improved for street purposes, which interest may not be taken or damaged for public use without compensation as provided in section 14 of article 1 of the Constitution. The defendants contend, first, that the construction of a public street on the portion of the lot acquired by the city is not inconsistent with the use of land for residential purposes, and that said restriction is therefore not violated; and, secondly, assuming that the construction of a public street on land restricted for residential purposes be in violation of the restriction, a

court of equity should not enjoin the improvement.

The undisputed facts show that it was the purpose of the subdividers of the tract and of purchasers of the lots under the restrictions to establish and preserve the tract for high-class residential uses. To do so it must have been contemplated by all concerned that access to the lots in the tract should be had by means of public streets. That adequate street frontage available to the lots would be essential to the accomplishment of the purpose to devote the land to high-class residential uses would seem to admit of no doubt. It is inconceivable that a tract would be laid out with no street frontage incident thereto. Without adequate streets the lots in the tract would be less valuable than if due consideration were given to ingress and egress to and from such lots by means of thoroughfares. It is apparent that the use of a portion of the lots for public street purposes is not only not inconsistent with the use of the remaining lots for the purpose intended, but may be essential to the continuance and preservation of such intended use. There is nothing in the deeds issued in accordance with the general plan to devote the lots to high-class residential purposes which could be construed to prevent the use for street purposes of such of the lots in the tract or portions thereof as the public authorities might find to be convenient or necessary to be established and improved. It is not denied that the public convenience and necessity for the establishment and improvement of said street have been found to exist by duly constituted authority. Also, we may take notice of the fact that the lots in the vicinity might be assessed to acquire land and improve the same for public street purposes upon the theory that the lots assessed would be benefited by the proposed improvement. By reason of the pending proceeding instituted by the city it must therefore be conclusively presumed that public convenience and necessity required the acquisition and improvement of said portion of lot 2 for street purposes.

[1-5] What then is the nature of the title of the city or of the plaintiffs and other lot owners in the tract, which would prevent the city from improving the portion of lot 2 for street purposes as now proposed? The building restriction under consideration is in the nature of a negative easement or equitable servitude. (Martin v. Holm, 197 Cal. 733, 242 P. 718.) It is not a positive easement or right in the land itself which would permit of the physical use or occupation thereof by the other lot owners in the tract. It is merely a right enforceable in equity as between the parties to the contract, or their successors with notice, on the theory that it would be unconscionable to permit one who had contracted to use his property in a particular way to violate his agreement. It is a familiar rule that, when the physical conditions in the vicinity of the land thus restricted have so changed as to render it unconscionable to enforce the restriction, equity will refuse to enforce, and the restriction as to its enforceability then fades out of the contract of the parties. It is also well established that the "provisions of an instrument creating or claimed to create such a servitude will be strictly construed, any doubt being resolved in favor of the free use of the land." (Werner v. Graham, 181 Cal. 174, 183 P. 945; 7 Cal. Jur., p. 733.) This rule would seem to be especially applicable where the title to the land is acquired by a municipality for public street purposes. To construe the instrument strictly in favor of the servitude would impose upon the city the obligation to use the land acquired for residential purposes only, a use to which the city obviously has no power to devote land acquired for street purposes. A construction strictly against the covenant would permit the city to acquire the land freed from the restriction. Furthermore, a duly enacted law providing for such a restriction, binding upon private parties, is not binding upon the sovereign unless it appear expressly or by necessary implication that the sovereign consented to be so bound. (C. J. Kubach Co. v. McGuire, 199 Cal. 215, 248 P. 676.) Much less would the city be bound by the terms of a private contract to which it was in no wise a party.

[6-8] It therefore appears that the city may proceed as contemplated unless the plaintiffs and others similarly situated in the tract have such a property interest in the portion of lot 2 acquired by the city as would require that such interest be purchased or condemned before the city may be permitted to construct a public street thereon. It was conceded by counsel for the plaintiffs at the oral argument, and we think properly, that the legal situation of the parties hereto would be the same whether the proposed street were to be improved on property acquired by the city by voluntary dedication or by proceedings in eminent domain. "The conveyance of land for a public purpose will ordinarily vest in the grantee the same rights as though the land had been acquired by condemnation." (2 Lewis on Eminent Domain, 3d Ed., sec. 474.) If the plaintiffs are possessed of a property right in said portion of lot 2 it may be taken for granted that they would be necessary parties defendant in any suit brought by the city to condemn said land for street purposes. Likewise would all other lot owners in the tract, as well as incumbrancers of such other lots, be necessary parties. The plaintiffs expressly "do not contend that parties may by private contract restrict the exercise of the power of eminent domain," yet by private contract with their neighbors they have created, if their position be sustained, an estate inherent in each lot in the tract protected against the taking or damaging thereof with-

out compensation, and have brought about a situation where the number of the parties defendant and of the interests to be appraised in condemnation would be manifold. In cases of large tracts the increase in number would practically be prohibitive. It is true that the increase in the number of the defendants and interests to be appraised is not determinative or controlling, provided an estate be created which must be measured in money in the condemnation suit, but such results may be considered where we approach a contention that by private contract an estate in land unknown to the common law or the law of this state is created which would have the result of greatly increasing the cost of condemnation proceedings and making them more burdensome on the public. As above noted, the interest sought to be imposed on said portion of lot 2 is no more than a negative easement or an equitable servitude. It does not rise to the dignity of an estate in the land itself. It is not a property right, but is a contractual right cognizable in equity as between the contracting parties, not binding on the sovereign contemplating a public use of the particular property taken. This was expressly so declared in the leading case of United States v. Certain Lands (C. C.) 112 Fed. 622. The declarations of the court in that case are in accordance with reason and the weight of authority on the subject. No case in this state is in point, and decisions in other states, notably Allen v. Detroit, 167 Mich. 464, 133 N. W. 317, 36 L. R. A. (N. S.) 890, and Flynn v. New York W. & B. Ry. Co., 218 N. Y. 140, 112 N. E. 913, Ann. Cas. 1918B, 588, are not persuasive in the light of the declarations of this court as to the nature of the restrictive covenant relied upon by the plaintiffs herein, and the further consideration that parties may not by mutual covenants in private contracts create for themselves an estate in land not known to our law and thus entitle them to compensation where no such right existed before.

The judgment is reversed.

We concur: WASTE, C. J.; PRESTON, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.

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209 Cal. 552

DONOVAN v. CITY OF LOS ANGELES et al.

L. A. 11783.

Supreme Court of California.

June 11, 1930.

Rehearing Denied July 11, 1930.

1. Municipal corporations ⟹293(1).

Passage of ordinance of intention and publication of notice thereof confers jurisdiction on city authorities to proceed with street improvement.

2. Municipal corporations ⟹288(1).

That portion of street improvement expense was to be defrayed from city treasury did not foreclose assessment of remaining cost against benefited property.

3. Municipal corporations ⟹513(9).

Contentions that property assessed for street improvements was not in assessment district and that owner's protest against amount of assessment was not properly heard were overcome by court's properly supported contrary finding.

4. Municipal corporations ⟹488, 489(5).

Property owner's failure to protest street improvement or district benefited forecloses inquiry on such questions (Deering's Gen Laws 1923, Act 8198, §§ 3, 4, 11, 18).

The complaining property owner filed no protest in response to notice of hearing of protests against improvement and extent of district under Deering's Gen. Laws 1923, Act 8198, § 3, did not appear at hearing after publication of notice thereof, under section 4, nor intervene in condemnation proceedings, though notice thereof was published as required by section 11, but first appeared and filed protest in response to notice of assessment under section 18.

5. Municipal corporations ⟹513(9).

Property owner's contention that city was argely influenced in beginning of street improvement by traffic association *held* without nerit.

There was no showing that city council acted through improper motives, abdicated its functions or exercised oppression on property owners, or that traffic association did anything more than was commendable in promulgating comprehensive plan, which was approved by popular vote, to improve traffic conditions in city.

In Bank.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Augusta Lamb Donovan against the City of Los Angeles and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

James Donovan and John D. McCarthy, both of Los Angeles, for appellant.

Erwin P. Werner, City Atty., Sam H. Erwin, Deputy City Atty., Jess. E. Stephens, Ex City Atty., and Herman Mohr and Jerrell Babb, Ex Deputy City Attys., all of Los Angeles, for respondents.

PRESTON, J.

We feel that the questions raised in this case are all thoroughly settled in opposition to the contentions of appellant, and that but little discussion is required in disposing of this appeal.

Plaintiff, the owner of an interest in property situated at 1929 Ocean View avenue, Los Angeles, sues defendant city and the other defendants as members of the city council and board of public works thereof, respectively, for the purpose of enjoining the collection of a certain street assessment initiated, promulgated, and levied under the Street Opening Act of 1903, supplemented by the Street Opening Bond Act of 1911 (Deering's Gen. Laws 1923, Acts 8198 and 8199, p. 3309 et seq.), to improve Third street in said city. The ordinance of intention was duly passed on September 1 and approved on September 4, 1925. Theretofore, and on August 27, 1925, the city had approved and adopted a map, numbered A-3244, showing the land to be taken and the assessment district to be formed for the improvement contemplated by the said ordinance of intention above referred to. The ordinance provided that $164,033 be paid toward the expense of said improvement out of the treasury of the city of Los Angeles.

[1] Notice of the ordinance was duly published and notice of the public improvement was also posted and published. This passage of the ordinance and the publication of notice thereof has been held sufficient to confer jurisdiction upon the city authorities to proceed with the improvement contemplated. O. T. Johnson Corp. v. City of Los Angeles, 198 Cal. 308, 245 P. 164.

[2] In this case it may be noted that the fact that a portion of the expense was to be defrayed from the city treasury did not foreclose the city from providing that the remaining cost of said improvement be assessed against the property of the local district benefited thereby as determined by it. Frank v. Maguire, 201 Cal. 414, 422, 423, 257 P. 515.

Notice of the hearing of protests against said improvement and against the extent of the assessment district was duly given as provided by section 3 of said act (Deering's Gen. Laws 1923, Act 8198). Appellant, however, filed no protest in response to this notice. The council then fixed a time for the hearing of protests and gave notice thereof by publication of the time and place fixed for hearing as provided by section 4 of said act. Again appellant did not appear.

Thereafter and on December 31, 1925, the city council passed a final ordinance, ordering the performance of the work incident to this improvement, this ordinance having been preceded by a notice duly published as required by section 4 of said act. This final ordinance directed the city attorney to commence a condemnation action against all the owners and claimants of the property or any part thereof necessary to be taken to carry out said improvement. None of appellant's property was sought to be taken; hence she was not made a party to nor was she a proper defendant to the action. Nevertheless, publication as required by section 11 of said act was duly and regularly made and had appellant desired to intervene, the opportunity was thus afforded her of doing so. In fact, appellant at no time up to this point offered any opposition whatever to the proposed improvement. On the contrary, the record shows that she actually petitioned the council for the initiating of such proceeding.

Thereafter an interlocutory judgment was duly entered in said condemnation proceeding and later, and on June 20, 1928, the city council ordered the city engineer to make and deliver to the board of public works a diagram of the improvement and of the property within the assessment district described in the ordinance of intention. Thereafter and on June 25, 1928, the board of public works reported its assessment to the city council and the city council duly and regularly published notice of the filing of the assessment under section 18 of said act. In response to this notice appellant for the first time appeared and filed a protest against the said assessment and against the confirmation thereof. The protest was continued from time to time. Finally, after appellant had appeared before the council twice with reference to her protest, her assessment was modified by being reduced from $7,500 to $6,750, and the assessment was then confirmed. Thereafter appellant failed to pay the assessment, and, after publication of notice of delinquency was made, she filed this action to restrain the city from collecting this assessment upon the ground that the proceedings were illegal and would not sustain a valid assessment.

The suit was filed December 31, 1928; the answer on February 25, 1929; trial was started on February 27, 1929, and ended March 14, 1929; judgment was entered on May 20, 1929; notice of appeal was filed July 6, 1929; the transcript lodged August 31, 1929 and reply brief filed March 21, 1930. We are thus expediting the disposition of the cause on account of its public nature.

[3-5] As above pointed out, we have found nothing in the objection made by appellant warranting any extended discussion of the case. Her contention that the property was not in the assessment district is overcome by the finding of the court to the contrary. Her failure to protest the improvement or the district benefited forecloses inquiry on these questions. Frank v. Maguire, supra; Cohen v. City of Alameda, 183 Cal. 519, 522, 191 P. 1110; United Real Estate & Trust Co. v. Barnes, 159 Cal. 242, 113 P. 167; Duncan v.

Ramish, 142 Cal. 686, 691, 76 P. 661. Her contention that she was not properly heard in her protest against the amount of the assessment on her property is overcome also by properly supported specific findings of the court to the contrary, and nothing is pointed out on the face of the proceeding that invalidates the assessment. Her contention that the city was largely influenced in the beginning of this improvement by an organization known as the Major Traffic Association, and particularly by the highway committee thereof, in that this organization at its own expense employed engineers and prepared a general comprehensive plan covering the whole city for the improvement of different streets therein, the laying out of additional streets, and the widening, grading, and paving of certain other streets, is likewise without merit as there is nothing in the record to show that the city council acted through improper motives, or that this organization did anything more than was highly commendable in promulgating a comprehensive plan for the improvement of traffic conditions in said city.

Moreover, the city, by popular vote, approved the plan submitted by said traffic association. Nothing whatsoever appears to compel the conclusion that the city either abdicated its functions or exercised oppression upon the property owners in the area. The burden of a heavy assessment on a property owner is appreciated, but, unless judicial questions are presented, the courts are powerless to grant relief.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J; SHENK, J.; SEAWELL, J.; RICHARDS, J.

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106 Cal. App. 307

HARVEY et al. v. STAFFORD et al.

Civ. 4110.

District Court of Appeal, Third District, California.

June 9, 1930.

1. Partition ⚷114(4).

Where judgment in partition apportioned plaintiff's attorney's fees expended for common benefit, plaintiffs were not required to file memorandum of costs (Code Civ. Proc. § 796).

2. Partition ⚷114(1).

Statute providing that costs in partition may be included in and apportioned by judgment controls and excludes general statute requiring plaintiff to file memorandum of costs (Code Civ. Proc. §§ 796, 1033).

Code Civ. Proc. § 796 provides that the judgment in partition may include reasonable counsel fees expended by plaintiff or defendants for common benefit, etc. Section 1033 applying to civil actions generally provides that the party in whose favor judgment is rendered shall file a memorandum of costs.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action in partition by Everett Clyde Harvey and others against Clayton Culver Stafford and others. From part of a judgment directing defendants to pay one-half of plaintiffs' attorney's fees, defendants appeal.

Affirmed.

J. Vincent Hannon, of Los Angeles, for appellants.

J. W. Falkner, of El Monte, for respondents.

PULLEN, Justice pro tem.

The parties hereto were the owners of a certain parcel of real estate situated in the city of El Monte. Respondents brought an ordinary partition suit to sever the common ownership. An answer was interposed by appellants and thereafter an interlocutory judgment was entered based upon an agreed statement of facts, determining the respective interests of the parties, that the property could be equitably divided according to the respective interests of the parties, without loss or damage to either of those interests, and appointing referees.

The matter was then continued to a day certain to receive the report of the referees, and thereafter respondents served notice of motion for the allowance of the final report of the referees and for allowance of attorney's fees and costs.

The trial court heard the matter and entered its final judgment, awarding the property in accordance with the findings of the referees, and fixed the costs, referees' fees, and attorney's fees, and found that the same were expended for the common benefit of the plaintiffs and defendants.

It is from that portion of the decree directing appellants to pay one-half of the attorney's fees that this appeal is brought.

[1] Appellants contend respondents having failed to file a cost bill claiming attorney's fees, that they are now precluded from recovering the same. The contention of appellants is without merit. Section 796, Code of Civil Procedure, provides as follows:

"The costs of partition, including reasonable counsel fees, expended by the plaintiff

or either of the defendants, for the common benefit, fees of referees, and other disbursements, must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. When, however, litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them."

[2] "The provision in section 796, Code Civ. Proc., that the costs of partition may be included and specified in the judgment, controls upon this point, and is exclusive." Harrington v. Goldsmith, 136 Cal. 168, to page 170, 68 P. 594, 595.

The above-quoted section being exclusive in its terms as to the claiming and allowing of costs, including attorney's fees, no memorandum of costs is required to be filed, as provided by section 1033 of the Code of Civil Procedure.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

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106 Cal. App. 238

WORTHINGTON v. PEOPLE'S STATE BANK OF CHULA VISTA.

Civ. 219.

District Court of Appeal, Fourth District, California.

June 5, 1930.

1. Judgment ⟹18(2).

Where judgment for plaintiff was supported by two sufficient counts, sufficiency of third count was immaterial.

2. Banks and banking ⟹154(9).

Where court found for plaintiff on counts alleging wrongful payment of checks by defendant bank after stop-payment order, this amounted to finding that stop order had not been countermanded.

The defendant bank alleged that, although a stop-payment order had been given, it had been countermanded by the plaintiff.

3. Evidence ⟹591.

Plaintiff calling cashier of defendant bank as if under cross-examination, *held* not bound by testimony, although not announcing that he called witness under statute permitting such procedure (Code Civ. Proc. § 2055).

Defendant's cashier, after being called by plaintiff, testified that plaintiff's stop-payment order had been countermanded. Defendant contended that, because of plaintiff's failure to announce that he was calling the witness under Code Civ. Proc. § 2055, the cashier became plaintiff's own witness, and that plaintiff was bound by this testimony since it was uncontradicted.

4. Evidence ⟹591.

Rule that party is bound by testimony of own witness merely confines method of impeaching own witness within certain narrow limits (Code Civ. Proc. § 2049).

5. Evidence ⟹594.

Where cashier's testimony was vague and uncertain generally, court *held* not required to believe testimony that stop-payment order was countermanded, although such testimony was uncontradicted.

6. Appeal and error ⟹994(3).

In action for money on deposit, credibility of witness was for trial court.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Fanny Worthington, continued by Paul Worthington, her executor, who was substituted on her death, against the People's State Bank of Chula Vista. From a judgment for plaintiff, defendant appeals.

Affirmed.

Ward, Ward & Ward, of San Diego, for appellant.

Stickney & Stickney, of San Diego, for respondent.

CARY, P. J.

Defendant appeals from a judgment rendered against it.

Mrs. Fanny Worthington, having ample funds on deposit to cover same, drew a check on defendant in favor of Stephens & Company, a corporation, in the sum of $2,465.63 and mailed it to the payee. Before the check had been paid, Mrs. Worthington telephoned defendant a stop-payment order. In the meantime the check, bearing a stamped indorsement "Pay to the order of Southern Trust & Commerce Bank, San Diego, Cal. Stephens and Company" had been deposited with the Southern Trust & Commerce Bank for collection. It seems there were two companies incorporated under the laws of California, one being called Stephens & Company,

and the other Stephens and Company. What, if any, connection there was between the two, does not appear. This check, after passing through the clearing house, in due course was paid by defendant. Some months later, Mrs. Worthington filed this action against the defendant, alleging in the first count that the bank had received from her $2,465.63, subject to her order, that she had demanded of the bank that they pay her that sum, but that they had refused so to do; in the second count, that she had on deposit said sum, that she had issued her check in favor of Stephens & Company for said sum, that before presentation for payment, she notified the bank not to pay same but that, contrary to her orders, it had done so; and in the third count, that the defendant had not paid said check to the payee named therein, but had in fact paid same to some one other than the payee and charged her account therewith. Prior to trial Mrs. Worthington died and her executor was substituted. The court gave judgment for plaintiff based upon findings which in general followed the language of the complaint.

[1] Defendant contends that the first count does not state a cause of action, that a general finding that the allegations thereof are true is insufficient for the same reason, and that the court has failed to find on defendant's affirmative defense that after giving the stop-payment order Mrs. Worthington later directed the bank to pay the check. However, the sufficiency of the second and third counts is not challenged, and as the court found in accordance with the allegations therein contained, that fact is sufficient to support the judgment. Furthermore, in finding on these two counts, the court specifically found that Mrs. Worthington had not countermanded her stop order.

[2] Defendant further contends that the evidence is insufficient to support the finding that the stop-payment order was not revoked. Counsel for plaintiff called defendant's cashier as a witness, but failed to state that he was called under Code of Civil Procedure, § 2055. Under examination by plaintiff's counsel, the cashier testified that after giving the stop payment order Mrs. Worthington countermanded it. Defendant argues that the cashier thus became plaintiff's own witness, and since this witness testified to the countermanding of the stop order, and there was no testimony to the contrary upon that point, that plaintiff is bound by the testimony.

[3] Did plaintiff, by failing to announce that the witness was called under section 2055, waive the benefits conferred by that section? That the deposition of an adverse party may be read in evidence and the party using same not be bound by such testimony, even though he fails to announce that it is being offered under section 2055, has been held in Weir v. New York Life Insurance Company, 91 Cal. App. 222, at pages 230-231, 266 P. 996. We can perceive no reason why the same rule should not apply where the witness is actually present in court. It may be added in passing that nowhere in that section is there any requirement that the person calling such adverse witness must announce that he is called under the provisions of that section.

[4] The effect of the rule that a party is bound by the testimony of his own witness seems to be the subject of considerable misunderstanding. As a matter of fact, its only practical effect is to confine within certain narrow limits the method by which the party calling the witness may impeach him. Code Civ. Proc. § 2049. As said in Bellus v. Peters, 165 Cal. 112, at page 119, 130 P. 1186, 1189: "The rule invoked that plaintiff was bound by the statements of Willits, because he was a witness on behalf of plaintiff, does not go to the extent of requiring the court to believe and accept as true the statements of such witness."

The testimony of the cashier was vague and uncertain in many particulars. He could not state definitely whether certain writings were in his handwriting, and his memory was poor. In regard to some of the most important matters in the controversy, he testified that Mrs. Worthington had given him certain directions over the telephone. Mrs. Worthington's son, who had lived with her all of his life, testified that for the fifteen years preceding her death she had never used the telephone at all, due to her defective hearing.

[5, 6] Even though the testimony of the cashier as to the countermanding of the stop-payment order is without direct contradiction in the record, the credibility of the witness is still a matter for the trial court to pass upon, and it was not bound to accept his statement as a fact. Blankman v. Vallejo, 15 Cal. 638, at page 645; Pacific Coast Dried Fruit Company v. Sheriffs, 31 Cal. App. 131, at page 137, 159 P. 986; County of Sonoma v. Stofen, 125 Cal. 32, at page 35, 57 P. 681; and People v. Knutte, 111 Cal. 453, at pages 455, 456, 44 P. 166.

The court having found that the stop-payment order was never countermanded, a consideration of the other points raised by appellant is unnecessary.

The judgment is affirmed.

We concur: MARKS, J.; BARNARD, J.

106 Cal. App. 193

MacDONALD v. CRAWFORD

Civ. 5968.

District Court of Appeal, Second District, Division 2, California.

June 3, 1930.

1. Attachment ⚷5.

Action for damages for purchaser's breach of contract for sale of realty *held* action for "direct payment of money" so as to entitle plaintiff to attachment (Code Civ. Proc. §§ 537, 538; Civ. Code §§ 3307, 3353).

Code Civ. Proc. § 537 provides for a writ of attachment in action on contract for the direct payment of money. Section 538 requires that the indebtedness shall be shown by affidavit. Civ. Code, § 3307, provides that the damages for the breach of an agreement for the purchase of real estate by the purchasers shall be the difference between the value of the property to the vendor and the contract price. Section 3353 fixes the method of ascertaining the value of the property to the seller in estimating the damages. Plaintiff in this case sued for what he claimed was the difference between the value of the property and the purchase price.

[Ed. Note.—For other definitions of "Direct Payment," see Words and Phrases.]

2. Attachment ⚷8.

Attachment may issue in action for damages for breach of contract, although amount of damages must be proven at trial.

3. Attachment ⚷8.

Attachment may not issue in action for damages for breach of contract, unless there is basis upon which damages can be ascertained.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Kenneth MacDonald, Jr., against Erma J. Crawford. From an order denying motion for release of attachment, defendant appeals.

Affirmed.

Frank G. Falloon, of Los Angeles, for appellant.

Andrew J. Copp, Jr., of Los Angeles, for respondent.

CRAIG, Acting P. J.

A motion was interposed by the defendant in an action pending in the superior court of Los Angeles county for the release of an attachment. An order denying such motion was entered and she appealed therefrom.

From the pleadings it appears that the parties signed certain escrow instructions to a bank wherein the said defendant agreed to deposit for the account of the plaintiff $2,000 in cash, a mortgage, and a deed of trust through which she assumed an indebtedness of $8,500, and the plaintiff agreed to deliver in escrow a deed to certain real property provided the other party should make the deposits mentioned above. In the complaint it was alleged that the value of the realty was $10,000; that the plaintiff was to receive $10,500 as consideration therefor, and that "the excess of the amount which would have been due to plaintiff under said contract over and above the value of the said real property to him was and is the sum of $500.00." That the defendant had failed and refused to "perform the terms, covenants and agreements of said contract," and that her failure so to do had damaged the plaintiff in the sum of $500, for which he prayed judgment. An affidavit filed upon issuance of the writ of attachment recited that the defendant was indebted to the plaintiff "upon an implied contract for the direct payment of money, to-wit: Agreement for the purchase and sale of real property."

[1] It is contended by appellant that upon the facts alleged section 537 of the Code of Civil Procedure does not authorize the issuance of a writ of attachment; that it is not an action for recovery of the purchase price upon a sale, or a "direct payment of money," but for damages claimed to have been sustained through her failure to fulfill her promise to the bank. Respondent insists that his action, although for damages, is for that portion of the purchase price which he would have gained or profited had the sale been made, and that as to the $500 it is based upon a contract for the "direct payment of money." The complaint is entitled "complaint for damages on sale of real property," and alleged that at the time the defendant refused to perform the plaintiff had performed all of the covenants then to be performed, and that he is now able and willing to perform all covenants and agreements to be performed under said agreement. There is but slight distinction between the two views. The pleading attempts to allege a cause of action founded upon the breach of a contract which it recites is attached thereto, and as an exhibit certain escrow instructions to the bank are appended. Both parties in effect concede the extinction of any contract that may have existed between them, and the plaintiff makes no pretense of intention to convey, nor does he demand performance by the defendant. The sole support for the writ of attachment lies in conclusions of the pleader under his interpretation of sections 3307 and 3353 of the Civil Code. These sections

appear in the title affording compensatory relief for a breach of contract, and are as follows:

"The detriment caused by the breach of an agreement to purchase an estate in real property, is deemed to be the excess, if any, of the amount which would have been due to the seller, under the contract, over the value of the property to him."

"In estimating damages, the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale."

We think the decision in Dunn v. Mackey, 80 Cal. 104, 22 P. 64, 65, is controlling. It is there held that an attachment may properly issue in an action brought by the principal against his agent for damages for breach of contract to sell real property within a year and for a specified amount. In that action it was clearly necessary to prove the amount of the damages by showing the actual value of the land at the end of the year. The measure of damages was held to be the difference between this value and the price at which the agent had bound himself to sell it. The circumstances involved seem not to be distinguishable from those in this case. A degree of uncertainty existed there as to the amount of damages. In each case the suit is in tort, but for damages resulting from a breach of an express contract. The court there said:

"Our Code does not require that the amount due on the contract shall appear from the contract itself (Code Civil Proc. § 537), but that the amount of the indebtedness shall be shown by affidavit (Id. § 538).

[2, 3] "Attachment may issue in an action for damages for the breach of a contract. Donnelly v. Strueven, 63 Cal. 182. And this where proof is necessary at the trial to show the amount of damages. Drake, Attachm. §§ 13–23.

"But there must exist a basis upon which the damages can be determined by proof. Thus it is said, 'where the contract sued upon furnished a standard by which the amount could be so clearly ascertained as to enable the plaintiff to aver it in his affidavit, or the jury by their verdict to find it, an attachment might issue.' "

To the same effect are Greenbaum v. Smith, 51 Cal. App. 692, 197 P. 675; Force v. Hart, 205 Cal. 670, 272 P. 583. Hamburger v. Halperm, 28 Cal. App. 317, 152 P. 61, is not applicable here, because the damages were alleged to have arisen from failure to deliver goods, wares, and merchandise. The contract was not for the direct payment of money, but to deliver personal property.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; GATES, Justice pro tem.

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106 Cal. App. 277

BROOKS et al. v. GROSS.
Civ. 63.

District Court of Appeal, Fourth District, California.

June 6, 1930.

Rehearing Denied June 23, 1930.

1. Appeal and error ⟹1010(1).

Findings of trial court, supported by substantial evidence, cannot be disturbed on appeal.

2. Brokers ⟹51, 58.

Where brokers brought owner and prospective buyer together, but owner himself negotiated contract, brokers were entitled to commission, though contract did not lead to final transfer of property.

3. Brokers ⟹71.

Landowner's agreement to pay brokers stipulated commission, in consideration of reduction of his apparent liability, *held* supported by consideration, though sale was never consummated (Civ. Code, § 1605).

Though sale was not consummated, owner of property received sum of $500 paid by buyer on account of purchase price, which money was delivered by brokers, and it did not appear that this had been returned. Civ. Code, § 1605, provides that a prejudice suffered by the promisee or benefit conferred on promisor is a sufficient consideration to support a contract.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by G. W. Brooks and another against H. J. Gross. Judgment for plaintiffs, and defendant appeals.

Affirmed.

H. C. Gardiner, of San Diego, for appellant.

Edward H. Whelan and Marcus W. Robbins, both of San Diego, for respondents.

MARKS, J.

Respondents were real estate brokers, duly licensed as such under the laws of the state

of California. Appellant, together with his brother, Harry F. Gross, and the estate of Layman, deceased, were the owners of about forty-two acres of land in the county of San Diego, Cal. On or about March 15, 1926, appellant entered into a written contract with the respondent Brooks, employing him as a broker to negotiate the sale of this forty-two acres of land, agreeing to pay a 5 per cent. commission upon the selling price. About the 1st of October, 1926, respondent Brooks engaged R. E. Struve to assist him in negotiating the sale. This was done with the permission and consent of appellant, and the sale price was fixed at the sum of $20,000.

About the 19th of October, 1926, respondents brought appellant and the J. C. C. Company, a corporation, together, and a memorandum in writing, prepared by appellant's attorney, was executed whereby appellant agreed to sell to the J. C. C. Company, and it agreed to buy the real estate in question for the sum of $20,000. The agreement was signed by appellant and the corporation. Respondents had previously received $100 on account of the purchase price, and later collected an additional sum of $400, which sums were paid to appellant. On October 27, 1926, appellant, with his attorney and certain of the officers and agents of the J. C. C. Company, together with respondent Brooks, met in the office of the Union Title Insurance Company of San Diego, and appellant and the officers of the J. C. C. Company signed instructions to the Union Title Insurance Company for the consummation of the transaction and the sale of the property from appellant to the J. C. C. Company. These escrow instructions, together with the memorandum agreement before signed, set forth all of the terms of the contract of sale and purchase, which were definite and complete except in one particular. The purchaser was engaged in the business of buying, subdividing, and selling real property which it proposed to do with the forty-two acres in question. It desired a partial release clause in a mortgage of $15,000 which it had agreed to execute to appellant and his brother as part of the purchase price of the property. In the written instruments, the terms of the partial release clause were left to be later agreed upon. The memorandum agreement and escrow instructions were prepared under the direction of appellant and his attorney and the officers and agents of the J. C. C. Company. It does not appear that respondents took any part in the preparation of these instruments. The terms of the partial release clause to be inserted in the mortgage were never agreed upon.

On the 10th day of November, 1926, appellant approached respondents and negotiated with them concerning a reduction of their commission from $1,000 to $750. These negotiations resulted in a written agreement in words and figures as follows:

"San Diego, California
"Nov. 10, 1926

"Mr. G. W. Brooks
"Mr. R. E. Struve } San Diego

"I hereby agree to give the regular 5% commission on $15,000.00 which amounts to $750.00 of the sale of Gross-Layman Estate secured by yourselves but will not pay commission on the $5,000.00 covering the ¼ interest sold by Public Administrator.

"[Signed] H. J. Gross"

"We agree to accept the commission on $15,000.00 as noted above and release you of any further claim. We will look to the estate for commission on additional $5,000.00.

"[Signed] G. W. Brooks
"R. C. Struve"

Under the escrow instructions, December 15, 1926, was fixed as the time limit for consummating the sale. The title to the property was defective, and appellant was compelled to file suit to quiet his title, which necessitated an extension of this time limit to January 1, 1927.

[1] It seems that neither appellant nor his purchaser made any serious efforts to consummate the transaction and the sale was not completed. Respondents did not appear in the matter at all after the escrow instructions of October 27, 1926, except in signing the agreement of November 10, 1926, which we have quoted. On or about February 1, 1927, appellant told respondents that he had canceled the proposed sale to the J. C. C. Company, and had sold the property to another purchaser. He demanded the return of the agreement of November 10, 1926, which demand was refused. These facts were all found by the trial court, and there is material evidence supporting the findings which therefore cannot be disturbed by us. Mah See v. North American Accident Insurance Company, 190 Cal. 421, 213 P. 42, 26 A. L. R. 123.

[2] Where, as in this case, a broker brings an owner and prospective buyer together, and they negotiate a contract to their own liking, and the owner takes the consummation of the sale into his own hands and away from his brokers, he cannot complain if the contract with his buyer, which he himself prepared, is defective and does not lead to a final transfer of the property. As was said in the case of Contant v. Wallace, 62 Cal. App. 769, 217 P. 1081, 1082:

" 'The contract of the broker is to negotiate a sale; that is, to procure a valid contract to purchase, which can be enforced by the vendor if his title is perfect; or if he does not procure such contract, to bring the vendor and the proposed purchaser together, that the vendor may secure such a contract, unless he is willing to trust to an oral agree-

ment.' Gunn v. Bank of California, 99 Cal. 349, 33 P. 1105. See, also, Mott v. Minor, 11 Cal. App. 774, 106 P. 244; Cone v. Keil, 18 Cal. App. 675, 124 P. 548; Massie v. Chatom, 163 Cal. 772, 127 P. 56; Twogood v. Monnette, 191 Cal. 103, 215 P. 542. It is true that in the opinions in some of the cases cited there are dicta which indicate that, where an agreement of sale is executed between one desiring to sell and a prospective purchaser presented to the seller by a broker, the latter does not earn his commission unless the agreement is valid and binding. Such a rule would place brokers in an intolerable position, as it would make their compensation for services depend upon circumstances beyond their control. Where the broker procures the contract from the purchaser it is of course necessary that the paper be one which is valid and the terms of which the seller may enforce, but where the seller himself formulates the contract with the purchaser the situation is different. It cannot be the law that a broker loses his commission, after bringing seller and purchaser together, if an invalid or unenforceable agreement is entered into between seller and purchaser through the mistake, inadvertence, or ignorance of the former. Where the seller himself negotiates the terms of the contract the responsibility for its form and contents is on him, and it is necessary only that it be satisfactory to him when executed. The fact of execution by him is sufficient evidence that he is satisfied, in the absence of fraud, duress or the like. When the seller takes into his own hands the completion of the agreement of sale, the affair is so much in his hands and the broker is so completely discharged from responsibility in the premises that the seller is estopped to contend against the broker's claim for commission that the purchaser was not ready, able, or willing, to make the purchase. Wood & Tatum Co. v. Basler, 37 Cal. App. 381, 173 P. 1109; Sobaje v. Schubert, 37 Cal. App. 709, 174 P. 364. See, also, Johnson v. Krier, 59 Cal. App. 330, 210 P. 966. Plainly, it is as much the seller's duty to formulate a valid and enforceable contract as it is to ascertain for himself that the purchaser is ready, able, and willing to buy. We are satisfied that respondent earned her commission."

[3] The facts in the case before us go much farther than those in the case of Contant v. Wallace, supra. We only need to consider the agreement between the parties hereto, dated November 10, 1926, and the circumstances under which it was executed to uphold the judgment of the trial court in favor of respondents and against appellant. On that date appellant found himself in a position where he apparently would be obliged to pay respondents $1,000 commission on the sale of the real property. He sought to save himself $250 of this sum, and agreed in writing to pay respondents $750 for their services. His offer was accepted by respondents, and the written contract ensued. Appellant maintains that this agreement was not supported by any consideration. In this we cannot agree with him. He secured the reduction of his apparent liability in the sum of $250. He had already received, and, as far as the record shows, still retains the sum of $500 paid by the J. C. C. Company on account of the purchase price of the real property, which money was delivered to him by respondents. Section 1605 of the Civil Code provides that a prejudice suffered by the promisee or benefit conferred on the promisor is a sufficient consideration to support a contract. Burge v. Midway Pacific Oil Co. (Cal. App.) 279 P. 181.

In considering this phase of the case, we must bear in mind that appellant could not deliver title to the property on December 15, 1926. The decree quieting title was not filed until December 24, 1926. Thereafter appellant took no steps to complete the sale until January 20, 1927, when he mailed a notice in San Diego to the J. C. C. Company requiring the completion of the escrow by February 1, 1927. It will be observed that the time for appeal from the decree quieting title had not expired at this time. On or about February 1, 1927, he demanded the return of the agreement of November 10, 1926, from respondents, stating that he had sold his property to a purchaser other than the J. C. C. Company. On or about the last day appellant had given the J. C. C. Company to complete its part of the escrow, we find him demanding a return of his contract with respondents, with the announcement that he had sold his property to a new purchaser. This fact of there being a new purchaser may furnish an explanation of appellant's cancellation of the escrow and his refusal to complete the sale to the J. C. C. Company. At least the trial court was authorized to weigh his evidence and consider his motives under all the circumstances of the case.

We are of the opinion that appellant, having taken the completion of the sale to the J. C. C. Company and the preparation of his contracts with it into his own hands and out of the control of respondents, cannot be heard to complain that the contract which he prepared could not be specifically enforced. Under the circumstances of this case, we believe that the contract between the parties bearing date of November 10, 1926, was supported by a valuable consideration.

Judgment affirmed.

We concur: CARY, P. J.; BARNARD, J.

WHEAT et ux. v. BARRETT, Building Inspector. *

Civ. 6993.

District Court of Appeal, First District, Division 1, California.

June 10, 1930.

Rehearing Denied July 10, 1930. Hearing Granted by Supreme Court Aug. 7, 1930.

1. Municipal corporations ⟹108.

Where zoning ordinance of city of Piedmont was adjudged void, subsequent zoning ordinance could be enacted by council without submission to voters (Piedmont City Charter, § 41).

Section 41 of charter of city of Piedmont provided no existing zone should be reduced or enlarged or zones reclassified without submission of question to voters, but after first ordinance was declared void city had no zoning ordinance and subsequent ordinance did not reduce or enlarge zones then existing.

2. Appeal and error ⟹1182.

Judgment on appeal has force and effect from time of its entry.

3. Constitutional law ⟹101.

Persons securing writ of mandate compelling issuance of building permit had no vested rights in permit requiring issuance after passage of new zoning ordinance.

This is true notwithstanding that petitioner relying on permit purchased property and expended $1,000 in excavating cellar and expense of services of architect and of having land surveyed. The mandamus judgment, not having become final, was annulled upon showing that new valid zoning ordinance prohibited erection of store building on plaintiff's property.

Appeal from Superior Court, Alameda County; J. J. Allen, Judge.

Action by James M. Wheat and another against R. H. Barrett, as Building Inspector of the City of Piedmont, for writ of mandate to compel the issuance of a building permit. Judgment for plaintiffs, and defendant appeals.

Judgment set aside, and writ annulled.

Girard N. Richardson, City Attorney, of Piedmont, for appellant.

Breed, Burpee & Robinson, of Oakland, for respondents.

CAMPBELL, Justice pro tem.

This is an action to compel the building inspector of the city of Piedmont to issue a permit for the erection of a store building upon plaintiffs' property.

Defendant's refusal to issue the permit was based upon the prohibitions contained in ordinance No. 268 of the city of Piedmont, commonly known as the "Piedmont Zoning Ordinance," which restrained the erection of store buildings except within very restricted districts. The trial court held ordinance No. 268 void, and ordered that a writ of mandate issue. Subsequent to this judgment by the trial court ordinance No. 268 was declared void by this court on the ground that it created a business monopoly (Wickham v. Becker, 96 Cal. App. 443, 274 P. 397), and in Andrews v. City of Piedmont (Cal. App.) 281 P. 78, such ordinance was likewise held to be void on the authority of Wickham v. Becker, supra, and it is conceded by the parties here that such ordinance is of no force and effect.

Subsequent to the entry of judgment the city of Piedmont passed ordinance No. 315, which prohibits the erection of a store building on plaintiffs' property. If the new ordinance is valid, it presents the question whether a writ of mandate should issue out of the lower court pursuant to the judgment as affirmed in Wickham v. Becker. Accordingly, under the broad powers recently granted to appellate tribunals in this state, this court permitted the introduction of evidence upon the passage of the new zoning ordinance to determine its validity and upon the question of whether plaintiffs—respondents herein—had secured a vested right in the permit required to be granted under the terms of the original judgment. The additional evidence is before the court in the form of a written stipulation appended to which is ordinance No. 315, adopted under authority of section 41 of the charter of the city of Piedmont, and the building contract entered into by Wheat and wife with Charles E. Bardwell for the erection of the store building.

Section 41 of the charter of the city of Piedmont, as amended, is as follows: "The City of Piedmont is hereby declared to be primarily a residential city and the Council shall have the power to adopt such zoning system within the city as may in its judgment be most beneficial, and in such zoning systems may prohibit the erection or maintenance of any class or classes of buildings within said areas, and may classify or reclassify the zones established, but no zone now existing shall be reduced or enlarged with respect to size or area and no zones shall be reclassified without submitting the question to a vote of the electors held at a general election or a special election to be called for that purpose, and no zones shall be reduced or enlarged and no zones reclassified unless a majority of the voters voting upon same shall vote in favor thereof."

From the stipulated facts it appears that after judgment was entered and before a stay

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 290 P. 1033.

of execution was secured and prior to taking an appeal the peremptory writ of mandate was served upon appellant, and the permit fee required to be paid was tendered to him, and upon such tender being refused respondents thereafter deposited the sum of money involved in accordance with section 1500 of the Civil Code; also, that prior to appellant taking the appeal respondents entered into a contract for the erection of the building, and the contractor commenced work under the contract and dug 610 feet of trench and erected 84 feet of forms for concrete—evidently for foundation purposes. The work was stopped by threat of arrest on the part of the building inspector. Finally the permit authorizing the erection of a $100,000 store building was deposited with the clerk of the superior court to abide the judgment on appeal.

[1, 2] No point is made that ordinance No. 315 creates a monopoly, which was the decisive question in Wickham v. Becker, supra, the ordinance being attacked only on the ground that the council had no authority to pass it, and that to become effective it had to be adopted by a majority vote of the voters of the city. We do not agree with respondents in this contention, as it is obvious from a reading of section 41 of the Piedmont charter that the city council was within its rights and had authority to pass the ordinance, as ordinance No. 315 is a new ordinance and not an amendment to ordinance No. 268 nor any other ordinance. At the time ordinance No. 315 was passed the city of Piedmont had no zoning ordinance, the former ordinance having been adjudged to be void (Wickham v. Becker, supra), and the city council did not reduce nor enlarge zones then existing. The charter expressly provides that "the Council shall have the power to adopt such zoning system within the city as may in its judgment be most beneficial * * * and may classify and reclassify the zones established, but *no zones now existing* shall be reduced or enlarged with respect to size or area and no zones shall be reclassified without submitting the question to a vote of the electors," etc. It will thus be noted that section 41 of the charter gives the city council jurisdiction to classify new zones, and that it is only when existing zones are to be reclassified or changed that the question of the propriety of such reclassification or change must be submitted to the vote of the electors. Ordinance No. 268, being adjudged void, was ineffective for all purposes as of January 28, 1929—the date of the decision in Wickham v. Becker, supra—and thereafter the city council had jurisdiction under section 41 of the charter of the city of Piedmont to adopt a new zoning ordinance, which it did when it adopted ordinance No. 315, and which was not an amendment to nor a reclassification of "zones now existing."

"A judgment on appeal, like a judgment of a trial court, has the force and effect of a judgment from the time of its entry." Eaton v. Southern Pacific Co., 31 Cal. App. 379, 381, 160 P. 687, 688.

[3] Respondents' claim that a vested right had been secured in the permit for the erection of the store building is answered in the following language from Brougher v. Board of Public Works, etc., 205 Cal. 426, 432, 271 P. 487, 490: "It is held, however, in a number of well-considered cases, that a board of public works, or a body exercising similar powers to those exercised by the board of public works of the city and county of San Francisco, may cancel or revoke a permit issued by it when the ordinance under which the permit was issued had been amended in such a manner as to render the erection of the building covered by the permit objectionable and contrary to the terms of the ordinance as amended. This precise question was considered and decided in the very recent case of Brett v. Building Commissioner of Brookline, 250 Mass. 73, 145 N. E. 269, wherein the court, on page 271 of the opinion (250 Mass. 79), says: 'The petitioners have no special and peculiar immunity arising from the fact that permits had been issued to them. They had begun work pursuant to those permits, although such work had not progressed very far.'" It is true the court, as suggested by respondents, calls attention to the exception "that a permit would not be revoked in those cases where the licensee 'had done something under the license from which the mere privilege would ripen into a vested right,'" but here, as in the Brett Case, "such work had not progressed very far."

In the Brett Case, cited with approval by our Supreme Court in the Brougher Case, permits under the then existing statutes and by-laws were granted to petitioners to erect two-family dwelling houses on adjoining lots. Each petitioner made certain contracts towards the construction of these houses and work thereon had actually begun. On one lot only some slight excavation had been done prior to the amendment of the by-law. On each of the other two lots the batter-boards had been erected and the engineering work of designating the lines of the houses and the height of the foundations had been done; on one of these some work of excavation had been done and on the other foundation trenches had been dug to the full depth and permits to pour cement for the foundations had been obtained, and yet the court held the erection of the buildings authorized by the permits would be a violation of the amendment to the zoning by-law effective after the issuance of the permits and dismissed the petitions for writs of certiorari. A similar situation is presented in Salem v. Maynes, 123 Mass. 372. In that case, before any ordinance on the subject was adopted, the defendants had begun work on the cellar, had made a contract for the erection of a proposed wooden building and had bought and prepared lumber to carry

out the contract. Thereafter an ordinance was passed which defined the height of wooden buildings in that locality and the area and distance of such buildings from any other building. The proposed building of defendants did not comply with the ordinance. In a suit for the removal of the building plaintiff was granted a decree, the court using this language: "All contracts between individuals, and even charters granted by the state, are subject to the exercise of this [the police] power. * * * The facts that, before the passage of the ordinance, the defendants had begun work on the cellar upon the site of the proposed building, and had made a contract between themselves for the erection of the building, and had bought and prepared lumber to carry out that contract, does not exempt them from the operation of the ordinance" (citing authorities).

As much, if not more so in the present case, is the work done inconsequential in proportion to the total cost of construction, than in the cases cited, and therefore less reason upon which to base the claim of a vested right. While it is held in Pelham View Apts. v. Switzer, 130 Misc. Rep. 545, 224 N. Y. S. 56, 57, cited by respondents, that a vested right had been secured by reason of the building permit having been issued in that case, the facts there are not analogous to those in the present case. In that case, quoting from the facts stated in the opinion of the court, "the petitioner purchased the real property in question, relying upon his right to the original permit issued to him to build a building, and that he paid a substantial sum of money on account of the purchase price for the same. That he thereafter employed the services of an architect, who prepared and caused to be filed plans for an apartment house building, for the building of which the original permit was issued. That, relying upon this permit, he paid additional sums on account of the purchase price, took title, and executed a purchase-money bond and mortgage. He thereafter incurred additional expense to have the land surveyed, so that the building might be properly placed thereon. That thereafter he proceeded to excavate the cellar, and paid for such excavation approximately $1,000."

From the foregoing statement of facts it appears that petitioner, relying upon his permit to build the building, purchased the property upon which to erect the building called for in the permit, paid the purchase price therefor in money and purchase-price bond and mortgage, and expended $1,000 in excavating the cellar and the expense of the services of the architect and in having the land surveyed. As we read the opinion of the court, the holding of a vested right in the permit was based on the fact that petitioner in good faith relied upon the permit in purchasing the property and incurring the expenses enumerated in the statement of facts. We do not think the wording of the opinion justifies respondents' conclusion as stated in his brief that "the court held that where a permit had been secured and the owner had entered into contracts for the erection of the building, a subsequent zoning ordinance will not revoke the permit for the reason that a vested right had been secured." The conclusion of respondents drawn from the opinion, if correct, is against the weight of authority in other jurisdictions and is not the rule in this state. Brougher v. Board of Public Works, etc., supra.

Shreveport v. Dickason, 160 La. 563, 107 So. 427, 431, cited by respondent is a case in which the vested right claimed was based upon a final judgment giving defendant the right to have a building permit issued to her, the opinion stating: "As we are presently concerned only with the asserted right of plaintiff to plead the ordinance in this case as authority for divesting the defendant of a valuable property right secured to her by a final judgment of this court, we feel that we may pretermit consideration of all other questions growing out of or pertaining thereto. * * * Matters once determined by a court of competent jurisdiction, if the judgment has become final, can never be called in question by the parties, or third persons. It matters not under what form the question * * * recurs between the same parties the plea of res adjudicata estops." In the present case the judgment had not become final, but is pending decision on this appeal.

The trial court properly held ordinance No. 268 void and ordered that a writ of mandate issue, directing defendant as building inspector to issue a permit for the erection of the building in question. The permit was issued and deposited with the clerk of the superior court to abide the judgment on this appeal. From the facts and records submitted to us in the written stipulation of facts, we find that ordinance No. 315 is a valid ordinance, and that the judgment of the trial court for such reason should be set aside and the writ of mandamus heretofore issued herein should be annulled and judgment is entered accordingly.

We concur: TYLER, P. J.; CASHIN, J.

106 Cal. App. 335

PEOPLE v. ANDERSON.

Cr. 1941.

District Court of Appeal, Second District, Division 1, California.

June 10, 1930.

1. Criminal law ⚷1159(5).

Robbery ⚷26.

Identification of defendant as perpetrator of robbery was for jury, and verdict was final.

2. Criminal law ⚷1035(3), 1166½(12).

Court's remarks to witness suggesting defendant was robber were not reversible where not objected to, and defendant's counsel made similar remarks.

It appeared that the witness, who may have had difficulty in understanding the questions, had already positively identified defendant as the guilty person. The court, in asking the witness to explain a certain diagram, told him to mark a cross "where the defendant came when he took your billfold." Shortly after this language and other similar expressions had been used defendant's attorney in cross-examining the witness asked: "How was the defendant dressed?" and further: "Does this represent * * * the defendant?"

3. Criminal law ⚷829(18).

Refusing instruction concerning reasonable doubt of defendant's identity as robber, substantially covered by instructions given, was not error.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Hans M. Anderson was convicted of robbery, and he appeals.

Affirmed.

Kirtland I. Perky, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

HOUSER, J.

Defendant was convicted of the crime of robbery. He appeals from the ensuing judgment, as well as from an order by which his motion for a new trial was denied.

[1] The only issue presented on the trial of the action related exclusively to the identification of defendant as the man who committed the robbery. In that connection, on direct examination as a witness, although the robber was masked, a Japanese who was robbed in his place of business positively identified defendant as the robber, and stated that a part of the sum of money of which he was robbed was contained in a wallet, and that the total sum amounted to about $51. His testimony was fully corroborated by another Japanese who was present at the time the robbery was committed. In addition thereto, a third witness, who was apparently unwilling to give testimony, and whose memory of events appeared somewhat defective, admitted that, although on the day when the trial of the action occurred she could not well recall the facts, at the time when she gave former testimony on the preliminary examination of defendant she "must have" testified that on the night when the robbery occurred defendant had a "gun" in his possession and stated to the witness that he had robbed "a chop suey joint, * * * between fifty and fifty-one dollars, and he was laughing about it, the way he had tricked the Japanese people. * * * He had a wallet, too, and it was a Japanese name."

The weight of the evidence and the credit which was to be given to the testimony of the several witnesses was addressed solely to the consideration of the jury, and its conclusion thereon is final. In such circumstances, and in view of the evidence in substance hereinbefore stated, the contention of appellant that the evidence was insufficient to support the verdict cannot be sustained.

[2] Appellant also specifies prejudicial error occurring on the trial of the action in that the trial judge usurped the function of the jury by using language in which the guilt of defendant was assumed. The alleged misconduct of the judge of the trial court in that particular arose from the following situation: At a time when a Japanese witness was being cross-examined by the attorney who represented defendant in the action, he was asked by such attorney the following question:

"Q. How long was this man who robbed you, in your place of business? How long did he stay there from the time you first saw him until the time he left?"

At this point the judge of the trial court asked the following question:

"The Court: How long was he in there? A. Myself?

"The Court: No, the defendant, the man that robbed you."

It also appears that on two other occasions which occurred during the trial, on questioning the same witness, the judge of the trial court used language which indicated that defendant was the man who robbed the Japanese. The language to which exception is now taken by appellant was as follows:

"The Court: Make a little cross there where the BF is, where the defendant came when he took your billfold, just put a little cross there where he stood.

"The Witness: For myself?

"The Court: No, for him, when he took the billfold."

Appellant admits that at no time did he object to either of such remarks, or in any manner indicate to the trial judge that he had made use of language which was prejudicial to defendant, or which might possibly be so considered. His declaration at this time that the reason for his silence was that by directing attention to the objectionable language "would only have accentuated and intensified the prejudice engendered," is somewhat weakened by the fact that almost immediately following the last criticized remark by the court, when the attorney for defendant resumed his cross-examination of the witness, he asked the witness the following question:

"Mr. Perky (Attorney for defendant): Q. Now, the time that this robbery took place, what time of night was it? A. About fifteen minutes before twelve.

"Q. How was the *defendant* dressed?"

It also appears that prior thereto, in circumstances wherein the attorney for defendant was endeavoring to have the witness elucidate the diagram which he had placed on the blackboard, the following question was put to the witness:

"Q. What does this represent? A. This is closet, hanging clothes in here, we have closet here, and here is the door right in here.

"Q. This represents the *defendant?* * * *"

"Q. Where did the *defendant* come for the billfold; where did he get the billfold?"

When it is considered that the witness was a Japanese who was perhaps not altogether familiar with our language, and that before either of the occasions to which reference has been had occurred, he had positively identified defendant as the robber, it is clear that no harm resulted from the palpable attempt on the part of the trial judge to have the witness clearly understand, first, the question which had theretofore been addressed to him by the attorney for defendant; and, secondly, in order that in making the diagram the witness would be clear and accurate. It is most apparent, especially after the witness had identified defendant as the robber, that every one connected with the examination of the witness assumed that all his testimony was directed to the point of identifying defendant as the man who committed the crime, and the references by the trial judge to which attention has been directed could not have been understood by the jury as any indication that the trial judge was either attempting to state any fact, or that he had any opinion with reference to the guilt of defendant.

[3] Finally, it is contended that the trial court erred in refusing defendant's request to give to the jury a certain instruction which particularly required the jury to be convinced beyond a reasonable doubt of the identity of defendant as the robber before it would be justified in finding defendant guilty as charged in the information. But when it is considered that the identity of defendant as the robber was the sole question in the case, and that in each of two separate instructions in effect the trial court fully instructed the jury that it could find defendant guilty only in the event that it believed from the evidence beyond a reasonable doubt that defendant "feloniously took from the person or the immediate presence of Henry Hasegawa the property, or any part thereof," it becomes manifest that in the refusal by the trial court to give to the jury the instruction to which appellant refers, no error was committed.

No prejudicial error appearing, it is ordered that the judgment and the order denying the motion for a new trial be, and they are, affirmed.

We concur: CONREY, P. J.; YORK, J.

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106 Cal. App. 255

SOUTHERN CALIFORNIA MUSIC CO. v. LABES.

Civ. 5924.

District Court of Appeal, Second District, Division 2, California.

June 6, 1930.

1. Sales ⟹324(3).

Evidence *held* sufficient to support trial court's finding that buyer paid seller's salesman amount claimed to be due at time of purchasing piano.

Salesman testified that he wrote letters "C. O. D." before word "Cash" on delivery ticket when buyer refused to pay cash on execution of contract and never received amount stated, and seller's ledger account showed balance due of slightly more than such amount, but buyer testified positively that she paid salesman such sum at time of making purchase and later offered to pay any sum due except such amount.

2. Appeal and error ⟹1011(1).

Appellate court will not disturb lower court's finding, supported by some evidence, where there was substantial conflict of evidence on material points.

3. Evidence ⟹584(3).

Direct evidence of single witness entitled to full credit is sufficient to prove any fact

except perjury or treason and to create substantial conflict in evidence.

4. Evidence ⟹598(1).

Comparative number of witnesses for or against particular fact is not determining factor in ascertaining sufficiency of evidence to prove such fact.

5. Evidence ⟹413.

Testimony as to other payments than of amounts called for by sale contract and shown by receipts *held* not inadmissible as tending to vary written contract.

6. Payment ⟹35.

Receipt is not contract, but simply acknowledgment of payment or satisfaction of debt.

7. Payment ⟹70(1).

Payment may be proved by oral testimony.

8. Sales ⟹316(1).

Seller not informing buyer, at time of latter's payment of everything demanded except disputed sum, that additional amount was due, cannot complain of her failure to tender such amount (Code Civ. Proc. § 2076).

9. Appeal and error ⟹173(7).

Seller's contention, not raised at trial, that salesman to whom buyer claimed to have paid amount alleged to be due was not authorized to collect money, cannot be raised on appeal.

10. Sales ⟹329.

Finding that defendant in claim and delivery paid plaintiff stated sums on price of piano on successive days and made further payments or tender thereof in full of price *held* sufficient to support judgment for defendant.

11. Trial ⟹404(1).

Uncertainties in trial court's finding must receive such construction as will uphold, rather than defeat, judgment.

12. Witnesses ⟹275(7).

Objections to questions, on cross-examination of defendant in claim and delivery, as to matters appearing in sale contract executed by parties, *held* properly sustained.

13. Evidence ⟹448.

Oral evidence as to contract terms which are clear and free from ambiguity or uncertainty, is incompetent.

14. Evidence ⟹397(1).

Refusal to permit examination of witness as to parties' negotiations preliminary to execution of unambiguous written contract *held* not error (Civ. Code, §§ 1697, 1698; Code Civ. Proc. § 1856).

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by the Southern California Music Company against Cora A. Labes. Judgment for defendant, and plaintiff appeals.

Affirmed.

Fred E. Peterson, of Los Angeles, for appellant.

Henry M. Lee, of Los Angeles, for respondent.

GATES, Justice pro tem.

This is an action for claim and delivery in which plaintiff seeks to recover from defendant the possession of one Schultz player piano, alleged to be of the value of $400, and for damages in the sum of $100 for the alleged unlawful detention thereof. Defendant in her answer denies that plaintiff is the owner of the personal property in controversy or is entitled to the possession thereof. She also denies that she wrongfully withholds the property, alleging that she is the owner of the same, having paid the full purchase price thereof. After hearing the evidence the court gave judgment for the defendant, and plaintiff appeals.

[1, 2] Appellant's first contention is that the evidence is insufficient to establish that respondent paid the full purchase price for the piano or that she is entitled to the possession of the same.

On or about October 2, 1923, appellant sold respondent the piano involved herein on an ordinary form of conditional sales contract for $600. The agreement executed by the parties was a twofold affair; the note being in the principal sum of $500, and the contract being, as stated, for the principal sum of $600. Appellant contends that respondent did not pay the full sum agreed and that at the commencement of the action there was due appellant the sum of $110 and interest on $190 from February 4, 1925, and on $110 from March 6, 1925. The payment of the $100 of October 2d is the principal matter in dispute.

A delivery ticket was introduced into evidence by appellant. In the lower portion thereof is found the following:

Cash $100.
Nov. 1st $100.
Per month 14
8%

Just preceding the word "Cash" is found the letters "C. O. D." Mr. Hollister, salesman for appellant, testified that he wrote that when respondent would not pay cash when the contract was executed and she stat-

ed that she wanted to pay it the next day: that he wrote the word "Cash" and put on delivery the $100 payment; that he did not receive the $100 from respondent that day nor has he since that time. The ledger account of appellant was introduced. It shows a balance due of $110. All of the payments made, except the $110, have been credited to the account of the respondent. Respondent testified that at the time she purchased the piano she paid $100 on it; on October 2d $100 to Mr. Hollister, the salesman for appellant; on October 3d $100 to the driver who delivered it; and on November 1st $100. She also testified to the payment of the $290 which was made on the principal. Respondent testified positively that she made the payment of $100 on October 2d to Mr. Hollister. This is the payment over which the disagreement arises. She further testified that she later went to the office of the appellant company and offered them the balance that was due; that they insisted that there was $180 more due; that she said: "Now, here is $80. I will pay you any other sum that is due except the $100." She further testified that she paid the $80 at that time, which sum appellant received and credited to her account.

There is a direct conflict in the evidence upon the payment of the $100. The trial court believed the respondent and found that she had paid the amount as testified to by her. There was sufficient evidence to support this finding. The rule is well settled that an appellate court will not disturb a finding of a lower court where there is a substantial conflict of evidence on material points and where there is some evidence to support the finding. 2 Cal. Jur. 921, and cases there cited. While it is true that the trial court might have found the other way, we cannot substitute our judgment for that of the lower tribunal. 2 Cal. Jur. 926; Clopton v. Clopton, 162 Cal. 27, 121 P. 720; Barry v. Coughlin, 90 Cal. 220, 27 P. 197.

[3, 4] Also, the rule is well settled that the direct evidence of a single witness who is entitled to full credit is sufficient to prove any fact except perjury or treason; and such evidence is necessarily sufficient to create a substantial conflict in the evidence regardless of the number of witnesses or the inferences supporting their testimony to the contrary. 2 Cal. Jur. 930; Broder v. Conklin, 121 Cal. 282, 53 P. 699. The comparative number of witnesses for or against is not by any means the determining factor. 10 Cal. Jur. 1141. The foregoing rule is just as applicable to the issue of payment as to any other issue. Goodrum v. Abajian, 58 Cal. App. 485, 208 P. 695.

[5-7] Appellant makes the further point that the testimony offered of payments other than the $100 cash called for by the contract and the $390 shown by the receipts was improperly received, as it tends to vary a written contract by parol evidence. There is no merit to this contention. The contract of the parties was already executed. The evidence referred to did not vary nor tend to change the terms of the contract; it proved merely the manner of the performance of the contract, that is, the payment of a part of the principal sum or consideration. The receipts given by appellant to respondent were no part of the agreement entered into by them. A receipt is in itself not a contract, but simply an acknowledgment of the fact of the payment or satisfaction of a debt. Doolittle v. McConnell, 178 Cal. 697, 174 P. 305. Payment, like any other relevant fact, may be proved by oral testimony.

[8] The next point made by appellant is that there should have been a tender made. There is no merit to this point. Respondent offered to appellant and paid it the amount that the latter claimed was due, except the disputed item of $100. She refused to pay any more upon the theory that she was not obligated so to to. If the appellant claimed any further sum, its agent should have so informed respondent at the time. She paid everything demanded of her except the $100 which the court found she did not owe. If there was $11.27 remaining unpaid, there is nothing in the record to show that appellant called this to respondent's attention at the time it mentioned the $180 balance or at any other time. She was led by appellant to believe that there was $180 due according to their computations, $80 of which she was willing to and did pay. No objection was made by appellant that there was any amount due in excess of the $80 except the disputed sum of $100. Mr. McKenny, credit manager of appellant, refused to receipt respondent in full after she had paid the $80, but credited the $80 paid on the contract. Appellant should not now be allowed to question the tender. Code Civ. Proc. § 2076.

[9] Appellant for the first time makes the contention that Mr. Hollister was only its representative and was not authorized to collect money. This point was not raised at the time of the trial and cannot now be raised for the first time on appeal. Lugiani v. Syphon Co., 38 Cal. App. 146, 175 P. 648; National Union Fire Ins. Co. v. Nason, 21 Cal. App. 297, 299, 131 P. 755.

As to appellant's contention that the findings of fact are not supported by the evidence, this point has been answered by what has been said heretofore concerning the sufficiency of the evidence to sustain the findings and decision of the trial court.

[10, 11] Appellant challenges the finding "that defendant paid plaintiff on account of said purchase the sum of $100 on the second day of October, 1923, and the further sum of $100 on the 3d day of October, 1923, and that she made further payments or tender of payment to the plaintiff in full of the purchase or offered price." This finding is amply suf-

ficient and cannot be construed to mean that such payment was made after the filing of the action. The evidence is clear that the payments were made prior to the filing of the action. It is well settled that any uncertainties in the findings are to receive such construction as will uphold rather than defeat the judgment—as will give them effect rather than destroy them. 2 Cal. Jur. 871, 872.

[12, 13] Appellant claims that the trial court erred when it refused the plaintiff corporation the right to cross-examine the respondent. The questions asked were irrelevant and immaterial. The purpose thereof was to elicit from the witness certain matters that appeared in the contract, which contract was executed by the parties. The court properly sustained objections to these questions. It is well settled that where the terms of the contract are clear and free from ambiguity or uncertainty oral evidence relating thereto will be incompetent. 6 Cal. Jur. 249, 250, 251; Peterson v. Chaix, 5 Cal. App. 525, 90 P. 948.

[14] Complaint is made that the trial court erred in not permitting appellant's counsel to examine the witness Hollister, who testified for appellant. The questions propounded to Mr. Hollister were wholly immaterial and if answered would not have proved or disproved or tended to prove or disprove any issue in the case. Furthermore, they related to the contents of the contract. An inspection of the contract would have sufficed. Also, the questions sought to elicit from the witness Hollister what the preliminary negotiations of the parties were. This line of questioning was improper, as a written contract which was clear and free from uncertainties and ambiguities had been entered into by the parties. 6 Cal. Jur. 261, 262; Civ. Code, §§ 1697, 1698; Code Civ. Proc. § 1856.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

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110 Cal. App. 414

KING v. EMERSON et al. (three cases).

Civ. 3876–3878.

District Court of Appeal, Third District, California.

May 28, 1930.

Rehearing Granted June 27, 1930.

1. Automobiles ⟹147.

Statute *held* not retroactive so as to destroy right of guest in automobile to recover for injury occurring in 1927 (California Vehicle Act, § 141¾, as added by St. 1929, p. 1580).

2. Courts ⟹116(1).

Courts of record have inherent power to correct record so they conform to actual facts.

3. Courts ⟹116(3).

In correcting records, court cannot, under form of amendment, correct judicial error.

4. Appeal and error ⟹1024(4).

Evidence required to satisfy court regarding what was real order of court, and what was proper entry on minutes, must rest with court in correcting record to speak truth.

5. Courts ⟹116(5).

Court in correcting records may rely upon memory, and is not precluded from correcting entry because record does not show it is itself incorrect.

6. Courts ⟹116(3).

Where motion for new trial was presented on ground evidence was insufficient to sustain verdict, and court announced it would grant motion and clerk entered order to effect motion was granted, court could correct minute order to show ground.

When motion for new trial was presented and argued, sole contention made by plaintiff was that evidence was insufficient to sustain the verdict. The court thereupon announced from the bench that it would grant motion and the court entered a minute order to effect that motion was granted. The action of the court in omitting to orally state the grounds for his ruling was an inadvertence and it could not be said that court, in correcting and amending its original order, was correcting a judicial error.

7. Appeal and error ⟹1001(1).

Jury's verdict and implied findings will not be disturbed on appeal where there is substantial evidence supporting them.

8. Appeal and error ⟹930(1).

When conflicting inferences may reasonably be deduced from facts proved, those must be adopted which support verdict.

9. Master and servant ⟹330(1).

Third person suing for injuries caused by employee has burden of proving relation of employer and employee existed at time.

10. Master and servant ⟹318(1).

Relation of "master and servant" does not exist unless relation of parties is such that master may control work, and direct manner of doing work.

[Ed. Note.—For other definitions of "Master and Servant," see Words and Phrases.]

11. Master and servant ⟹318(2).

To hold master responsible for servant's negligence, master must have power of supervision of servant's conduct.

12. Master and servant ⟹301(1).

Employer cannot claim immunity from liability for damage to third party by employee because law regarding employment was not complied with.

13. Automobiles ⟹245(30).

Whether real estate salesman, having automobile accident injuring guest, was acting in discharge of duty, *held* for jury.

14. Master and servant ⟹302(1).

If servant is engaged in business in which master is interested, directly or indirectly, master is liable for injuries to third person.

15. Master and servant ⟹302(1).

If servant was combining his own business with that of employers, latter were responsible for injuries to third person.

16. Master and servant ⟹332(3).

Whether landowner assumed control over methods and means of work by broker's employee injuring third person, so as to make landowner liable, *held* for jury.

17. Master and servant ⟹318(1).

If landowner assumed control over methods and means of work by broker's employee injuring third person, landowner was liable irrespective of existence of employment contract between it and such employee.

18. Master and servant ⟹301(4).

Where employee injuring third person was under general control and directions of broker and landowner, they were jointly liable for injuries.

19. Trial ⟹139(1).

Where there was substantial evidence in favor of plaintiff on which jury was justified in acting, court properly denied motion for directed verdict for defendant.

Appeals from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Mae King against Ralph W. Emerson, Monroe, Lyon & Miller, Incorporated, and W. B. Moyle. From the judgment, C. R. Fairfield, and Monroe, Lyon & Miller, Incorporated, and W. B. Moyle take separate appeals, and from an order granting a new trial with respect to defendant Ralph W. Emerson he also prosecutes an appeal.

Order granting new trial affirmed, and judgment affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, Theodore W. Chester, of Sacramento, J. Hampton Hoge, of San Francisco, and Irving D. Gibson, of Sacramento, for appellants.

Dutton & Gilkey, of Oakland, for respondent.

TUTTLE, Justice pro tem.

This is an action brought to recover damages for personal injuries sustained by plaintiff in a collision between two automobiles driven by defendants Ralph W. Emerson and C. R. Fairfield. Plaintiff was a guest in the automobile of defendant Fairfield. Defendants Monroe, Lyon & Miller, Inc., and W. B. Moyle are joined as defendants upon the theory that defendant Fairfield was their agent and employee.

The jury rendered a verdict in favor of plaintiff and against defendants C. R. Fairfield, W. B. Moyle, and Monroe, Lyon & Miller, Inc., in the sum of $13,000. From this judgment there are two appeals, one by defendant Fairfield and one by defendant Monroe, Lyon & Miller, Inc., and defendant Moyle.

As to defendant Emerson a new trial was granted, and from the order granting said motion said defendant also prosecutes an appeal.

[1] As to defendant Fairfield, the only point raised by him is that the right of a guest to recover in this case was destroyed by section 141¾ of the California Vehicle Act of 1929 (added by St. 1929, p. 1580). The injury took place on August 10, 1927, and the trial was had September 25, 1928. It has been held that the foregoing section is not retroactive, and hence it has no bearing upon this case. Krause v. Rarity (Cal. App.) 285 P. 879.

Defendant Emerson contends that the court erred in granting a motion for new trial against him. The facts upon which this defendant relies may be briefly summarized as follows: A motion for new trial was made by this defendant upon all the statutory grounds. Thereafter the court caused to be entered the following minute order:

"Superior Court, Civil Record, County of Sacramento,

"State of California.

"Friday, November 23rd, A. D. 1928, Dept. 2.
"Court met pursuant to law.
"Peter J. Shields,
"Judge,
"Superior Court, presiding.

"Mae King,
"39127. vs.
"Ralph W. Emerson, et al.

"The motions for new trial of defendants had heretofore been submitted to the court and the court being fully advised, orders that said motion for a new trial as to defendants

Monroe, Lyon and Miller, C. R. Fairfield and W. Moyle be denied and that the motion for a new trial against defendant Ralph W. Emerson be and the same is hereby granted."

Thereafter the following minute order was entered in the records of the court:

"Order for Correction of Order Granting Motion for New Trial as to Defendant Emerson and Directing that Same be Done Nunc Pro Tunc.

"It appearing from an inspection of the records in the above entitled court and cause that the order of this court heretofore given and made herein on November 23, 1928, and thereafter entered, wherein and whereby the motion of plaintiff for a new trial as against defendant Ralph W. Emerson was granted, was entered in such a way as not to correctly set forth the order of this court as then made in the premises, and that the records of this court herein should be corrected so as to conform to the facts and speak the truth.

"It is hereby ordered by the court upon its own motion that the minutes of this court herein be corrected to conform with the facts of the case and that the said minutes be amended to read as follows:

"The motion of plaintiff for a new trial as to defendant Ralph W. Emerson having been heretofore submitted to the court for decision, and the court having fully considered the same, it is ordered that said motion be and the same is hereby granted upon the ground of the insufficiency of the evidence to sustain the verdict in favor of the said Ralph W. Emerson, and that the motion of the said plaintiff for a new trial as to the said defendant Emerson is hereby granted accordingly.

"It is further ordered that said order be entered herein nunc pro tunc as of November 23, 1928.

"Done in open Court this ——— day of December, 1928. Peter J. Shields,
"Judge of the Superior Court.

"(Endorsed): Filed, December 1st, 1928, Harry W. Hall, Clerk. By W. Hickey, Deputy."

The notice of appeal states that said appeal is taken from the order of the court made November 23, 1928. This is the original order, first above set forth.

It is urged by this appellant that the trial judge was without jurisdiction to amend the said order granting a new trial. He concedes that the evidence is conflicting upon the issues raised by the pleadings, and admits that if the order, as corrected and amended, is allowed to stand, his appeal should be denied. It will be observed that the original order was corrected so that the motion was granted upon the ground of the insufficiency of the evidence.

[2-5] Defendant Emerson moved the court to strike from the files the order granting the motion for new trial as amended and dated December 1, 1928. This motion was denied. The sole question upon this appeal is the power of the trial court to amend its order granting the motion for new trial.

It is elemental that all courts of record have the inherent power to correct their records so that they conform to the actual facts and speak the truth. 7 Cal. Jur. p. 613. In the exercise of this power the court is not, however, authorized to do more than to make its records correspond to the actual facts, and cannot, under the form of an amendment to its records, correct a judicial error. The amount and kind of evidence requisite to satisfy that court as to what was the real order of the court and what was the proper entry on the minutes must rest with the court and be decided upon the evidence adduced. In this connection, the judge may rely upon his own memory. The court is not precluded from correcting the entry because the "record" does not show that it is itself incorrect. The clerk is but an instrument and assistant of the court, whose duty it is to make a correct memorial of its orders and directions. The foregoing rules are laid down in the case of Kaufman v. Shain, 111 Cal. 16, 43 P. 393, 52 Am. St. Rep. 139. In the later case of Harris v. Minnesota Investment Co., 89 Cal. App. 396, 265 P. 306, 309, the rule is stated to be as follows:

"Independent of statutory provisions the court has power on its own motion to correct mistakes in its proceedings, and to annul within a reasonable time orders and judgments inadvertently made. Robson v. Superior Court, 171 Cal. 588, 154 P. 8; People v. Curtis, 113 Cal. 68, 45 P. 180. Rulings and even judgments inadvertently made are not the result of judgment, but of oversight, neglect, or accident, and are subject to correction by the court making them. Wiggin v. Superior Court, 68 Cal. 398, 9 P. 646; Stewart v. Taylor, 68 Cal. 5, 8 P. 605."

In the earlier case of Wiggin v. Superior Court, 68 Cal. 398, 9 P. 646, 648, the following language is used:

"But independent of statutory provisions, we are of opinion the court has power to correct mistakes in its proceedings, and to annul, within a reasonable time, orders and judgments inadvertently made. To illustrate: suppose a judgment is taken upon a default prematurely entered, or a judgment is inadvertently entered in favor of defendant where it was intended to be in favor of plaintiff, or that for any one of a hundred reasons which might be supposed the court has accidentally or inadvertently entered orders or decrees not in consonance with its judgment or with law, and from which rank injustice must follow, can it be contended the court has no power, when within a day it discovers the mistake to correct the error, and that the injured party must be remitted to an appeal for remedy? We think not."

[6] When the motion of this appellant for new trial was presented and argued, the sole contention made by plaintiff was *that the evidence was insufficient to sustain the verdict.* The court thereupon announced from the bench that it would grant the motion, and the clerk entered a minute order to the effect that the motion was granted. Under these circumstances the court had the right to assume that the minute order would be entered by the clerk to the effect that the motion was granted upon the insufficiency of the evidence, that being the only point urged at the hearing. Upon discovering that the clerk had not made the proper entry, and that the minute order did not express the true ruling, the court had the power to correct its order. The act of the court in omitting to orally state the grounds for his ruling was an inadvertence under the authorities cited, and it cannot be said that the court, in correcting and amending its original order, was correcting a judicial error.

The act of the trial court questioned here cannot be held to have misled counsel for appellant. The affidavit of the trial judge stated, as we have said, that the sole ground urged by respondent in connection with her motion for new trial was the insufficiency of the evidence. This was the only question presented to the court for decision. When the trial judge inadvertently failed to specify that the motion was granted upon the insufficiency of the evidence, the oversight of the court must have been at once apparent to this appellant. And so when appellant descants upon the sanctity of orders made under these circumstances he assumes a rather anomalous position.

Defendants Monroe, Lyon & Miller, Inc., and W. B. Moyle appeal from the judgment. The two essential questions to be determined upon their appeal are as follows:

1. Was defendant Fairfield, at the time of the accident in question, the servant, agent, or employee of appellants Monroe, Lyon & Miller, Inc., and W. B. Moyle?

2. Was defendant Fairfield, at the time of the said accident, acting within the scope of his authority or within the course of his employment, as such servant, agent, or employee?

[7, 8] Appellants contend that the evidence is insufficient to establish the foregoing facts, which, like any other facts in the case, are for the determination of the jury. The verdict of the jury and their implied findings upon such questions will not be disturbed on appeal, where there is any substantial evidence to support them, and when conflicting inferences may reasonably be deduced from facts proved, those must be adopted which support the verdict. Estate of Shay, 196 Cal. 355, 237 P. 1079.

We will detail some of the salient facts of the case bearing upon the questions involved, and in doing so shall refer to evidence most favorable to respondent where a conflict is involved. At the time of the accident appellant Monroe, Lyon & Miller, Inc., was the owner of a tract of land in Santa Cruz county, known as Rio Del Mar. It had subdivided this tract and was placing the lots upon the market and attempting to sell them. Appellant W. B. Moyle held a license as a real estate broker and was selling said lots under a "brokerage" agreement with defendant corporation. Defendant Fairfield was engaged in selling said lots, under an oral agreement with Moyle, under whom he held a salesman's license. Fairfield devoted his full time to the sale of this property. He was paid on a commission basis, and his territory was Sacramento and vicinity. It was his duty to search out prospects, submit their names to the local office at Sacramento, and if these names were approved to take such prospects to the property, where they were to be the guests of defendant corporation. Defendant Moyle was the general salesmanager of Monroe, Lyon & Miller. Defendant Fairfield received orders and instructions as to the details of his work from both appellants. Fairfield also executed sales contracts on behalf of defendant corporation. On the day of the accident Fairfield had gone to Roseville to take respondent, her sister and daughter to Rio Del Mar in an attempt to sell the lots. For some reason they decided not to go to Santa Cruz that day. Fairfield testified that he took these parties as his guests to Sacramento. He testified that he took them as "prospects" and that he intended to "hold them as prospects" and to accommodate them with the ride for that purpose. There was also evidence that plaintiff was undecided when she entered the car whether or not she would go straight through to Santa Cruz or stop at Sacramento, through which they must pass on their way to the property. The names of both appellants were inscribed upon the entrance door of the Sacramento office.

It is appellants' contention that the evidence shows conclusively that Fairfield was not licensed to work for Monroe, Lyon & Miller; that he was performing no services for that corporation; that it had no control or supervision of the conduct of his work; that it was not licensed as a broker-employing salesman, but was merely the contract owner of the property; and that if Fairfield was the employee of anybody it was William B. Moyle, whose name appears in the salesman license issued to Fairfield.

[9-11] It is well settled that on plaintiff is the burden of proving that the relation of employer and employee existed at the very time of the alleged negligence. The relation of master and servant or employer and employee does not exist unless the relations of

the parties are such that the master or employer may control the work of the servant or employee and direct the manner in which it shall be done, and the master or employer must have control and direction, not only as to the employment, but of all of its details. In order to hold the master responsible for the negligence of a servant, he must have the power of supervision of servant's conduct. Indeed, the words "master" and "servant" imply such power. Pilger v. City of Paris, etc., Co., 86 Cal. App. 277, 280, 261 P. 328; Cotter v. Lindgren, 106 Cal. 607, 39 P. 950, 46 Am. St. Rep. 255.

[12] It is conceded by appellants that Fairfield was working under the direction and control of Moyle, who, in turn, was working, under a written agreement, for Monroe, Miller & Lyon. Assuming that under the terms of said written agreement Moyle was an independent contractor, yet the corporation would still be liable for the negligence of Moyle, if it took charge of the details of the work performed by Moyle and Fairfield and exercised supervision and control over the work of said parties, although in a manner inconsistent with and contrary to the terms of said agreement. Luckie v. Diamond Coal Co., 41 Cal. App. 468, 183 P. 178. Nor can appellants complain because in so acting they were violating the terms of the State Real Estate Act and it would have been unlawful for them to have directly employed Fairfield. An employer cannot claim immunity from liability for damages done to an innocent third party by his employee because the law in respect to such employment has not been complied with. He cannot be permitted to take advantage of his own illegal act. Such a contention is utterly untenable.

[13, 14] It is contended that Fairfield was not acting in the scope of any employment. We are satisfied that there was sufficient evidence to justify the jury in concluding that Fairfield, at the time of the injury, was acting in discharge of his duties. If a servant, employee, or agent is engaged in business in which the master is interested, either directly or indirectly, it is the master's business, and he will be held liable. Kish v. Calif. S. Automobile Ass'n, 190 Cal. 246, 212 P. 27. Fairfield had gone to Roseville, at the direction of Moyle, to interview plaintiff and endeavor to sell her one of the lots. Plaintiff entered the automobile of Fairfield and was being driven toward Sacramento when the injury occurred. Plaintiff was a "prospect," and Fairfield was then and there engaged in his duties of a real estate salesman, acting under the control and directions of appellants. The foregoing are a few of the facts which the jury might have considered in this connection.

[15] If the jury concluded that Fairfield was combining his own business with that of his employers, the latter would still be responsible. The following language was used by the court in the case of Ryan v. Farrell (Cal. Sup.) 280 P. 945, 946: "It is the established rule in this jurisdiction that where the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured; but the master will be held responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master"—citing cases.

Great stress is laid by appellants on the case of Barton v. Studebaker Corp. of America, 46 Cal. App. 707, 189 P. 1025, where the judgment was reversed on the ground that the evidence showed the alleged employee to be an independent contractor. An examination of the facts in both cases indicates clearly that the case last cited can be readily distinguished from the case at bar in the following particulars:

(a) In the Barton Case the salesman signed no contracts and closed no deals for the company. In this case Fairfield signed appellant corporation's name to contracts, including both preliminary and final contracts, with the full consent of the corporation, and, apparently, with full authority to bind the corporation.

(b) In the Barton Case the salesman simply brought the purchaser in touch with the manager. But in this case Fairfield, himself, signed up any prospective purchaser which he was able to procure and collected money from him and gave the company's receipt, signing "Monroe, Lyon & Miller, Inc., by Fairfield."

(c) In the Barton Case the salesman made no report to the company. In this case Fairfield filed written reports and could take no persons down to the tract without the approval of his superiors.

(d) In the Barton Case the corporation had no control over the salesman. In this case the corporation exercised full control as to the methods to be employed by the salesmen, the route to be taken in transporting prospective purchasers to the property, and the procedure to be followed with relation to the prospects taken to the tract, and, of particular significance, it had full power to discharge Fairfield at any time.

(e) In the Barton Case the salesman was free to choose his own time for working and could seek prospects anywhere. In this case Fairfield had to report to the company's Sacramento office at 8 o'clock at least three mornings a week. Also was given only a restricted district, namely, the Sacramento territory.

(f) In the Barton Case the only business of the salesman was to find and procure pro-

spective purchasers and bring them to the company. In this case the business of Mr. Fairfield was to transport prospective purchasers to the Rio Del Mar tract, later to sell lots to them, and, if possible, actually sign up contracts with them, collect the money, and, in short, complete the sale, in all of which he fully represented the corporate appellant. In the case at bar the purchaser need never see nor deal with any one else except the agent Fairfield in order to purchase a lot, pay for it, and receive the final contract.

(g) In the Barton Case, the agent was under no obligation to give any particular time or service to the company. Nor was he in fact bound to handle the Studebaker car exclusively. In this case Fairfield was bound to give his full time and service to the selling of lots in the Rio Del Mar tract of the corporate appellant.

In view of these distinctions between the Barton Case and the case at bar, it is evident that the Barton Case is not controlling. In several California cases, where the facts are practically identical with the case at bar, the Barton Case has been discussed and has been distinguished. Briggs v. Jess Mead, Inc., 93 Cal. App. 666, 675, 270 P. 263; May v. Farrell, 94 Cal. App. 703, 271 P. 789; Ryan v. Farrell (Cal. Sup.) 280 P. 945.

In this connection the following language of the court in the case of George v. Chaplin (Cal. App.) 279 P. 485, 487, is extremely pertinent: "Appellants, in support of their contention, rely upon the case of Barton v. Studebaker Corporation, etc., 46 Cal. App. 707, 189 P. 1025. There it was held that a salesman employed on commission, with no salary or fixed hours, and over whom the employer exercised no authoritative control, was an independent contractor, for whose negligence the defendant was not liable. In the present case, however, many circumstances are disclosed by the evidence, which strongly tend to prove that the right was claimed, and that such control was exercised by appellants, to the extent at least that the character of the employment made reasonably possible. From the facts shown, the inference was not unreasonable that, subject to the freedom of action inherent in the employment, it was understood that the right to direct the manner of performance was reserved by appellants. The question was properly submitted to the jury (Majors v. Connor, 162 Cal. 131, 121 P. 371; Buckley v. Harkens, 114 Wash. 468, 195 P. 250), and their conclusion is supported by the evidence."

[16, 17] Defendant corporation earnestly insists that it cannot be held as the master of Fairfield, as there is no evidence of any contract of employment between said parties. The answer to this contention is that there is ample evidence in the record to support the finding that the corporation assumed control over the methods and means by which the work was to be done, and under such circumstances it will be held liable, irrespective of the existence of any contract of employment between it and Fairfield, and the mere fact of nominal employment by Moyle will not relieve it of liability. 39 C. J. p. 38.

[18] Viewing the evidence in its entirety, it would appear that the history of the relations of these parties would point to the conclusion that Fairfield acted at all times under the joint control and directions of both of these appellants, and it must follow that they are jointly liable for the injuries inflicted.

[19] Appellants, at the conclusion of the case, moved the court to direct a verdict in their favor. From what we have said it clearly appears that there was substantial evidence in favor of plaintiff upon which the jury was justified in acting, and under such conditions the court properly denied the motion. Diamond v. Weyerhaeuser, 178 Cal. 540, 174 P. 38.

A number of other points are discussed in the briefs, but they are all elaborations of the main points which we have here discussed.

Suffice it to say that, after a careful examination of the entire record, we have come to the conclusion that none of these appellants should prevail.

The order granting new trial in respect to appellant Emerson is affirmed, and the judgment against defendants Fairfield, Monroe, Lyon & Miller, Inc., and W. B. Moyle is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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106 Cal. App. 228

STEINECK, Deputy Labor Commissioner, Bureau of Labor Statistics, v. HAAS-BARUCH CO. et al.

Civ. 6019.

District Court of Appeal, Second District, Division 2, California.

June 5, 1930.

Rehearing Denied July 3, 1930.

1. Garnishment ⟹165.

Minute order in "garnishment" proceeding, reciting "Garnishment discharged and Defendant discharged," did not dissolve any attachment lien, but merely excused garnishee from further attendance.

"Garnishment" is an attachment of the effects of the defendant in the garnishee's hands, differing in no essential respects from attachment by levy, except that the

plaintiff does not acquire a clear and full lien on the specific property in the garnishee's possession, but only the right to hold the garnishee personally liable for such property or its value.

[Ed. Note.—For other definitions of "Garnishment," see Words and Phrases.]

2. Garnishment ⟹13.

Right to maintain garnishment exists only where moneys are owing defendant from garnishee.

3. Garnishment ⟹13.

Liability of garnishee is determined as of time of service of attachment writ.

4. Garnishment ⟹32.

Money held by garnishee in trust for debtor with instructions to pay it to designated creditors *held* not garnishable at instance of another creditor, where fund was exhausted in carrying out purposes of trust (Code Civ. Proc. § 542).

Any claim or right that the debtor had in the money was subject and subservient to the trust agreement. So long as the trust continued, he could not successfully maintain an action against the trustee for the recovery of the money or any part thereof. Code Civ. Proc. § 542, provides for garnishment, where third party has in his possession or in his control credits or other personal property belonging to the defendant.

5. Garnishment ⟹32.

Disposition of money in trust generally takes priority over subsequent garnishment.

6. Garnishment ⟹32.

Where creditor garnishes trustee who holds debtor's funds pursuant to express trust, trustee will be obligated to attaching creditor only to extent of surplus over amount required to execute trust.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by W. E. Steineck, Deputy Labor Commissioner, Bureau of Labor Statistics, against the Haas-Baruch Company and others. From an adverse judgment, plaintiff appeals.

Affirmed.

A. B. Edler, of Los Angeles, for appellant.

L. A. Lewis, of Los Angeles, for respondent.

GATES, Justice pro tem.

This is a suit to recover money which appellant contends had been attached while in the possession of a garnishee, respondent herein. The cause was submitted to the trial court upon a written stipulation of facts.

One Simon, prior to March, 1924, was the owner of a certain grocery store, stock, and fixtures. On February 28, 1924, he sold the store to E. L. Simmons, and gave the customary notice of sale. Between February 28 and March 10 of the same year respondent received $2,500 in trust to pay creditors of Simon, as the purchase price of said groceries and fixtures. On March 5, 1924, respondent was notified by the attorney for N. Diamantes, appellant's assignor and original owner of the claim sued upon, that there was due and owing from Simon to Diamantes $500 for labor. On March 10 respondent received instructions from Simon to disburse the money held by it to creditors other than N. Diamantes. On March 20, 1924, appellant, as assignee of Diamantes, brought suit against Simon upon the identical claim upon which demand had theretofore been made. On March 21st an attachment was issued out of the superior court and was served upon respondent the same day, whereupon the latter made the following return: "That I am indebted in the sum of No Dollars; but that I have in my possession and under my control personal property belonging to said defendant, to-wit: money held in trust with instructions to pay to his certain creditors. Haas-Baruch Company, by C. V. McMannamy, Cr. Mgr." A motion to discharge said attachment was made and denied. Later, the respondent corporation, C. V. McMannamy, and Simon appeared in the superior court in response to a citation, and were examined under oath as to money held by respondent belonging to Simon. At the conclusion of such hearing the court ordered McMannamy "Discharged." The minute order as made stated: "Garnishment discharged and Defendant discharged." After the filing of the instant suit, this minute order was changed by the court to read: "Garnishee discharged and Defendant discharged." Respondent herein had no notice or knowledge of the application to the court to change the minute order. The corporation, however, after securing a copy of the minute order as originally made, did on or about the month of September, 1924, pay the $2,500 to the designated creditors of Simon, other than the appellant herein. No motion for the discharge of any attachment had been filed when respondent and the other named parties appeared before the court. Thereafter plaintiff herein recovered from Simon a judgment for $650, plus interest and costs, in the same action in which an attachment was served upon the respondent here. Execution was duly had and served upon the corporation, whose return showed that all moneys held by it belonging to Simon had been paid to certain des-

ignated creditors, and that it held no moneys belonging to Simon.

[1] There is no merit in appellant's contention that the minute order made by the court dissolved any attachment lien that appellant might have had on the money as a result of the levy made by the sheriff. The order made by the court did not purport to, nor did it, dissolve any attachment lien. The effect of this minute order was to excuse or discharge the respondent from further attendance in the matter. Ogden v. Mills, 3 Cal. 253.

[2] "The term garnishment, as used today, means a proceeding or process whereby the property, money or credits of one person, generally called the debtor, and in the possession of or owing by another, generally designated the garnishee, are applied to the payment of the debt of the debtor, by means of process issuing against the debtor and the garnishee. Garnishment is, therefore, an attachment of the effects of the defendant in the garnishee's hands, differing in no essential respects from attachment by levy, except, as is said, that the plaintiff does not acquire a clear and full lien upon the specific property in the garnishee's possession, *but only the right to hold the garnishee personally liable for it or its value.*" 13 Cal. Jur. 3; Finch v. Finch, 12 Cal. App. 274, 107 P. 594, 598. (Italics ours.) "The right to maintain garnishment proceedings exists only where the defendant or party against whom judgment has been rendered would have had a cause of action under the practice at common law in debt or indebtedness assumpsit, against the garnishee." 13 Cal. Jur. 3, 4; Hassie v. God Is With Us Congregation, 35 Cal. 378; Marshall v. Wentz, 28 Cal. App. 540, 153 P. 244, 246; Aigeltinger Co. v. Healy-Tibbitts Const. Co., 23 Cal. App. 608, 139 P. 436, 438. Donohoe-Kelly Banking Co. v. Southern Pacific Co., 138 Cal. 183, 71 P. 93, 94 Am. St. Rep. 28. However, this rule has been somewhat extended, as may be seen by examining Brainard v. Rogers, 74 Cal. App. 247, 239 P. 1095, 1096, which, among other things, holds: "Moneys which are owing the debtor, though not yet due, are subject to garnishment, because the term 'owing' includes an immature as well as a mature obligation."

[3] The limits as well as the basis of a garnishee's liability to an attaching creditor is stated in American Exchange National Bank v. Superior Court, 29 Cal. App. 8, 11, 154 P. 279, 280, as follows: "A garnishee's liability in the case of a debt due from him is grounded upon and is limited by his liability to the defendant in the principal action whereby the latter has, at the time of the garnishment, a cause of action, present or future, against him. Drake on Attachment (7th Ed.) § 463." This principle is clearly illustrated in Marshall v. Wentz, supra. The District Court of Appeal in that case, among other things, said: "In Hassie v. G. I. W. U. Congregation, 35 Cal. 378, it is said: 'If, at the time the attachment was served upon the garnishee, the defendant in the attachment could have maintained against him, under the practice at common law, an action of debt or indebitatus assumpsit, then the liability of the garnishee is transferred from the defendant to the plaintiff in the attachment suit.' * * * 'Whenever there is a legal liability the law creates a promise upon which an action of assumpsit will lie.'" However, it may be said that the liability of the garnishee is to be determined as of the time of the service of the writ. Nordstrom v. Corona City Water Co., 155 Cal. 206, 100 P. 242, 132 Am. St. Rep. 81; 28 C. J. 243. The garnishee will only be held for the debts then owing at the time of the service of the writ. Norris v. Burgoyne, 4 Cal. 409; Johnson v. Carry, 2 Cal. 34. Therefore, any right that appellant may have had against respondent became fixed as of the date of the levy of the attachment.

[4-6] Can it be said that the respondent herein did, on the 21st day of March, 1924, the date of the levy of the attachment or garnishment, have "in its possession or under its control any credits or other personal property belonging to the defendant, Simon, or did it owe him any debts or any money"? Section 542, Code Civ. Proc. Respondent's return to the writ of attachment of the sheriff compels us to answer in the negative. The return is conclusive, as it shows plainly that respondent is not indebted to Simon in any sum, and that the only property it had was being held in trust for certain creditors. Any claim or right that Simon had in or to said money was subject to and subservient to the trust agreement. Simon divested himself of any legal claim to the money that he might have had. So long as the trust continued to exist, he could not successfully maintain an action against respondent for the recovery of the money or any part of it. 13 Cal. Jur. 4, § 4, and cases there cited. The $2,500 had been placed in respondent's control for a definite and specific purpose, to wit, for the payment of certain creditors of Simon. Subsequent events clearly show that respondent fully executed the trust mentioned by paying out the $2,500 to certain creditors.

As a general proposition of law, it is well settled that a disposition of money in trust takes priority over subsequent garnishment. 28 C. J. 120. It is also well settled that a surplus or balance remaining in the hands of a trustee after the execution of a trust created by the defendant may be reached by garnishment, unless such surplus has been assigned. Giles v. Ash, 123 Mass. 353; New England M. Ins. Co. v. Chandler, 16 Mass. 274; Sands v. Berkley, 88 Mo. App. 54; 28 C. J. 124. And likewise, if there were, for any reason, a failure of a trust so created, the funds covered thereby could be reached by attachment.

Hungerford v. Greengard, 95 Mo. App. 653, 69 S. W. 602; Chesley v. Coombs, 58 N. H. 142; Greene, etc., v. Remington, 72 Wis. 648, 39 N. W. 767, 40 N. W. 643.

The authorities are somewhat divided upon the question as to whether garnishment lies prior to the termination of the express trust and the accrual of a dry resulting trust in favor of the assignee to the extent of the surplus. 28 C. J. 125. In the early case of Handley v. Pfister, 39 Cal. 283, 2 Am. Rep. 449, our Supreme Court intimated that a garnishment levied prior to the termination of an express trust was proper. The basic facts in that case are somewhat similar to the facts in the instant proceeding. The court there said: "The rights acquired by the appellants to the fund in question, through the levy of their writ of attachment, are precisely those which Fitzgerald, their debtor, had at the time of the levy. This was a right to the overplus remaining after the payment of these debts; but there was no overplus. * * * The steps taken by him to provide the means for their payment, were such as the law permitted him to pursue; and when he, with the assent of these other creditors, placed this property in the hands of the respondent, with instructions to sell it and pay himself and them out of the proceeds, the respondent and those he represents, obtained a lien upon it and its proceeds superior to any which the appellants could acquire by the subsequent levy of their process thereon. The authority to Handley to sell and apply the proceeds to the payment of his own debt, was, in law, irrevocable by Fitzgerald, and would continue while the debt should subsist. And as having, with the assent of the other creditors associated with him, undertaken to apply these proceeds in part to the payment of these debts, the respondent became clothed with a power coupled with a trust, for the benefit of those others, and which he was not at liberty to relinquish until these debts should have become in some manner discharged"—citing cases. We think the true rule to be deduced from the authorities is that, where a creditor garnishees a trustee who holds funds pursuant to an express trust, and it is shown by the plaintiff that the trustee has a surplus on hand—an amount over and above that required to execute the terms of the trust—that he, the trustee, will be obligated in law to such attaching creditor in an amount to which the creditor is entitled, not exceeding the surplus in the hands of the trustee. Younkin v. Collier et al. (C. C.) 47 F. 571; Handley v. Pfister, supra. The foregoing principle, however, has no application in the instant case, for the reason that there was not any balance or surplus, as all of the money deposited with respondent had been disbursed pursuant to the terms of the trust.

Judgment affirmed.

IRA F. THOMPSON, J. I concur. The agreed statement of facts recites that the fund was held in trust. That being so, the attaching creditor secured no superior rights.

I concur: CRAIG, Acting P. J.

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106 Cal. App. 224

VAN DOREN et al. v. BURNS et ux.

Civ. 5972.

District Court of Appeal, Second District, Division 2, California.

June 5, 1930.

1. Licenses ⟹39.

Law requiring architect, if unlicensed, to so inform employer, is merely for benefit of owner in determining employment.

2. Contracts ⟹285(1).

Architect conferring with contractors and acting as arbitrator in agreeing on claims in accordance with provisions of contract did not exceed authority.

The builder's contract provided that, in case owner or architect at any time during progress of work requested any modification, alterations, or deviations, that either should be at liberty to do so, and that contract should not be affected, but that amount should be added to or deducted from amount of contract price, and that, in case of dispute between owner and contractor, or between contractor and architect, the same should in first instance be decided by architect, and that, in case contractor was dissatisfied with decision, he should nevertheless conform thereto, but should not be barred from recovering from owners reasonable compensation.

3. Appeal and error ⟹931(1).

All intendments must be resolved in favor of judgment on conflicting evidence.

4. Contracts ⟹284(4).

Architect's decision in respect to contractor's claim will be held conclusive, and can be impeached only for fraud or gross mistake amounting to fraud.

5. Accord and satisfaction ⟹26(3).

Evidence *held* to sustain finding that there was not an accord and satisfaction between contractors and owners in settlement of claim (Civ. Code, §§ 1583–1585).

6. Contracts ⟹322(5).

Finding that contractors' charges for extras were not excessive *held* supported by evidence.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by P. W. Van Doren and another, doing business under the firm name of Van Doren & Trueman, against Fritz B. Burns and wife. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Janeway, Beach & Pratt and Roland T. Kinney, all of Los Angeles, for appellants.

Joseph Sokolow, of Los Angeles, for respondents.

CRAIG, Acting P. J.

The respondents were awarded judgment for a balance alleged to have been owing and unpaid by appellants, the owners of certain real property in Los Angeles county, for the construction of a dwelling house thereon and the latter appealed from said judgment.

It is conceded that Fritz B. Burns employed one L. G. Scherer as architect to prepare plans and specifications and to superintend the work of the contractors; that Scherer, although not a certified architect, fulfilled his part of the agreement in this respect, and that considerable labor was performed and materials were furnished in addition to those called for by the original plans; that the job was completed, certain liens were filed, and that Scherer, acting as an arbitrator, attempted to adjust differences between the contractors and the owners as to a balance claimed by the contractors which Burns declined to pay them, and for which this action was prosecuted.

[1, 2] It is contended by appellants that the architect exceeded his authority in conferring with the contractors and acting as arbitrator in agreeing upon amounts of items forming the basis of their claim. Incidentally it is insisted that Scherer's failure to obtain an architect's certificate deprived him of the power to act. But this is not an action for the architect's compensation, nor is the result of his services, other than as arbitrator, seriously, if at all, questioned as being unsatisfactory. In any event, the provisions of the act requiring one, if unlicensed, to so inform his employer, is for the benefit of the owner merely to place him upon his guard as to whether or not he should employ a person not so qualified. Ex parte McManus, 151 Cal. 331, 90 P. 702. As to the arbitration, appellant Burns testified and here insists that Scherer not only acted without authority, but that he and the contractors placed exorbitant prices upon the extra work and materials at conferences in which appellant had no opportunity to participate, without his consent, and for which he could not legally be held liable. The builders' contract, executed by respondents and Burns, provided, in part, as follows:

"Should the owner or the architect at any time during the progress of the work request any modifications, alterations or deviations in, addition to, or omission from, this contract or the plans or specifications, either of them shall be at liberty to do so, and the same shall in no way affect or make void this contract; but the amount thereof shall be added to or deducted from the amount of the contract price aforesaid, as the case may be, by a fair and reasonable valuation, based upon the market value of labor and material."

"Should any dispute arise between the owner and contractor or between the contractor and architect, respecting the true construction of the plans or specifications, the same shall, in the first instance be decided by the architect; and should the contractor be dissatisfied with the justice of such decision he shall, nevertheless, conform thereto, but is not thereby debarred from recovering from the owners reasonable compensation for any extra work thus entailed, if not in fact a part of the work herein agreed to be performed."

[3, 4] It also appears by affirmative testimony that expensive alterations or changes requiring extra labor and materials were demanded by the owners and were actually furnished, and received the latter's approval; that Burns objected to the charges therefor upon the grounds that they were not extras or were excessive, and Scherer positively testified that Burns "authorized me to take charge," "to get together with Mr. Van Doren and adjust the matter"; that "Van Doren and myself and Mr. Burns worked back and forth two or three weeks trying to bring it to a conclusion"; that he "brought it to a conclusion by arriving at the amounts there" in the bill of particulars; "probably cut out 10% to 20% from each item that was excessive"; that he and Van Doren agreed upon prices, prepared a statement, and furnished Burns a copy thereof, to which the owners declined to agree. It further appears that the ultimate charges were based upon the fair and reasonable market value. There is no merit in appellants' contention, since the contractors and the arbiter in this respect followed the provisions of the contract, regardless of Scherer's authority to bind the owners as an arbiter. And, resolving all intendments in favor of the judgment, upon conflicting evidence we must conclude that he was so authorized. In such event his decision will be held conclusive, and can be impeached only for fraud or for gross mistake amounting to fraud. American-Hawaiian Eng. Co. v. Butler, 165 Cal. 497, 133 P. 280, Ann. Cas. 1916C, 44; Connell v. Higgins, 170 Cal. 541, 150 P. 769; Roberts v. Security Trust & Savings Bank, 196 Cal. 557, 238 P. 673.

[5] It is next asserted that there was an accord and satisfaction between the parties,

Van Doren & Trueman having agreed that, if Burns would pay certain claimants, they would forego all further compensation to which they might be entitled under their contract. Again there is conflicting evidence from which the trial court may have concluded that such was not only an untrue version of the controversy, but that appellants had so failed to comply with respondents' proposition as to preclude reliance upon it. It was testified by the contractors that they did offer to waive any amount due them if Burns would pay subcontractors before liens were filed, as a protection to the contractors' credit; that Burns agreed to "think it over," but that he did not communicate with them again, and the liens were in fact filed. This point is also without merit. Civ. Code, §§ 1583–1585.

[6] The only remaining point of consequence requiring discussion consists of appellants' argument that the charges for extras were excessive, and that respondents were allowed commissions to which they were not entitled. It appears that materials purchased were charged to appellants at actual cost, which qualified witnesses testified was the fair and reasonable market value. For tearing off the roof of the building after its completion and replacing it with a roof of different type after enlarging rooms, stairway, and porch, etc., the actual square-foot dimensions were computed and charges made accordingly for the services pursuant to builders' customs, but at about 75 cents less per foot than the charge which had been made for the original construction work. This the testimony also tends to show was fair, reasonable, and proper. We find no error in this respect in the findings when read as a whole.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; GATES, Justice pro tem.

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106 Cal. App. 43

Ex parte DANIELS.

Cr. 1126.

District Court of Appeal, Third District, California.

May 23, 1930.

1. Prisons ⟹15.

Credits allowed on prisoner's term for good behavior are not operative unless some affirmative action is taken by board of prison directors.

2. Habeas corpus ⟹54.

Convict *held* not entitled to discharge on habeas corpus on ground term has expired by reason of credits earned, where petition does not show that board of prison directors allowed credits.

No allegation was contained in the petition setting forth that any action had ever been taken by the board of prison directors relative to the allowance of credits, and therefore court could not assume that any such action had ever been taken.

3. Prisons ⟹15.

Sentence under indeterminate sentence law is in legal effect sentence for maximum term, and fixing actual term by board of prison directors is limitation of such term.

4. Prisons ⟹15.

Statute respecting credits allowable on prisoner's term for good behavior amended statute to state in express words law as previously declared by appellate courts (Pen. Code § 1168, as amended by St. 1929, p. 1930).

The statute provides that credits shall not be allowed until procedure specified has been followed leading up to the adoption of an order or resolution by the board of prison directors.

5. Pardon ⟹9.

Prisoner outside walls of prison on parole is still under direction and jurisdiction of board of prison directors, and constructively prisoner of state.

Application for writ of habeas corpus by F. V. Daniels, prayed to be directed to the Warden of Folsom prison to secure release of petitioner on the ground that his term has expired.

Writ denied.

Lawrence J. Skirving, of Sacramento, for petitioner.

PER CURIAM.

The petition of F. V. Daniels for the issuance of a writ of habeas corpus by this court sets forth the following:

That on the 24th day of June, 1925, the petitioner was sentenced by the superior court, in and for the county of Los Angeles, to state prison, for the crime of receiving stolen goods; that on the 27th day of June, 1925, the petitioner was received at the state prison at San Quentin; that on the 8th day of January, 1926, the petitioner's sentence was fixed at five years; that the credits which the petitioner earned upon said five-year sentence amounted to one year and five months; that the petitioner's term, there-

fore, would expire in three years and seven months, to wit, on January 28, 1929. The petitioner further sets forth that on the 31st day of January, 1928, petitioner was admitted to parole; that on the 23d day of October, 1928, petitioner was arrested in the county of Los Angeles, state of California, and sentenced to the county jail in the county of Los Angeles; that this sentence expired on the 13th day of May, 1929; that on the 7th day of November, 1928, the petitioner's parole was suspended; that on the 14th day of May, 1929, petitioner was returned to the state prison at Folsom, and is confined therein; that on the 18th day of May, 1929, the board of state prison directors attempted to forfeit all credits earned by the said petitioner, and that before said date, namely, on the 28th day of January, 1929, the petitioner's term had expired. Wherefore, the petitioner asks that a writ may be issued herein, a hearing had, and the petitioner restored to his liberty.

[1, 2] The petitioner's application herein is based upon, and proceeds upon, the theory that the credits which may be allowed on a prisoner's term for good behavior, attach, are operative and limit the term of imprisonment theretofore imposed upon a prisoner, irrespective of any action of the board of prison directors in allowing such credits. No allegation is contained in the petition before us setting forth that any action has ever been taken by the board of prison directors relative to the allowance of credits, and therefore we cannot assume that any such action has ever been taken. As we read the decisions, the indeterminate sentence law and the act of the Legislature relative to credits, such credits are not now operative unless some affirmative action has been taken by the board of prison directors. It is, in our opinion, insufficient to allege simply that credits have been earned.

[3] Beginning with the case of In re Lee, 177 Cal. 690, 171 P. 958, a sentence under the indeterminate law is held to be, in legal effect, a sentence for the maximum term authorized by the Penal Code, and that the fixing of the actual term of imprisonment or confinement by the board of prison directors is a limitation of that term.

[4] Section 1168 of the Penal Code now provides, in express language, that credits shall not be allowed until the procedure therein specified has been followed leading up to the adoption of an order or resolution by the board of prison directors, awarding the same. While this section, as amended in this particular, did not become effective until after the petitioner in this case had been sentenced for the period of five years, and after the period at which he claims he was entitled to be discharged, as set forth in his petition, the act of the Legislature in amending section 1168 of the Penal Code in 1929 (St. 1929, p. 1930) only put into section 1168, in express words, the law as previously declared by the appellate courts.

In the case of In re Thompson, 54 Cal. App. 177, 201 P. 473, the law relative to the allowance of credits, prior to the amending of section 1168 of the Penal Code, is thus stated (we quote from the syllabus): "An inmate of the state prison is not entitled to his discharge on habeas corpus on the ground that the term of his imprisonment has expired by reason of credits earned and not forfeited, where it is not shown by the petition that the board of prison directors by any act on its part has accorded the petitioner any credits for good conduct, or if any have been given, that they have not been declared forfeited."

[5] The fact that the petitioner was outside the walls of the state prison, on parole, has no bearing whatever upon the power of the board of prison directors to act in his case. Even though outside the prison walls, in contemplation of law the petitioner was still under the direction and jurisdiction of the board of prison directors and, constructively, a prisoner of the state.

This court, in the case of Ex parte Heckman, 90 Cal. App. 700, 266 P. 585, had occasion to review and cite the authorities bearing upon the power of the board of prison directors relative to prisoners on parole.

In Pareses v. California State Board of Prison Directors et al., reported in 281 P. 394, 395, the Supreme Court, passing upon questions similar to those presented to us, held as follows: "Since the enactment of the Indeterminate Sentence Law (Stats. 1917, p. 665), the 'recognition to be given to such conduct becomes a matter of consideration and affirmative action by the board [of prison directors] in each particular case.' In re Thompson, 54 Cal. App. 177, 178, 201 P. 473. The allegation that petitioner is entitled to certain credits for good behavior is insufficient. It must be made to appear that the board of prison directors by affirmative act has accorded petitioner those credits and that they have not been declared forfeited by said board. In re Thompson, supra; In re Piantanido, 56 Cal. App. 259, 260, 205 P. 17; In re Mann, 192 Cal. 165, 166, 219 P. 71."

Under the authorities cited, it is evident that the petition under consideration does not contain facts sufficient to warrant the issuance of a writ.

The petition is denied.

SHORT v. SHORT.

Civ. 7163.

District Court of Appeal, First District, Division 2, California.

June 4, 1930.

Rehearing Denied July 2, 1930. Hearing Denied by Supreme Court July 31, 1930.

1. Husband and wife ⟹281.

Evidence *held* to sustain finding that contract for maintenance of wife was based on valuable consideration.

The wife had transferred all her interest in the community property to her husband. Moreover, the agreement was made shortly prior to a divorce proceeding between the parties in which the wife renounced all her rights in the community property and also renounced any right she may have had to maintenance, except as agreed theretofore between the parties.

2. Estoppel ⟹79.

Where husband represented to court in divorce proceeding that agreement for wife's maintenance was valid and subsisting, he was thereafter estopped from attacking validity of agreement on ground of illegality.

The husband did not object to validity of maintenance agreement during a proceeding for divorce which he brought against his wife in another state, although he had an opportunity so to do. He represented to court that he was then supporting his wife and child by virtue of a maintenance agreement between himself and his wife, and on the strength thereof the court imposed no duty on him to pay maintenance moneys for his wife or child. When sued upon such maintenance agreement by his wife, he contended that the agreement was illegal.

3. Divorce ⟹172.

For purpose of ascertaining what were issues in divorce action, entire record in that action, including evidence, may be examined.

4. Divorce ⟹172.

Judgment in divorce proceeding is res judicata of all matters which were or might have been litigated in that action.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by Dot Marie Wolfe Short against Frank H. Short. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Sutherland & Dearing and Frank Kauke, all of Fresno, for appellant.

Philip Conley, Conley, Conley & Conley, and F. de Journel, all of Fresno, for respondent.

STURTEVANT, J.

The plaintiff commenced an action to recover under two separate contracts. The defendant answered and a trial was had before the court sitting without a jury. That court made findings in favor of the plaintiff, and from the judgment entered thereon the defendant has appealed.

Formerly the plaintiff and defendant were husband and wife. They had a child, a son, who was about ten years of age when this case was tried. During their married life the parties accumulated some community property. In January, 1927, they entered into an agreement which the parties termed the first agreement. By its terms the plaintiff agreed to sell to the defendant for the sum of $50,000 all of her rights in the community property; she also agreed that he might have the custody of their minor son, and it was further agreed that she would go to Paris, obtain a divorce, and marry James Doud. That agreement was partly executed. Mrs. Short conveyed her interests in the community property, and the defendant has ever since retained the same. They could not borrow $50,000 on their properties, but they succeeded in borrowing $35,000, which in the form of a check Mr. Short delivered to James Doud, who invested the same, lost the most of it, and later paid the balance, $3,800, to Mr. Short, which he has retained ever since. In the course of a few months it transpired that James Doud declined to get married. Thereupon he dropped out of the arrangements, and no other part of the so-called first agreement was ever carried into effect.

In November, 1927, and for some time prior thereto many discussions occurred between Mr. and Mrs. Short regarding the $35,000. She claimed she had never received it. He claimed that he paid it to James Doud on her request. She denied that it was done wholly at her request and asserted that Mr. Short should have looked to the collection of it. After these discussions Mr. Short wrote out, signed, acknowledged, and delivered an instrument in writing as follows: "I hereby agree to pay to Dot Marie Wolfe Short three hundred dollars per month as long as she lives whether she remains my wife or divorced, or the wife of another, whether living in this country or abroad." That instrument the parties designate as the second agreement. After delivering it the defendant made the payments from time to time until the first of November, 1928. At that time he failed to make the payment due for that month and Mrs. Short instituted this action for the purpose of collecting the installment alleged to be due at that time.

The defendant calls to our attention the fact that the trial court made a finding that the second agreement was a modification of the first agreement. Thereupon he claims that the plaintiff's cause of action, if any, should have been based on the modified agreement. The finding was not in response to any written allegation. It may be contended that it was in response to plaintiff's unwritten replication. Code Civ. Proc. § 462. Our attention has not been called to any evidence showing that in truth and in fact it was a modification of the first agreement. We have found none. However, as we view this action, the finding was of no importance in the litigation.

[1] The defendant contends that the finding of the trial court that preceding the execution of the second contract there had been controversies between the plaintiff and the defendant concerning their respective property rights, and that their said agreement was supported by a good and valuable consideration, and defined the respective property rights of the parties, is wholly unsupported by the evidence. With this contention we are unable to agree. The defendant had received and now holds all of the plaintiff's interest in the community property. Furthermore, the agreement was made a short time prior and was carried into the divorce case, which will presently be noted.

[2-4] The trial court, in the instant case, made a finding that said contract and property settlement (second agreement) was recognized, ratified, and confirmed by said defendant Frank H. Short in connection with the said divorce proceedings, and that no other or additional provision was made in connection with said divorce proceedings or otherwise for the maintenance and support by said Frank H. Short of said Dot Marie Wolfe Short or of said minor child, Frank H. Short III. That finding is not a perfect statement of an estoppel, but such was clearly the claim of the plaintiff in the trial court and is her claim in this court. She pleaded other facts and the court found those facts true, and, considering all of them in connection with the finding which we have just quoted, we are unable to say that the plaintiff did not plead an estoppel and that the trial court did not find one. In this connection the evidence showed that the divorce case was heard and judgment entered on the 9th day of April, 1928; three months prior to the filing of the complaint Mr. Short became a resident of Nevada; in his complaint he charged Mrs. Short with cruelty; she filed a cross-complaint in which she charged Mr. Short with cruelty, and prior to the hearing of the action Mrs. Short's deposition was taken in Monterey county. She and Mr. Short prepared the answers to the written interrogatories. Among her answers she stated: "If I am given the custody of our boy I am sure Mr. Short will properly provide for him. He is very fond of him. There is no community property belonging to him and me. I waive all rights to permanent alimony for my own support and maintenance *except those previously agreed upon.*" Mr. Short was in the courtroom when that deposition was read and made no objection whatsoever and allowed the trial court to act thereon. He took the stand as a witness in his own behalf. Some of his answers included the following: "There is no community property belonging to me and Mrs. Short. I have been supporting Mrs. Short and the boy recently. That was pursuant to an agreement I have with her. I am willing to continue that support in accordance with that agreement. That agreement calls for the payment of three hundred dollars a month." Later the trial court made findings in favor of Mrs. Short and in those findings made no provision for maintenance of the wife or the minor child. but awarded the custody of the child to the mother and expressly reserved jurisdiction to thereafter modify its decree relative to the custody and maintenance of the minor child. That decree has never been modified nor set aside. When, during the hearing of the divorce case, the second agreement was taken up, Mr. Short could have asserted any of the facts hereinabove recited and could have contended that the contract was illegal. He did not do so. For the purpose of ascertaining what were the issues in the divorce action the entire record in that action, including the evidence, may be examined. Slaker v. McCormick-Saeltzer Co., 179 Cal. 387, 389, 177 P. 155. That judgment is res judicata of all matters which were or might have been litigated in that action. Estate of Bell, 153 Cal. 331, 95 P. 372. On examining that record it appears that on the hearing Mr. Short represented to the trial court that the second agreement was and is a valid subsisting agreement, and he took a judgment against himself that imposed no duty on him to pay maintenance moneys for his wife or child. He is now estopped from claiming that the second agreement is illegal. 15 Cal. Jur., p. 144; Borland v. Borland, 56 Cal. App. 638, 206 P. 478. In his brief the defendant contends that one will not be estopped from pleading the illegality of a contract. Union Collection Co. v. Buckman, 150 Cal. 159, 164, 88 P. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609. That point is not the one before us. The point before us is whether a final judgment of a court of competent jurisdiction can be claimed to be an estoppel.

Finding No. 13 is very long and dwells extensively on the first agreement and the relation thereof to the second agreement. The defendant claims that it is not responsive to the issues presented by the pleadings. The first agreement was pleaded by the defendant in his answer. The second agreement was

pleaded by the plaintiff in her complaint. The finding contained some expressions regarding modification. We have already considered that subject. That finding treats of many other subjects not necessary to be considered because they do not go to the rights of the litigants as we have pointed out those rights in this opinion. Claiming that the first contract was wholly contra bonos mores, and that the second agreement was but a modification of the first, the defendant asserts that the modified agreement contains all of the vices of the first agreement. As we have pointed out, he did not make that claim when he should have done so, and may not do so now.

The second contract on which the plaintiff sought to recover was an alleged contract under the terms of which the defendant purchased from the plaintiff an automobile. The trial court found all of the facts in favor of the plaintiff. There was certainly evidence in the record that justified it in making those findings. We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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209 Cal. 539

In re JACOBSEN.

L. A. 11951.

Supreme Court of California.

June 6, 1930.

Attorney and client ⚷61.

Application for reinstatement as attorney, by petitioner whose license to practice was revoked since filing of application, presented moot question requiring dismissal.

In Bank.

Application by Victor L. Jacobsen for reinstatement as an attorney at law.

Application dismissed.

Kemp, Partridge & Kemp, of Los Angeles, for petitioner.

Charles L. Nichols, of Los Angeles, for the State Bar.

PER CURIAM.

This petitioner was admitted to practice law in this state by an order made and entered by the District Court of Appeal in and for the Second District on June 14, 1926. Subsequently he was convicted of a felony involving moral turpitude and placed on probation. This court thereafter, on October 18, 1927, made and entered an order that

pending the termination of probation he be suspended as an attorney and counselor at law until the further order of the court. 202 Cal. 289, 260 P. 294. He has now made an application that such order of suspension be revoked, and that he be reinstated as an attorney and counselor at law.

When the application came on to be heard in open court, counsel for the State Bar directed the attention of the court to the fact that since the filing of the application for reinstatement the order admitting Jacobsen to practice law has been set aside and his license revoked by the court which admitted him to practice. In re Victor L. Jacobsen (Cal. App.) 287 P. 131. The petitioner being no longer an attorney, his application presents only a moot question, and it is therefore dismissed.

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209 Cal. 507

HERON, Director State Department of Finance, v. RILEY, State Controller.

S. F. 13658.

Supreme Court of California.

May 31, 1930.

1. Statutes ⟹105(1).

Main object of constitutional provision requiring every act to embrace but one subject expressed in its title is to prevent legislators and public being entrapped by misleading titles (Const. art. 4, § 24).

Const., art. 4, § 24, provides that every act shall embrace but one subject, which subject shall be expressed in its title, but that if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title.

2. Statutes ⟹105(1).

Constitutional provision respecting titles must be construed liberally to uphold proper legislation, all parts of which are reasonably germane (Const. art. 4, § 24).

3. Statutes ⟹109.

The general subject of statute need not appear in title if it is clearly disclosed or readily inferred from details expressed in constitutional provision.

4. States ⟹127.

Expenditure for liability insurance premiums on state automobiles *held* payable from "emergency" fund (Civ. Code, § 1714½, as added by St. 1929, p. 565; St. 1929, pp. 81–96).

The expenditure for liability insurance premiums covering state automobiles under Civ. Code, § 1714½, as added by St. 1929, p. 565, was payable from emergency fund provided in budget bill of 1929 (St. 1929, pp. 81–96), since situation presented "emergency" within intent and definition of Legislature.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Emergency.]

5. Statutes ⟹119(1).

Statute respecting state's liability for loss occasioned by negligent driving of automobiles by its officers, agents, or employees *held* not invalid for insufficient title (Civ. Code, § 1714½, as added by St. 1929, p. 565; Const. art. 4, § 24).

The title of the act reads as follows: "An act to add a new section to the Civil Code to be numbered 1714½, relating to negligence upon the part of officers, agents and employees of the state, counties, cities and counties, municipal corporations, school districts, irrigation districts, districts established by law and political subdivisions of the state and authorizing the issuance of insurance covering such liability." It was contended that because title failed to expressly declare, as provided in body of act, that liability for negligence of such officers, agents, and employees must be borne by state or other political subdivision represented by them, title was hopelessly deficient and violative of constitutional provision.

6. States ⟹191(1).

State may be sued only by its express consent.

7. States ⟹119.

Statute respecting state's liability for agents' negligence in automobile accidents *held* not invalid on ground payment of judgments against state constitutes "gift of public money" (Civ. Code, § 1714½, as added by St. 1929, p. 565).

8. Automobiles ⟹6.

Constitutional law ⟹205(2), 208(16).

Statute respecting state's liability for agents' negligence in automobile accidents *held* not invalid as class legislation or as granting special privileges (Civ. Code, § 1714½, as added by St. 1929, p. 565; Const. art. 1, § 21).

9. States ⟹112.

Right of action to one injured through operation of instrumentality used by state is statutory.

10. Constitutional law ⟹208(1).

Law to be general in scope need not include all classes of individuals in state, "general law."

Law answers constitutional requirements if it relates to and acts uniformly upon whole of any single class of individuals or objects, and classification is founded upon some natural, intrinsic, or constitutional distinction.

11. Evidence ⟹14.

It is common knowledge that operation of automobiles imposes hazard on practically entire population.

12. Statutes ⟹85(4).

Statute respecting state's liability for agents' negligence in automobile accidents *held* not invalid on ground provision for subrogation to rights of injured person violated provision against special laws regulating practice of courts (Civ. Code, § 1714½, as added by St. 1929, p. 565; Const. art. 4, § 25, subd. 3).

Civ. Code, § 1714½, as added by St. 1929, p. 565, provides that in case of a recovery against the state or one of its subdivisions under its provisions by one who has been injured, the state or political subdivision is subrogated to the rights of person injured, and may recover from officer, agent, or employee causing the damage. It was contended that this provision violates Const. art. 4, § 25, subd. 3, against special laws regulating the practice of courts of justice, but such contention was without merit, since the statutory provision relates to the substantive law of subrogation and not to practice of courts.

In Bank.

Application by Alexander R. Heron, Director of State Department of Finance, for a writ of mandate, prayed to be directed to Ray L. Riley, State Controller of the State of California, to compel respondent to draw a warrant for the payment of liability insurance premiums. Writ granted.

Adopting opinion in 284 P. 209.

Webb Shadle, of Sacramento, for petitioner.

Thomas H. Christiansen, of Sacramento, for respondent.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco, for City and County of San Francisco; Erwin P. Werner, City Atty., and D. M. Kitzmiller, Deputy City Atty., both of Los Angeles, for Los Angeles; Nowland M. Reid, City Atty., of Long Beach, for City of Long Beach; Harold P. Huls, City Atty., and Leonard A. Diether, Deputy City Atty., both of Pasadena, for City of Pasadena; Percy V. Long, of San Francisco, for National Automobile Club; G. E. Sandford, General Counsel, of San Francisco, for California State Automobile Ass'n; Ivan Kelso, General Counsel, and J. Allen Davis, Associate Counsel, both of Los Angeles, for Automobile Club of Southern California—amici curiæ.

WASTE, C. J.

By the former decision and judgment in this cause the respondent was directed to audit and allow the claim of petitioner as prayed for. The petition of the controller for a rehearing was granted because of his contention that the court had overlooked and failed to consider the decision of the District Court of Appeal in Brunson v. City of Santa Monica, 27 Cal. App. 89, 148 P. 950, and to permit further consideration to be given to the question of whether or not the title of the act in question (Stats. 1929, p. 565), adding a new section to the Civil Code to be numbered 1714½, satisfies the requirements of section 24 of article 4 of the Constitution, wherein it is provided that: "Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title. * * *"

[1, 2] An examination of the many decisions interpreting and applying the foregoing constitutional provision convinces us that we were correct in holding in the former opinion that the title is sufficient. The main object of the provision, of course, is to prevent legislators and the public from being entrapped by misleading titles to bills whereby legislation relating to one subject might be obtained under the title of another. Frank v. Maguire, 201 Cal. 414, 418, 257 P. 515. In the accomplishment of this object, however, the constitutional provision is not to receive a narrow or technical construction, but is to be construed liberally to uphold proper legislation, all parts of which are reasonably germane. In other words, the provision was not designed as a loophole of escape from, or a means for the destruction of, legitimate legislation. McClure v. Riley, 198 Cal. 23, 26, 243 P. 429. This being so, the authorities are legion to the effect that the title of an act need not embrace an abstract or catalogue of its contents, but need only contain a reasonable intimation of the matters under legislative consideration. The authorities are numerous to the effect that the title of an act may be relied on in ascertaining the intention of the Legislature, where the act itself

is ambiguous; but the title "cannot be used for the purpose of restraining or controlling any positive provision of the act." L. A. City School Dist. v. Odell, 200 Cal. 637, 641, 254 P. 570. 572. There is no ambiguity in the act here under consideration.

[3] As stated in Estate of Wellings, 192 Cal. 506, 519, 221 P. 628, 634, all that is required to be contained in the title of an act in order to meet the constitutional requirement "is a reasonably intelligent reference to the subject to which the legislation is to be addressed." Again, in Buelke v. Levenstadt, 190 Cal. 684, 687, 214 P. 42, 43, it is said: "All that is required in that connection is that the subject must be in some way indicated by the title of the act, or be logically germane to it, and included within its scope." The general subject need not appear in the title, if it is clearly disclosed or *readily inferred from the details expressed.* Hill v. Board of Supervisors, 176 Cal. 84, 88, 167 P. 514, citing Sutherland on Statutory Construction. In People v. Fryer, 175 Cal. 785, 793, 167 P. 382, 385, the rule is stated as follows: "It was never expected that the title to an act should be an index to all of its provisions, and so long as the provisions themselves are cognate, attingent, and germane to the subject-matter of the title, no violence is done to the Constitution." Where the body of an act embraces provisions which are germane to the general subject stated in its title, the title will be held sufficient to comprehend all of the provisions of the act itself; and where the title suggests to the mind the field of legislation which the text of the act includes, the title will not be held misleading or insufficient, or the act restricted in its operation. People v. Jordan, 172 Cal. 391, 393, 394, 156 P. 451. The rule is also stated as follows: "* * * If it appears that the title of the act is reasonably indicative of the legislation contained within the provisions of the statute, the objection that the subject of the act is not expressed in its title cannot be sustained." Matter of Lake, 89 Cal. App. 390, 395, 265 P. 325, 327. In Treat v. Los Angeles Gas, etc., Co., 82 Cal. App. 610, 613, 256 P. 447, it is held that "the Legislature may insert in a single act all legislation germane to the general subject as expressed in its title *and within the field of legislation suggested by that title.*" Again, in People v. French, 61 Cal. App. 275, 278, 214 P. 1003, 1004, it is said: "The objections should be grave, and the conflict between the statute and the Constitution palpable, before the judiciary should disregard a legislative enactment. * * * It is not essential that the best or even an accurate title be employed, if it be suggestive in any sense of the legislative purpose. The remedy to be secured and mischief avoided is the best test of a sufficient title which is to prevent it from being made a cloak or artifice to distract attention from the substance of the act."

This brings us to the pertinent inquiry: Does the title of the act here involved satisfy the requirements of the constitutional provision as above interpreted? The title reads as follows: "An act to add a new section to the Civil Code to be numbered 1714½, relating to negligence upon the part of officers, agents and employees of the state, counties, cities and counties, municipal corporations, school districts, irrigation districts, districts established by law and political subdivisions of the state and authorizing the issuance of insurance covering such liability." The contention is made that because the foregoing title fails to expressly declare, as provided in the body of the act, that liability for the negligence of such officers, agents, and employees is to be borne by the state or other political subdivision represented by them, such title is hopelessly deficient and violative of the constitutional provision. As already pointed out (61 Cal. App. 275, 278, 214 P. 1003, 1004,) "it is not essential that the best or even an accurate title be employed, if it be suggestive in any sense of the legislative purpose." The legislative enactment under consideration has to do solely with the negligence of public officers, agents, and employees, and the title thereof clearly and succinctly discloses this to be the fact. In other words, a reading of the title immediately "suggests to the mind the field of legislation which the text of the act includes," and, under the authorities, everything germane to the general subject as expressed in the title may be included within the body of the act. It will not be doubted that "liability" is inseparably connected with and is an outgrowth of "negligence." It is only reasonable to conclude, therefore, that an act, the title of which states that it relates to the negligence of certain persons, may, as a part of the text, fix the responsibility for such negligence. The fixing of liability is certainly germane to the negligence giving rise thereto.

The case of Brunson v. City of Santa Monica, 27 Cal. App. 89, 148 P. 950, 951, so strongly relied on in support of the argument that the present act is unconstitutional, is clearly distinguishable. The title of the act there involved was unquestionably misleading and insufficient, for it very definitely intimated that the act related solely to the *liability of public officers,* thus effectively precluding any thought or idea that the body of the act dealt with the liability of the public corporations represented by such officers. It was therein held: "Here we have an act which, in its title, purports to deal with the liability of public officers for damages resulting from certain specified causes. This cannot, by any process of reasoning, be made to include

the subject of liability of the public corporations in whose service such officers may be. The act is void as to any purported legislation therein contained attempting to create a new rule of liability as against such corporations." The title of the act in the case at bar does not, in our opinion, as did the title in the Brunson Case, restrict the provisions of the act to the "liability" of any person or persons. It states in a general way that the act relates to the "negligence" of certain public officers, agents, and employees, and refers to "the issuance of insurance covering such liability," thus suggesting to any one reading the title that liability for such negligence is to be ascertained from a reading of the text. We do not think it fatal to the act that the title failed to further refer to the subject of liability, for that is a subject germane to and logically falling within the bounds of the title.

The phrase, "and authorizing the issuance of insurance covering such liability," appearing at the close of the title of the act here involved, would seem to furnish an additional reason for holding the title sufficient. If the act merely purported to cover the liability of public officers, agents, and employees, as distinguished from the liability of the public corporations represented by them, the inclusion of such a clause in the title would have been wholly unnecessary. That is to say, there would be no reason for special legislation authorizing officers, agents, and employees of the state or political subdivisions to insure themselves against personal liability. That would be a matter for purely private determination. The presence of such a clause in the title of the act should, and does, serve to give rise to a query as to whose responsibility is to be insured against, which can readily be ascertained from the text. The title of this act cannot, therefore, be said to be "a cloak or artifice to distract attention from the substance of the act."

With this preliminary consideration of the contention of the respondent stressed in the petition for rehearing, we adopt the opinion first handed down, and from which the facts involved fully appear:

The Legislature, at its last session, added a new section to the Civil Code (section 1714½, St. 1929, p. 565) making the state and certain designated political subdivisions owning any motor vehicles responsible to persons sustaining damage by reason of death or injury to person or property as the result of the negligent operation of such motor vehicles by any officer, agent, or employee, or as the result of the negligent operation of any other motor vehicle by any officer, agent, or employee when acting within the scope of his office, agency, or employment. Such damaged person may now sue the state or political subdivision in any court of competent jurisdiction in this state in the manner directed by law. In case of a recovery under the provisions of the section, the state or appropriate subdivision is subrogated to the rights of the person injured, and may, in turn, recover from the officer, agent, or employee causing the damage the amount of any judgment recovered against the state or subdivision in the damage suit. The state and the designated political subdivisions are authorized by the provisions of the act to insure their liability in any insurance company permitted to transact the business of such insurance in the state of California, and the premiums for such insurance shall be a proper charge against the respective general funds of the state or subdivision.

After the effective date of the new law, the petitioner, under the authority vested in him as director of the state department of finance, contracted with a qualified insurance company for policies of insurance indemnifying the state, in the event of responsibility arising under the provisions of the section. The policies, duly authorized, were executed, issued, and delivered. The petitioner prepared and presented to the respondent, state controller, a claim against the emergency fund provided in the budget bill of 1929 (St. 1929, pp. 81–96) for the sum of $23,747.49, that being the amount of the total premiums on the policies so secured. The respondent has refused to allow the claim, and declines to draw his warrant for the amount. Petitioner is here seeking a writ of mandate to compel him to do so. Respondent has demurred to the petition.

[4] The controller does not question the power of the petitioner to direct the payment of the claim for the amount of the premiums, if section 1714½ is constitutional, provided a valid appropriation was made for the purpose, but interposes several objections to its being recognized as a legal demand.

The first of these is that there is no valid express appropriation for the payment of the premiums in the act itself or in the general appropriation bill, his further contention being that the "emergency fund" carried in the general budget cannot be drawn upon for any such purpose.

The act making appropriations for the support of the government of the state of California for the biennial period 1929–31, after setting aside specific amounts for each of the departments of state and its many institutions and for other public purposes (St. 1929, supra), provides as follows:

"Emergencies.

"For emergency fund, one million dollars ($1,000,000) (exempt from section 4 of this act) to be expended only on written authorization of the state department of finance for emergencies. Emergencies within the meaning of this provision are hereby defined as

contingencies for which no appropriation or insufficient appropriation has been made by law."

It has been the practice in this state for many years for the Legislature to include a similar provision in the general appropriations act, thus providing for the payment of emergency claims against the state and its activities, rather than subject the departments of the state and its officers to embarrassment in the administration of the state's business, and put claimants to the annoyance and uncertainty of having to depend upon subsequent Legislatures for reimbursement for services and supplies furnished. The purpose and policy of such an appropriation in the general budget bill has gone unquestioned during the time many Legislatures have met. The plan seems meritorious, and, so far as we are given to understand, it has not been challenged heretofore in its general application. We see no good reason, therefore, for now saying that it is not a proper plan to pursue, provided, of course, the demands against the emergency fund are just and reasonable. The definition in the act of what circumstances shall be sufficient to give rise to an "emergency," subjecting the emergency fund to a valid demand, seems to us to be logical and reasonable. We see no reason why it may not be held that the present situation presents an "emergency" within the intent and definition of the Legislature. The distinction between the situation here presented and the facts in Ingram v. Colgan, 106 Cal. 113, 38 P. 315, 39 P. 437, 28 L. R. A. 187, 46 Am. St. Rep. 221, so strongly relied on by respondent, is that in that case the statute (1891, p. 280) not only, like the one in the present instance, made no provision for the payment of the claims there involved (coyote scalps), but, in addition, there was no provision made in the general appropriations bill for the payment of any emergency claims against the state. In the instant case the Legislature has set aside a definite sum, to wit, $1,000,000, for the payment, among other things, of "contingencies for which no appropriation has been made." We think the use of the word "contingencies" is sufficiently general to include a situation like the one here presented. As to the wisdom of such a course—a question suggested by the respondent—of reposing such a power in the hands of an executive officer of the state, that is a matter resting solely with the Legislature.

[5] The other objections advanced by the respondent may be classed as resting on constitutional grounds. It is urged that the title of the act is insufficient. It is as follows: "An act to add a new section to the Civil Code to be numbered 1714½, relating to negligence upon the part of officers, agents and employees of the state, counties, cities and counties, municipal corporations, school districts, irrigation districts, districts established by law and political subdivisions of the state and authorizing the issuance of insurance covering such liability." The provisions of the act are relevant to the liability of the state and its political subdivisions for damages for injuries caused by the negligent operation of automobiles used in public service. In this sense they are expressive of but one general subject, and all parts of the general object to be attained by the statute are sufficiently catalogued in the title. In re Application of Schuler, 167 Cal. 282, 293, 139 P. 685, Ann. Cas. 1915C, 706. See, also, Estate of Wellings, 192 Cal. 506, 519, 221 P. 628.

[6, 7] We are not strongly impressed with the contention of the respondent that the application of funds to pay judgments obtained against the state constitutes a gift of public money, within the prohibition of the Constitution. The state cannot be subjected to suits against itself except by its express consent; but it may surrender its sovereignty in that particular. It has done so in this instance through the act of its duly authorized representative, the Legislature. The judgments which are to be paid bear no semblance to gifts. They must be first obtained in courts of competent jurisdiction, to which the parties have submitted their claims in the manner directed by law. In other words, they are judgments obtained after the requirements of due process of law have been complied with. The Legislature has not attempted to create a liability against the state for any past acts of negligence on the part of its officers, agents or employees—something it could not do, and the doing of which would, in effect, be the making of a gift—but has provided that "hereafter" it shall be liable for certain things done which cause damage to its citizens, its liability to be first determined by an appropriate action at law.

[8-11] It is objected that the section is class legislation, in that it inures to the benefit of a favored class of citizens, that is, only those who are damaged through the negligent operation of automobiles owned by or used in the service of the state, and thereby makes a distinction in their favor as against citizens who may suffer damages through being injured by other state owned and operated instrumentalities, and who are without recourse against the state because it has made no such remedial provision for them. This objection goes only to the policy of such legislation, and the wisdom of the Legislature in enacting it. A right of action to one injured through the operation of an instrumentality used by the state did not exist at common law. It is not an inherent right, and exists only so far, and in favor of such persons, as may be declared by the legislative power of the state. The provisions of the Constitution were not intended to make it necessary that the Legislature,

when conferring new rights of action upon particular classes of citizens for injuries not previously actionable, should, by the same act, declare that all persons who may suffer damages from injuries of that character shall also have such right of action. Pritchard v. Whitney Estate Co., 164 Cal. 564, 568, 129 P. 989. Consequently, a law, to be general in its scope, need not include all classes of individuals in the state. It answers the constitutional requirements if it relates to and acts uniformly upon the whole of any single class of individuals or objects, and the classification is founded upon some natural, intrinsic, or constitutional distinction. Abeel v. Clark, 84 Cal. 226, 230, 24 P. 383; People v. Jordan, 172 Cal. 391, 397, 156 P. 451. If good ground for the classification exists, such classification is not void because it does not embrace within it every other class which might be included. It is common knowledge that the operation of automobiles upon the streets and highways of the state imposes a hazard upon practically the entire population. It is alleged by the petitioner, and not denied, that the state owns and operates, in connection with its business approximately 2,500 motor vehicles, and operates, under a mileage arrangement with certain of its officers, agents, and employees, approximately 1,000 additional motor vehicles. The operation of such a large number of motor vehicles means that inevitably many claims will arise for injuries caused to persons and property. One of the allegations of the petition is that, since section 1714½, supra, became effective, "many claims have been presented to the state by persons alleging damage to property caused by the negligent operation of state-owned motor vehicles, and that other claims for damage to persons by reason of deaths and injury and damage to property caused by the negligent operation of state-owned motor vehicles and other motor vehicles operated by officers, agents and employees of the state will be presented to the state from time to time." In a very recent case, the Supreme Court of the United States took judicial notice of the "increasing frequency of litigation" arising from the use of the automobile as an instrument of transportation, and held that such use "is peculiarly the subject of regulation," and that "whether there has been a serious increase in the evils of vexatious litigation in this class of cases, * * * is for legislative determination. * * * Its wisdom is not the concern of courts. * * * It is enough," said the court in conclusion, if the "statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs." Silver v. Silver, 280 U. S. 117, 50 S. Ct. 57, 59, 74 L. Ed. 221.

The complaint that the act violates that part of section 21 of article 1 of the state Constitution which provides that no citizen or class of citizens shall be granted privileges which, upon the same terms, shall not be granted to all citizens, is, we believe, sufficiently answered by what we have said on the question of the classification by the act of those permitted to maintain an action under its provisions, and by other decisions of this court. County of San Luis Obispo v. Murphy, 162 Cal. 590, 123 P. 808, Ann. Cas. 1913D, 712; Pritchard v. Whitney Estate Co., supra.

[12] We discern little merit in the contention that because the act provides that, in case of a recovery under its provisions by one who has been injured, the state or political subdivision is subrogated to the rights of the person injured, and may, in turn, recover from the officer, agent, or employee causing the damage, it violates the inhibition of subdivision 3 of section 25 of article 4 of the state Constitution against special laws regulating the practice of courts of justice. The provision complained of but serves to give to the employer or principal of the person causing the injury the benefit of the well-settled rules of equity, now recognized in law, upon the subject of subrogation, which are part of the substantive law, and does not relate to practice in the courts.

Let a peremptory writ of mandate issue directing the respondent State Controller to audit and allow the claim of petitioner herein, as prayed for.

We concur: CURTIS, J.; PRESTON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

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209 Cal. 531

MARSHALL et al. v. HILTON.

S. F. 13287.

Supreme Court of California.
June 6, 1930.

Rehearing Denied July 3, 1930.

1. Specific performance ⟹49(2), 51.

Contract for purchase and sale of real property *held* just and reasonable, with adequate consideration, as respected right to specific performance.

The complaint in action for specific performance of agreement alleged that consideration for making of and entering into agreement was the sum and sale price of $3,000, to be paid to defendant by plaintiffs, and that the approximate value and the approximate reasonable value of premises at all times was and is the sum of $3,000, and, upon the issue made by a denial of such allegation in the answer, the court found in favor of plaintiffs.

2. Specific performance ⟹121(11).

Evidence *held* to establish that purchasers were ready and willing to perform part of contract, as respected right to specific performance.

3. Specific performance ⟹121(11).

Evidence *held* to establish sufficiency and validity of tender on part of purchasers, as respected right to specific performance.

4. Specific performance ⟹97(3).

Law requiring deposit of money tendered has no application as to tender by purchasers subsequently seeking specific performance (Civ. Code, § 1500).

Civ. Code, § 1500, applies only in cases where object and purpose of tender is to extinguish obligation, and proof of tender would not extinguish obligation of purchasers to pay to vendor amount due under agreement of sale, tender being merely a preliminary step to be taken before an action could be instituted by purchasers against vendor to specifically perform contract.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by N. S. Marshall and another against Marie Hilton, wherein defendant filed a cross-complaint. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Geary & Geary, of Oakland, for appellant.

Rudolph A. Rapsey, of San Bruno, for respondents.

CURTIS, J.

This appeal is from a decree of specific performance of an agreement for the purchase and sale of real property. As grounds for reversal of the decree or judgment, the defendant and appellant contends:

(1) That it does not appear that the contract as to the defendant was just and reasonable, or that the consideration for said contract is adequate.

(2) That it does not appear that the plaintiffs are ready and willing to perform their part of the contract.

[1] First: In support of appellant's first contention, she has cited numerous authorities to the effect that "it is a well-established rule in courts of equity that in a suit for specific performance it must be affirmatively shown that the contract is fair and just and that it would not be inequitable to enforce it. The court will not lend its aid to enforce a contract which is in any respect unfair or savors of oppression, but in such cases will leave a party to his remedy at law. It is incumbent on the plaintiff, therefore, to state such facts as will enable the court to decide whether the contract is of such a character that it would be inequitable to enforce it." With this statement of the law as a premise the appellant proceeds to an attack on the complaint, and attempts to show that it lacks the essential averments of a complaint in specific performance. We think there is no merit in her contention. In the complaint it is alleged that the consideration "for the making of and the entering into of said agreement was and is that set forth therein, to wit: the sum and sale price of three thousand dollars, to be paid to defendant by plaintiffs as in said agreement set forth. That the approximate value and the approximate reasonable value of said premises at all times herein mentioned was and is the sum of three thousand dollars; that said contract and agreement was fairly entered into and was and is in all respects just and reasonable." This allegation of the complaint was denied by the answer, the appellant further alleging that the premises involved herein were of the value of $4000. Upon the issue thus made the court found in favor of the plaintiffs. There is no contention that the finding of the court in this regard is not supported by the evidence. Under these facts, we reiterate our statement that this contention of the appellant is without merit.

[2] Second: The second contention of appellant is equally devoid of merit. The evidence before us shows that on March 28, 1921, the contract for the purchase and sale of said real property was entered into by the parties hereto, in which appellant agreed to sell to the respondents said real property for the sum of $3,000. Thereafter and on December 27, 1921, the contract was in certain respects modified, but the purchase price was in no way changed. These modifications are not material to any question involved in this appeal. At the time of this modification it was agreed by the parties to said contract that on said date there was due on the purchase price of said real property the sum of $2,853.32, which sum was to be paid in installments in the manner and at the times provided in said contract of modification. Thereafter, the respondents made payments on said purchase price according to said modification contract up to the 28th day of July, 1927, at which last-named date there was unpaid on the purchase price of said real property according to their said contract something less than $1,400. On said date the respondents tendered to appellant said sum of $1,400, and demanded of appellant that she execute and deliver to respondents a conveyance of said real property, which the appellant refused to do, and has ever since refused to execute and deliver.

[3, 4] Appellant excepts to the sufficiency and validity of the tender in two respects. She contends, in the first place, that it was not made by the respondents, or in their behalf. The evidence shows that the respondent N. S. Marshall furnished the money used in making the tender and directed the two persons who personally made the tender to make the same, and actually went with them to the home of the appellant when the tender was made, but did not go into the house and was not present at the time the tender was made. This evidence shows without any question that the tender was made on behalf of the respondents. Appellant's second objection to the tender is that the money tendered was not thereafter deposited by the respondents in appellant's name in some bank and the appellant notified of such deposit in accordance with the provisions of section 1500 of the Civil Code. This section has no application to a tender made in a case of this kind. It applies in cases where the object and purpose of the tender is to extinguish an obligation. Here no claim is made that the tender proven extinguishes the obligation of the respondents to pay to the appellant the amount due her under the agreement of sale, but was a preliminary step to be taken before an action could be instituted by the respondents against the appellant to specifically perform the contract. In such a case "the law does not require the purchaser to keep the tender good or deposit the money in the vendor's name and thus place himself at the vendor's mercy, since the decree, if granted, will require the plaintiff to pay the purchase money before receiving the deed." 23 Cal. Jur. 459.

There is no merit in this appeal, and it approaches exceedingly close to the border line of the frivolous.

Judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

LOS ANGELES & WEST SIDE TRANSP. CO. v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY et al. *

S. F. 13831.

Supreme Court of California.

June 6, 1930.

Rehearing Granted July 2, 1930.

1. Automobiles ⟹74.

State could collect license fees from transportation company, notwithstanding statute providing therefor was repealed before commencement of action (St. 1923, p. 706; St. 1925, p. 833; St. 1927, pp. 1708, 1742).

St. 1923, p. 706, providing for state license fees for transportation based on gross receipts, was re-enacted by St. 1925, p. 833, and after repealing statutes, St. 1927, p. 1708, had become effective, suit was commenced to collect unpaid license fees for year 1923. Contention of transportation company that, as act had been repealed before commencement of action, superior court was without jurisdiction to proceed to trial of cause, was without merit, since before repealing act became effective, St. 1927, p. 1742, declaring that it was amendatory of the 1925 act, became operative, and hence kept the assessment provision alive.

2. Automobiles ⟹97.

That rate fixed by Constitution for highway license fees varied from rate fixed by statute *held* not to work change of assessment system (Const. art. 13, § 15).

In Bank.

Application by the Los Angeles & West Side Transportation Company for writ of prohibition prayed to be directed to the Superior Court of the State of California in and for the County of Sacramento, and Peter J. Shields, Judge thereof, to prevent further proceedings in action by the Attorney General against petitioner to collect state license fees.

Writ denied.

Harry A. Encell and Samuel T. Bush, both of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and R. L. Chamberlain and Charles A. Wetmore, Jr., Deputy Attys. Gen., for respondents.

Elmer P. Bromley, H. E. Lindersmith, Frank M. Smith and Phil Jacobson, all of Los Angeles, amici curiæ.

SEAWELL, J.

Petitioner, Los Angeles & West Side Transportation Company, a corporation, was at all the times mentioned in its petition herein engaged in the business of transporting persons and property for hire over and upon the public highways of this state by means of motor-propelled vehicles. It failed to pay the state license fees for the year 1923, as provided by the Four Per Cent. Gross Receipts Highway Transportation Act (Stats. 1923, p. 706). Acting upon the written request of the state controller, the Attorney General, on March 16, 1928, commenced an action in the department of respondent superior court presided over by Hon. Peter J. Shields to recover

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing granted 295 P. 837.

said unpaid license fees, amounting to the sum of $729.54, as by said act provided. Petitioner demurred to the original complaint on jurisdictional grounds, but said demurrer was overruled. Said superior court will, unless prohibited by an order of this court, proceed with the trial of said cause.

Petitioner bases its right to said writ upon the ground that said superior court was divested of jurisdiction to entertain said cause by reason of the direct and unqualified repeal of the act under which said license fees are attempted to be collected by the adoption of chapter 843, page 1708, Statutes of 1927, which repealing statute became effective January 1, 1928, prior to the commencement of the action the trial of which is sought by these proceedings to be restrained. Said chapter 843, Statutes of 1927, contains no express saving clause or provision reserving unto the state the right to collect said fees accrued at the time of its passage. Said act repeals all acts or parts of acts in conflict therewith and makes specific reference to the repeal of the Statute of 1925 (Stats. 1925, p. 833), which latter statute is a continuation of the 1923 act (Bacon Service Corporation v. Huss, 199 Cal. 21, 248 P. 235), and entitled precisely as was said statute of 1923 under which said fees are claimed to be collectible. The 1925 act contains a re-enactment of the 4 per cent. gross receipts highway license fee clause as it existed in the 1923 repealed act. In all material respects said acts are alike.

[1] The repealing act of 1927 (chapter 843) furnishes the grounds of petitioner's claim that the superior court is without jurisdiction to proceed to the trial of said cause. It is true that said act was approved May 31, 1927, but it is also true that it expressly provided that it was not to become effective until January 1, 1928. It is further true that it contained no express saving clause or reservation to the effect that the rights and remedies of the 1925 act should remain enforceable after its repeal. If that was all of the legislation had on the subject, there would be force in petitioner's claim. But it is a fact that another statute (chapter 851, Stats. 1927, p. 1742) was approved on the same day, but from its arrangement in the statutes, at a later hour, which became effective before the act of 1925 became extinct by virtue of the repealing act of May 31, 1927. The act of May 31, 1927, which became effective October 1, 1927 (a period of three months before said repealing act of May, 1927, was to become effective), declares in both its title and in the body of the act that it is amendatory of the 1925 act, and the same title by which all of said acts were designated is reincorporated in said act of May 31, 1927. All of said acts provide for the 4 per cent. gross receipts highway license assessment or tax. Although said last-mentioned act purports to be an amendment of the act of 1925, it is in substance a complete act in itself. The 4 per cent. gross receipts highway license is not only carried forward in said act, but it further provides that all license fees or taxes accruing thereunder shall become a lien upon all property of the operator used in producing gross receipts from operations as therein defined. We think it plain that it was not the legislative intent to relinquish its right to collect any assessment or tax which accrued under the 1925 act. We are further of the view that the repealing act of May 31, 1927, was repealed by implication by the act of May 31, 1927. No subsequent act exists purporting to repeal said later act.

[2] Section 15, art. 13, State Constitution, adopted November 2, 1926, in no sense strengthens petitioner's claim that the state intended to relinquish taxes or assessments which accrued under the 1925 act or any subsequent act. The gross receipts assessment method adopted by the 1923 act, and which has been continued by each successive act, was approved by said amendment to the Constitution as a standard method of providing revenues for highway maintenance. The fact that the rate fixed by the Constitution slightly varied from the rate fixed by statute as to certain kinds of transportation service does not work a change of a system which has long been the general policy of the state, but at most is a mere matter of regulating the amount to be charged pursuant to an approved plan. Said constitutional amendment provides:

"Nothing herein contained shall affect any tax levied or assessed prior to the adoption of this section."

Since the adoption of the 1923 statute there has not been a moment of time when the "gross receipts" assessment system was not a part of our highway revenue system. The history of the legislation on the subject furnishes conclusive proofs that the Legislature designed it to be a permanent system and did not intend at any time to extinguish any tax accrued to the state under any previous act by reason of subsequent amendments or new legislation. Before the 1925 act became extinct it was amended and the assessment provision was kept alive by the act of May 31, 1927. This being so, the question of extinguishment by repeal is a false quantity in the case.

No other questions are raised which have not been heretofore determined by decision of this court.

The writ is denied.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.

COHAN v. SHIBLEY (SHIBLEY, Intervener).*

Civ. 7154.

District Court of Appeal, First District, Division 1, California.

June 2, 1930.

Rehearing Denied July 2, 1930. Hearing Granted by Supreme Court July 31, 1930.

1. Appeal and error ⟹662(2).

In absence of contrary showing, recital in amendment to intervention complaint that it was filed with court's leave must be accepted as true, though record contains no order.

2. Appearance ⟹19(4).

Court acquired jurisdiction of intervention proceeding when pursuant to order intervener, a nonresident, filed complaint.

3. Appeal and error ⟹1036(6).

Failure to serve complaint in intervention on defendant, though irregularity, did not affect jurisdiction nor prejudice defendant since intervener's causes of action, except one, were dismissed, and as to it findings were against intervener.

4. Appeal and error ⟹920(2).

Failure to serve defendant with further notice of trial after continuances *held* not reversible error presumption being orders continuing cause were regularly made, judgment stating cause came on regularly for hearing.

The fact that continuances were ordered daily from date case was first set for trial, until date of trial, strongly supports inference that previous orders were made.

5. Husband and wife ⟹299(1).

Order to pay alimony and attorneys' fees *held* judgment independent of final judgment, in wife's action for separate maintenance, and enforceable as any money judgment.

6. Injunction ⟹1.

Injunction operates strictly in personam.

7. Injunction ⟹228.

Persons not parties to injunction proceeding are unaffected by transfers and agreements violating injunction, except that agents, aiders, and abettors, and persons represented in suit, may by acts become amenable to punishment for violation.

8. Husband and wife ⟹272(1).

Community property does not come into court's custody merely by institution of divorce suit.

9. Husband and wife ⟹299(4).

Order appointing receiver of community property does not ipso facto constitute sequestration independent of actual or attempted possession.

10. Husband and wife ⟹299(4).

Motions to subject community property to lien, though husband be restrained from disposing of or incumbering property pending hearing, do not ipso facto constitute sequestration independent of actual or attempted possession.

11. Attachment ⟹180.

Wife's lien created by order in separate maintenance suit on community property has no priority over prior attachment (Civ. Code, §§ 140, 2897).

Civ. Code, § 140, provides that court may require husband or wife, as case may be, to give reasonable security for providing maintenance of other. Section 2897 provides that, other things being equal, different liens upon same property have priority according to time of their creation.

12. Attachment ⟹180.

Lien obtained by attaching community property by holder of note suing husband, *held* superior to wife's subsequent lien for alimony and attorneys' fees (Civ. Code, §§ 140, 2897).

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Frank D. Cohan against Kenneth Shibley, in which Marion Shibley intervened. From the judgment, the defendant appeals, and the plaintiff appeals from that part of the judgment in favor of the intervener and against plaintiff.

Judgment against the defendant affirmed, and the portion appealed from by plaintiff reversed.

Joseph A. Brown, of San Francisco, for appellant.

Milton T. U'Ren, of San Francisco, for respondent.

Livingston & Livingston, of San Francisco, for intervener.

PER CURIAM.

The above action was brought to recover on a promissory note executed by defendant, Kenneth Shibley, to the plaintiff. The action was filed on June 24, 1927, and on the same day an attachment issued by virtue of which the sheriff levied upon a certain deposit in the Crocker First Federal Trust Company of San Francisco standing in the names of Hugh Hagan and David Livingston, but which was the community property of defendant and Marion Shibley, his wife. The levy was made on June 25, 1927. On July 29, 1927, said Marion Shibley filed in

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Dismissed per stipulation Feb. 4, 1931.

the action her complaint in intervention, setting forth five separate causes of action, four of which were dismissed at the trial, and on January 14, 1929, she filed an amendment to her complaint, alleging a sixth cause of action. The complaint in intervention was not served upon the defendant. He was, however, served with the amendment thereto, and no answer to either pleading was made by him. He denied, however, the allegations of plaintiff's complaint. The validity of plaintiff's lien is not questioned, its priority only being contested by the intervener.

The case was tried on February 1, 1929, and the court found for the plaintiff as against the defendant. It also found against the intervener on her fourth cause of action, and in her favor upon the allegations of her sixth cause of action set forth in her amendment to her complaint. The findings last mentioned so far as material are, in substance, as follows: That on November 17, 1926, the intervener commenced an action in the superior court of the city and county of San Francisco against defendant Shibley for separate maintenance, in which action he appeared; that thereafter orders were made in the action requiring him to pay certain sums as temporary alimony and attorneys' fees, no part of which had been paid; that on December 24, 1926, an order was made restraining defendant from transferring certain community real property, but that by agreement this property was sold and the proceeds deposited in the Crocker First Federal Trust Company in the names of Hugh Hagan and David Livingston to abide the further agreement of the parties or the order of the court; that on June 20, 1927, an order was made directing defendant on the 27th day of the same month to show cause why he should not be enjoined until the determination of the action from transferring or incumbering the deposit and other property, and restraining him from so doing pending the hearing on the order to show cause; that the order also directed defendant and said Hagan and Livingston to show cause at the hearing why the deposit should not be used in payment of the alimony and attorneys' fees theretofore allowed in the action; that on June 28, 1927, following the hearing on the order to show cause the court granted a temporary injunction restraining defendant from transferring or incumbering the deposit, and ordered that execution issue for the amount of unpaid alimony and attorneys' fees, and imposed a lien upon the deposit to secure the payment of said amounts. The court also found that pursuant to said order execution issued, and on June 28, 1927, was levied upon the deposit mentioned, and that the present action, contrary to the contention of the intervener, was brought in good faith and not to defeat her rights, nor hinder, delay, or defraud any of defendant's creditors.

Judgment was entered for the plaintiff and against the defendant Shibley for the amount of the note, but it was also adjudged that intervener had a charge and lien upon the deposit prior to the lien of plaintiff's attachment, and that the lien of her execution was also superior thereto. The plaintiff and defendant were further enjoined from interfering in any way with the intervener's rights therein.

The plaintiff has appealed from that part of the judgment which is in favor of the intervener and against him, and defendant has appealed from the whole of the judgment.

Defendant urges as grounds for reversal that the original complaint in intervention was not served upon him and that no order permitting the defendant to file an amendment thereto was made, and also that he was not served with notice of trial.

[1] The code requires the complaint in intervention to be served upon the parties to the action (Code Civ. Proc. § 387). In the present case the defendant on the date of filing intervener's complaint, namely, July 29, 1927, was a nonresident of the state, and did not appear in the action until July 13, 1928. The amendment to the complaint in intervention was, however, served upon his attorney on January 7, 1929. This pleading recites that it was filed by leave of court first had and obtained, and, while no such order appears in the record, there is nothing therein inconsistent with the declaration, and in the absence of an affirmative showing to the contrary the same must be accepted as true. Segerstrom v. Scott, 16 Cal. App. 256, 116 P. 690.

[2, 3] The court acquired jurisdiction of the proceeding in intervention when pursuant to its order intervener filed her complaint (Ah Goon v. Superior Ct., 61 Cal. 555); and the failure to serve the same upon the defendant, while an irregularity, did not affect the question of jurisdiction, nor was it prejudicial to the defendant for the reason, as stated, that each cause of action therein with the exception of the fourth was subsequently dismissed, and as to this the findings were against the intervener.

[4] Defendant admits that on November 15, 1928, a notice was served upon his attorney, stating that the cause had been set for trial and would be tried on December 13, 1928. The record shows that on that date no department of the court was available for the trial, and that the matter was continued from day to day on the calendar of the presiding judge until December 24, 1928. On that date the

matter was again continued until January 7, 1929, the order reciting that the continuance was "on account of respective counsel's agreement as to state of facts." The trial was thereafter regularly continued until January 24, 1929. On that date no order of continuance so far as shown was made, but the case was transferred to department 14 of the same court, and on January 26, 1929, was placed on the extra sessions calendar. On January 28, 1929, an order was made continuing the trial to the following day, and thereafter the case was continued from day to day until February 1, 1929, when the trial was had. The defendant did not appear at the trial, and now maintains that the failure to serve him with a further notice thereof was an error requiring a reversal of the judgment.

It was held in Estate of Dean, 149 Cal. 492, 87 P. 13, that a failure to give notice of trial was prejudicially erroneous and necessitated a reversal. In that case the matter was regularly set and notice for trial on November 14, 1904, on which date on motion the trial was continued to February 7, 1905. On January 24, 1905, defendants made an application for an order requiring the plaintiffs, who were nonresidents, to furnish an additional undertaking as security for costs and for a stay of proceedings, until the same should be furnished. The motion was granted, but no order was then or subsequently made relative to the time of trial. On February 7, 1905, one of the plaintiffs, without notice to the other, filed the necessary undertaking. On that day the case was called for trial, and, none of the plaintiffs being present except the one who filed the undertaking, the proceeding was on motion dismissed for failure of the plaintiffs to appear. It was held on appeal from the judgment of dismissal that the order of January 24, 1905, in effect, vacated the order fixing the day of trial and left the matter to be again set for trial or triable on the original date upon a new notice. The court, however, referring to the order of continuance made on November 14, 1904, said: "If it were not for the subsequent proceedings had in January, 1905, this order, made on motion of plaintiffs, would undoubtedly be held effectual to dispense with further notice of the time of the trial therein designated." The judgment recites that the cause came on regularly to be heard; and, in the absence of anything in the record to show the contrary, it will be presumed on appeal that orders continuing the cause from the 24th to the 28th of January, 1929, were regularly made (2 Cal. Jur. Appeal and Error, § 499, p. 852; 4 Cor. Jur., Appeal and Error, § 2686, p. 752); and the fact that continuances were ordered daily from the date last mentioned to the date of trial strongly supports the inference that previous orders were made.

The plaintiff contends that the trial court erred in its conclusion that the intervener has a lien or charge upon the fund superior to the lien of the attachment.

[5-7] The order for the payment of alimony and attorneys' fees made in the suit for separate maintenance was a judgment independent of the final judgment in the action. Clopton v. Clopton, 161 Cal. 481, 119 P. 651; Robbins v. Mulcrevy (Cal. App.) 281 P. 668. Such judgments are the same as any money judgment, the wife's position being "assimilated to that of a creditor of her husband" (Murray v. Murray, 115 Cal. 266, 47 P. 37, 37 L. R. A. 626, 56 Am. St. Rep. 97; Tuers v. Tuers, 131 Cal. 625, 63 P. 1008; Lisenbee v. Lisenbee, 42 Cal. App. 567, 183 P. 862); and the court may enforce the same by the appointment of a receiver of the property of the husband (Civ. Code, sec. 140) or by an order imposing a lien thereon. Estate of Smith, 200 Cal. 654, 254 P. 567. Intervener contends that the effect of the order restraining her husband from transferring or incumbering the deposit was to impose such a lien, and, in support thereof, cites the following cases: In Elmwood Place Loan, etc., Co. v. Cincinnati Concrete Co., 6 Ohio App. 43; Davidson v. Dingeldine, 295 Ill. 367, 129 N. E. 79, and Vanzant v. Vanzant, 23 Ill. 485, it was held that a confession of judgment by a defendant violated an order restraining him from alienating or incumbering his property pending the trial of an action by his wife for divorce or support, and that a subsequent judgment for alimony took priority over the confessed judgment. The same rule has been followed in other cases. Springfield Marine, etc., Ins. Co. v. Peck, 102 Ill. 265; Union Trust Co. v. Southern, etc., Navigation Co., 130 U. S. 565, 9 S. Ct. 606, 32 L. Ed. 1043. Forrester v. Forrester, 155 Ga. 722, 118 S. E. 373, 29 A. L. R. 1363, also cited by respondent, holds that in an action for support against an absentee husband the court has jurisdiction, by a proceeding quasi in rem, to impose a lien upon a debt owing the husband by a resident of the state as security for the payment of alimony. Murray v. Murray, 115 Cal. 266, 47 P. 37, 37 L. R. A. 626, 56 Am. St. Rep. 97, was a suit for separate maintenance by a wife against her absentee husband who, in order to defeat the action, had transferred his California property. A receiver, who was appointed at the commencement of the action, took possession thereof, and it was held that by the receiver's possession and the due publication of summons the court acquired jurisdiction to subject the property to the satisfaction of its judgment. The court in its opinion refers to Bragg v. Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161. This case was a creditors' bill to reach certain debts evidenced by notes and mortgages executed by residents of Wisconsin to defendant Gaynor and by him assigned in fraud of Bragg,

his judgment creditor. Both Gaynor and the fraudulent assignee, who were nonresidents, were served with process out of the state, and failed to appear. The court held that such debts were property in the state; that the service of an injunction upon the mortgagors, who were made parties defendant, restraining them from paying the nonresident assignee brought the debts under the control of the court so that its judgment avoiding the assignment, and appointing a receiver to collect the debts and apply the proceeds to the plaintiff's demand, was valid. The following cases are also in accord with this rule: Kelley v. Bausman, 98 Wash. 686, 168 P. 181; Thurston v. Thurston, 58 Minn. 279, 59 N. W. 1017; Brewer v. De Camp, etc., Co., 139 Tenn. 97, 201 S. W. 145. In many of the above decisions, together with the case of Green v. Green, 23 Ohio Cir. Ct. R. 323, cited by intervener, it is declared that the doctrine of lis pendens is applicable to a suit for divorce or a proceeding for the allowance of alimony; but intervener contends that such is not the rule in this state. Sun Ins. Co. v. White, 123 Cal. 196, 55 P. 902, 904; 1 Cal. Jur. Alimony, § 91, p. 1041; 1 R. C. L., § 890. Moreover, the doctrine has been held to apply only to real property. MacDermot v. Hayes, 175 Cal. 95, 170 P. 616. It is the rule in California, as in other jurisdictions, that an injunction operates strictly in personam (Berger v. Superior Ct., 175 Cal. 719, 167 P. 143, 15 A. L. R. 373; Cherokee Nation v. Georgia, 30 U. S. (5 Pet.) 1, 8 L. Ed. 25; Fleckenstein Bros. v. Fleckenstein, 66 N. J. Eq. 252, 57 A. 1025; Armstrong v. Kinsell, 164 N. C. 125, 80 S. E. 235; 32 Cor. Jur. Injunctions, § 69, p. 83; Spelling, Injunctions, § 1), and not against the property (Schmaltz v. York Mfg. Co., 204 Pa. 1, 53 A. 522, 59 L. R. A. 907, 93 Am. St. Rep. 782); and while transfers and agreements in violation thereof are invalid as to the complainant or those claiming under him, except as to innocent third persons, and may be set aside (Powell v. Bank of Lemoore, 125 Cal. 468, 58 P. 83; Springfield Marine, etc., Ins. Co. v. Peck, supra; Union Trust Co. v. Southern, etc., Co., supra), it is the rule that the rights of persons not parties to the action are not affected thereby (Moulton v. Parks, 64 Cal. 166, 30 P. 613; Harvey v. Smith, 179 Mass. 592, 61 N. E. 217), except to the extent that certain classes, such as agents, servants, attorneys, aiders, and abettors, and persons represented in the suit may by their acts render themselves amenable to punishment for its violation. Berger v. Superior Ct., supra; Rigas v. Livingston, 178 N. Y. 20, 70 N. E. 107.

[8-12] In the case at bar, neither the plaintiff nor the bank was a party to the proceeding, nor were they or the trustees restrained by the order, which ran only against the defendant Shibley. Moreover, the proceeding was one to determine whether a lien should be imposed, and the order shows no intention to do more than to restrain Shibley from transferring or incumbering the deposit pending the hearing. Community property does not come into the custody of the court merely by the institution of a suit for divorce (Lord v. Hough, 43 Cal. 581; Sun Ins. Co. v. White, supra), and an order of the court appointing a receiver thereof does not ipso facto constitute a sequestration of the property independent of actual possession or an attempt to take possession (Bank of Woodland v. Heron, 120 Cal. 614, 52 P. 1006; 22 Cal. Jur. Receivers, § 76, p. 490); nor in principle should a different rule apply to motions to subject the property to a lien, though the husband be restrained from disposing of or incumbering the same, pending the hearing. As the court in Sun Ins. Co. v. White, supra, referring to section 140 of the Civil Code, said: "This is the only statutory power given upon this subject, and, as the Civil Code 'establishes the law of this state upon the subjects to which it relates' (section 4), it must be held that it is exclusive, and that the wife can have the property of the husband set apart as security for the payment of alimony, or burdened with a charge for her maintenance, only by an order of the court therefor." The lien being created by the order imposing it upon the property (Civ. Code, § 140), as in other cases, a mere right thereto does not give priority over an attachment levied before the lien actually comes into existence. Bailey v. Warner, 28 Vt. 87. It is the statutory rule that, other things being equal, different liens upon the same property have priority according to the time of their creation. Civ. Code, § 2897. In the present case the husband's debt was incurred previous to the institution of the intervener's suit for separate maintenance, and, according to the court's findings, the action thereon was brought in good faith and not, as alleged by the intervener, to defeat her rights nor hinder, delay or defraud her husband's creditors. The cases cited by the intervener fall short of supporting her claim that the restraining order created a lien in her favor; and under the circumstances shown, we see no legal or equitable reason why the priority of plaintiff's lien should not be recognized and enforced.

No ground for reversing plaintiff's judgment against the defendant is shown; and as between the defendant and the intervener the latter's right to a lien upon the deposit is plain. The judgment against the defendant is therefore affirmed, and the portion thereof appealed from by the plaintiff is reversed.

106 Cal. App. 220

SEARS v. MYERSON.

Civ. 5876.

District Court of Appeal, Second District, Division 2, California.

June 5, 1930.

1. Fraud ⟹11(1).

Statement that stock of merchandise was good and salable was representation of fact sufficient to support claim of fraud.

Plaintiff's assignor owned retail stores and became insolvent, and made an assignment for benefit of creditors to certain Board of Trade. Plaintiff's assignor then interested defendant in bidding $20,000 for the stock, and this bid was accepted by the Board of Trade. At same time plaintiff's assignor and defendant agreed that former should have right to purchase stock for sum of $23,500, plus additional sums laid out for expenses for merchandise, etc., and that, if plaintiff's assignor was unable to purchase business on this basis, defendant would pay him $1,600. Plaintiff, as assignee, sued to recover the last-named amount, and defendant pleaded fraudulent representations on part of plaintiff's assignor. The contract between defendant and Board of Trade contained provision that no representations of any kind were made as to quality or condition of merchandise.

2. Fraud ⟹9.

Single willful misrepresentation of material fact, if relied on, is effective to support claim of fraud.

3. Fraud ⟹35.

Waiver of fraudulent representations in favor of assignee for benefit of creditors in contract for sale of merchandise did not waive fraud under another separate agreement.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Ida B. Sears against V. Myerson. From the judgment, plaintiff appeals.

Affirmed.

W. W. Kaye, of Los Angeles, for appellant.

Crail, Shutt, Penprase & Crail, and Claude A. Shutt, all of Los Angeles, for respondent.

IRA F. THOMPSON, J.

Plaintiff's assignor, Joseph Chain, operated, prior to some time in April, 1924, two retail stores in Bakersfield, known as Chain's Emporium and Eddy's Store. He became insolvent and made an assignment for the benefit of his creditors to the Los Angeles Wholesalers Board of Trade. During April of that year an inventory was taken by the Board of Trade aggregating $37,480.51, inclusive of fixtures in the sum of $4,742.71. The prices used in determining the values of the goods in stock were the cost marks checked against the invoices wherever that was possible. Mr. Chain interested the defendant in bidding $20,000 for the entire stock, which bid was accepted by the Board of Trade. In the notice to bidders the following language was employed: "All inventories of stocks of merchandise and fixtures and other personal property, are guaranteed as to quantity and extensions of figuring only. No representations of any kind are made as to quality or condition of merchandise and fixtures. Bidders must inspect same before submitting offer." At the same time Chain and the defendant agreed that the former was to have the right to purchase the stock for the sum of $23,500 (the $3,500 representing the services of defendant) plus additional sums laid out for expenses or merchandise, and minus the sums received for merchandise sold at any time before August 30, 1924, and, if Chain was unable to purchase the business on this basis, the defendant agreed to pay him $1,600. It was to recover this last-named amount that the plaintiff, as assignee of Chain, brought the present action. The defendant admitted the execution of the agreement, but pleaded fraudulent representations on the part of plaintiff's assignor, which the court found to have been made as follows:

"That he had a large stock of merchandise in said store all of which was good and saleable;

"That his stock of merchandise and fixtures in said store inventoried at cost prices to him, the said Chain, of Thirty-Eight Thousand Dollars ($38,000.00)."

The court found that these statements were untrue, and that plaintiff's assignor knew them to be untrue, and that the inventory was in fact padded with second-hand goods listed at new prices, and with cheap and inferior articles listed at prices greatly in excess of their value. From a judgment responsive to the findings the plaintiff prosecutes this appeal.

[1] The first argument advanced for our consideration is that the statement that the stock was good and saleable is not a representation of fact, but is merely an opinion or "puffing" insufficient to support a defense grounded in fraud. It is at once apparent that what was intended to be conveyed to the mind of respondent and the reaction produced therein by the representation that "the stock was good and saleable" depends upon the circumstances under which it was uttered. Spoken in connection with a second-hand

business, the words would have an entirely different meaning from that attaching to them when used in connection with a place dealing in new goods. Or let us put it this way, a representation that a horse was sound in wind and limb would not convey the same meaning when applied to one known to be 15 years of age as when spoken of a three-year-old. Modernizing the illustration, a comparable statement would have different meanings when made with respect to a new or a second-hand automobile. It is not necessary to add instances. Sufficient has been said to make obvious the pertinency of the following language taken from the case of French v. Freeman, 191 Cal. 579, 217 P. 515, 517: "What amounts to an expression of opinion as compared with a positive statement of fact depends upon all the circumstances of the case, and is a question for the trial court to determine. Hodgkins v. Dunham, 10 Cal. App. 690, 103 P. 351; Stockton v. Hind, 51 Cal. App. 131, 196 P. 122; 26 Corp. Jur. 1083. In Stockton v. Hind, supra, 51 Cal. App. at page 136, 196 P. at page 124, the court said: 'It is conceded that the general rule is that an expression of opinion or belief, if nothing more, and if so understood and intended, is not a representation of fact, and although false, does not amount to actionable fraud. Ordinarily a person has no right to rely upon such statements, and if he does so rely, he cannot treat them as fraudulent, either for the purpose of maintaining an action in damages for deceit, or for the purpose of rescinding the contract. Where there is any doubt as to whether or not a representation was intended and understood as a mere expression of opinion or a statement of fact, the question is one not of law but of fact for the court or jury.'"

There is one further rule of law to be observed in this connection and which we think is helpful in arriving at a solution of our present problem. In Phelps v. Grady, 168 Cal. 73–77, 141 P. 926, 927, we read: "True of course it is that expressions of opinion honestly made are not actionable. Equity has no concern with them. But equally true it is that a false statement of an opinion * * * expressed to one entitled to rely upon it may form the basis of an action for deceit, like any other misrepresentation of fact. Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 126 P. 351, 42 L. R. A. (N. S.) 125; * * * Brandt v. Krogh, 14 Cal. App. 39, 111 P. 275. The complaint in intervention charges deceit upon this kind of a false opinion and in this respect it sufficiently states a cause of action." When we look at the facts in the present case we find testimony that plaintiff's assignor represented he had "a new stock of merchandise" "a little over $38,000 of stock," and again, "Everything new and everything saleable" and other similar expressions. The respondent's testimony also established that much of the stock was shopworn and second-hand clothing, that cheap shoes were placed in boxes made for and usually containing much higher-priced footwear, and that a large proportion thereof was not new and was not good or saleable as that expression would ordinarily be interpreted when applied to a stock of new merchandise; that the only way the respondent could have discovered the defects would have been a thorough investigation of the stock, which he was led to neglect on account of the necessity for quick action and the tears of the plaintiff's assignor. We are satisfied that the trial court had the right under all of the circumstances to determine that the representation was one of fact, and that the evidence is sufficient to sustain its finding.

[2] It is therefore unnecessary for us to determine whether the evidence is sufficient to sustain the finding that the other representations were false for the rule of law applicable is: That a single wilful misrepresentation of a material fact, if believed and relied upon, is as effective as a multitude. Davis v. Butler, 154 Cal. 623, 98 P. 1047.

[3] We must, however, consider the argument advanced by appellant that the statement in respondent's contract with the Board of Trade to the effect that no representations of any kind respecting the quality or condition of the goods were made forecloses the respondent of any complaint on the ground that false statements were made by plaintiff's assignor. We may assume that the clause now referred to and quoted in an earlier part of this opinion might bar the respondent from asserting a similar claim against the Board of Trade. But we are not here dealing with that contract. We are here concerned with, and the respondent defended against, another and separate understanding entered into with plaintiff's assignor. The court has found that the inducing cause of this separate obligation was the fraud of the obligee. It cannot be seriously contended that the waiver (if in law there is one) in favor of the Board of Trade can be broadened to cover the defense to the instant cause of action.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; GATES, Justice pro tem.

106 Cal. App. 289

FOX v. FEDERAL CASUALTY CO. OF DETROIT, MICH.

Civ. 27.

District Court of Appeal, Fourth District, California.

June 7, 1930.

Insurance ⟹464.

Beneficiary under health and accident policy was not entitled to recover for death of insured from gunshot wound intentionally inflicted by member of posse.

The policy contained a provision to the effect that it did not cover death, disability, or loss of insured caused by or resulting directly or indirectly from injuries intentionally inflicted upon insured by any person other than himself, except assaults by burglars or robbers.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by Jennie M. Fox against the Federal Casualty Company of Detroit, Mich. Judgment for plaintiff, and defendant appeals.

Reversed.

Everts, Ewing, Wild & Everts and C. M. Ozias, all of Fresno, for appellant.

B. M. Benson, of Fresno, for respondent.

MARKS, Acting P. J.

Respondent Jennie M. Fox is the widow of J. L. Fox, deceased, who died from the effects of a gunshot wound inflicted on December 1, 1928, by L. M. Cardwell, who was at the time constable of Chowchilla township, in the county of Madera, state of California. Appellant had issued to J. L. Fox a policy of health and accident insurance whereby it insured him "against the effects resulting directly and exclusively of all other causes, from bodily injury sustained during the life of this policy solely through external, violent and accidental means." Upon a trial of the case before the court without a jury, judgment was rendered in favor of respondent, who was the beneficiary named in the policy, and against appellant for the principal sum provided in the policy as the benefit to be paid in case of the accidental death of the insured.

The appellant presents several grounds upon which it relies for a reversal of the judgment, but we only need to consider one of them.

The policy contained the following provision:

"This policy does not cover death, disability or loss of the insured caused by or resulting directly or indirectly from * * * injuries intentionally inflicted upon the insured by any person other than himself (assaults by burglars or robbers excepted)."

Appellant maintains that this provision of the insurance policy releases it from liability. Under the facts and circumstances appearing in this case we agree with it.

The evidence before us shows that on December 1, 1928, L. M. Cardwell, accompanied by ten or more citizens, found the deceased walking across a field. Cardwell was of the opinion that the deceased was insane, and evidently he had assembled the posse to take him into custody, although no warrant had been issued for this purpose. The deceased was armed with a piece of a grapestake about three feet long and an iron pipe about two feet long. The members of the posse surrounded him, and he threw the grapestake at one of them. He then grasped the iron pipe in both hands and, raising it over his right shoulder, advanced toward Cardwell, threatening to kill him. Cardwell fired one shot from his pistol into the air, and, as the deceased continued his advance, fired the second shot into his body, which resulted in instant death. The last shot was fired when deceased was eight or more feet away from Cardwell. Cardwell testified that he "shot to stop him then, whether it killed him or not."

It is the well-established rule, supported by decisions in practically all of the states of the Union, that a recovery cannot be had under the circumstances of this case. The case of Matson v. Travellers' Insurance Co., 93 Me. 469, 45 A. 518, 74 Am. St. Rep. 368, is typical of a general rule governing these cases. In this case it was held as follows:

"The plaintiff was the holder of an accident insurance policy issued by the defendant corporation, which entitled him to receive, if disabled by bodily injuries sustained through 'external, violent, and accidental means,' a certain sum of money each week while the disability continued. The policy contained a clause which provided that the insurance should not cover, among other things, 'intentional injuries inflicted by the insured or by any other person except burglars or robbers.'

"During the life of the policy the plaintiff was violently assaulted by another person, not a robber or burglar, who attempted to strike him upon the head with a stick, but the plaintiff, to protect himself, put up his arm, and received the blow thereon, and thereby sustained the injury which he claims entitles him to recover of the company. The plaintiff was without fault in the affair, and the assault upon him is admitted to have been intentional. These facts appear in the agreed statement of facts upon which the case comes to this court.

"Under these circumstances, is the plaintiff entitled to recover? We think not. Were it not for the provision that the insurance should not cover injuries intentionally inflicted by another, it might perhaps be said, as some courts have held, that, as to the insured, the injury, for which he was in no way responsible, was an accident, an unforeseen event, a casualty.

"But here the injury was sustained in one of the very ways which the policy provided should not be covered by the insurance, intentional injuries inflicted by another. An act may be intentional, while its result may be unforeseen and unintentional and therefore accidental, within the meaning of the contract of insurance. But that is not so in this case. Here the act was intentional. It was directed against the insured, and direct injury to the insured was intended.

"All the cases that have been called to our attention, in which a similar provision of an accident insurance policy has been considered, hold that where the injuries sustained by the insured were intentionally inflicted by another, and where the intentional acts of another that caused the injury were aimed at the insured, there could be no recovery. Insurance Co. v. McConkey, 127 U. S. 661, 8 S. Ct. 1360, 32 L. Ed. 308; Hutchcraft's Ex'r v. Insurance Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484; Utter v. Insurance Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913."

To the same effect are the cases of Jarnagin v. Travelers' Protective Association of America (C. C. A.) 133 F. 892, 68 L. R. A. 499; Order of Commercial Travelers of America v. Williams (C. C. A.) 11 F.(2d) 577, 46 A. L. R. 1081; Butero v. Travelers' Accident Insurance Co., 96 Wis. 536, 71 N. W. 811, 65 Am. St. Rep. 61.

In the case before us the insurance policy provides that the insurance carrier shall not be liable where either death, disability, or loss of the insured was caused by injuries intentionally inflicted upon him. Under the language of this policy we do not think it is material whether or not Cardwell inflicted the injury with the intention of actually killing the deceased at the time he fired the fatal shot, or of merely wounding him. The intention to shoot deceased was sufficient, because this intention caused the disability which resulted in the death. The language of this policy brings the case squarely within the rule announced in the case of Matson v. Travellers' Insurance Co., supra, and the other cases we have cited. The case of Fischer v. Travelers' Insurance Co., 77 Cal. 246, 19 P. 425, 1 L. R. A. 572, is directly in point. In that case the insurance policy provided that the insurance carrier should not be liable if death or injury for which indemnity was sought "may have been caused by * * * intentional injuries inflicted by the insured or any other person." Another person intentionally shot the insured through the body with a pistol and he died as a result. The Supreme Court held that there could be no recovery under the terms of the policy. The conclusions in that case find approval in the reasoning used in the cases of Jenkin v. Pacific Mutual Life Insurance Co., 131 Cal. 121, 63 P. 180; Mar Shee v. Maryland Assurance Corporation, 190 Cal. 1, 210 P. 269; Mah See v. North American Accident Insurance Co., 190 Cal. 421, 213 P. 42, 26 A. L. R. 123.

In this case, it appearing from the undisputed evidence that J. L. Fox came to his death from a gunshot wound intentionally inflicted upon him by L. M. Cardwell, and that the contract of insurance did not impose any liability for an injury or death occurring under such circumstances, there can be no recovery by the beneficiary named in the policy.

Judgment reversed.

I concur: BARNARD, J.

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106 Cal. App. 261

PEOPLE v. ADINOLFI.

Cr. 1120.

District Court of Appeal, Third District, California.

June 6, 1930.

1. Criminal law ⟹507(7).

Illicit sexual intercourse of brother with adult competent sister, with her consent, constitutes her accomplice of crime of incest.

2. Incest ⟹15.

Testimony of female accomplice to incest must be corroborated as to material elements of crime to support conviction (Pen. Code, § 1111).

3. Incest ⟹15.

Testimony of female accomplice to incest *held* sufficiently corroborated with respect to material elements of crime.

The corroborating evidence consisted of evidence showing the circumstances under which defendant and his sister occupied the same house and of admissions by defendant to various witnesses by which defendant acknowledged that the accomplice was his sister, that she was his "wife," and that the issue of their carnal connection were his children.

4. Criminal law ⟹511(2).

Evidence tending to connect defendant with commission of crime, although not conclusive as to every element of offense, is sufficient corroboration of testimony of accomplice (Pen. Code, § 1111).

5. Criminal law ⟹511(7).

Defendant's own statements and admissions in corroboration of accomplice's testimony may be sufficient to sustain conviction.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Ray Adinolfi was convicted of incest, and he appeals.

Affirmed

C. M. Gill, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

R. L. THOMPSON, J.

The defendant was convicted of the crime of incest accomplished with his adult sister, by whom four children were born as a result of their illicit relationship.

It is contended that, because there is an absence of evidence of nonconsent to the sexual intercourse on the part of the sister, she must be deemed to have been an accomplice in the commission of the crime, and that the defendant could therefore not be legally convicted except upon corroboration of her evidence of both their relationship as brother and sister and their illicit sexual intercourse.

[1, 2] The illicit sexual intercourse of a brother with his adult competent sister, accomplished with her consent, constitutes her an accomplice of the crime of incest. People v. Letoile, 31 Cal. App. 166, 159 P. 1057. Her testimony as to the material elements of the crime must therefore be corroborated. Section 1111, Pen. Code.

Incest is defined by the provisions of section 285 of the Penal Code as accomplished when "persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void [section 59, Civ. Code] * * * commit fornication or adultery with each other." Fornication is an illicit sexual intercourse between unmarried persons.

[3] The information charged the defendant with the commission of acts of sexual intercouse with his sister, Josie Adinolfi. She testified that the defendant was her brother, that she was 27 years of age, and that he was the father of her four children, born as the result of his illicit sexual intercourse with her. This evidence was sufficiently corroborated with respect to every material element of the crime of incest. Three physicians testified to rendering professional services for Josie Adinolfi at the request of the defendant on the occasions of the birth of these children. The mother of these children was sufficiently identified as the sister of the defendant, who testified at the trial. Upon summoning the physicians for service during childbirth, the defendant referred to his sister as "my wife." Dr. Blinn testified: "Q. He engaged you to take care of a woman? A. The woman he was living with." While this physician was attending the patient at the home to which he was directed by the defendant, Ray Adinolfi was also present on several occasions. No other person was about the house. There was but a single bedroom in the house. Birth certificates were filled out by the physicians and filed, describing the parents of these children as "Ray Adinolfi and Josephine." Dr. Davidson, who testified to the delivery of one of these children, said it was a boy, and that "there is a marked resemblance in the features of the boy and the defendant."

Mrs. Mollie May, who lived for some three years as a neighbor of the defendant and his sister, testified that the brother and sister lived in the same house together; that the sister went by the name of Mrs. Lawrence; that she never saw any man other than the defendant about the house except when the doctor attended the sister during the birth of the children. The court inquired from this witness: "Q. Did the defendant ever refer to this woman as his sister? A. Yes. I had always heard that he was her brother, and he told me they were brother and sister." There is evidence indicating that Josie had been married to a man by the name of Lawrence, but that he was dead. Mr. Fredericks, captain of detectives at Stockton, testified that the defendant told him that Josie was his wife, that they lived in the house next to his barber shop, and that they had four children. Mrs. Grace Brown, assistant probation officer, testified that she visited the defendant at his barber shop a few days after the youngest child was born, and, thinking she was a nurse, he said "he was the father of those children * * * and he wanted help, and said the baby was just five days old, and * * * he had a little girl fourteen years old that was taking care of the children, and he took care of his wife. * * * I asked him to let me meet his wife, and he introduced me to (her). * * * That was Josie Adinolfi." The defendant also admitted to Mr. Burchfield, an investigator of the district attorney's office, that Josie Adinolfi was his sister. Several other witnesses testified to similar admissions on the part of the defendant. The evidence furnishes adequate corroboration of Josie's testimony that she was the sister of the defendant and the mother of the four children which the defendant, on several occasions, admitted were his children.

[4] It is not necessary that the testimony of an accomplice be corroborated by evidence which is conclusive as to every element of the offense. It is sufficient if it merely "tend to connect the defendant with the commission of the offense." Section 1111, Pen. Code; People v. Negra (Cal. Sup.) 280 P. 354; People v. Jensen, 76 Cal. App. 558, 562, 244 P. 1086.

[5] The defendant's own statements and admissions, in corroboration of an accomplice's testimony may be sufficient upon which to sustain a judgment of conviction. People v. Armstrong, 114 Cal. 571, 573, 46 P. 611; People v. Sullivan, 144 Cal. 471, 77 P. 1000.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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106 Cal. App. 283

EWING v. SMITH et al.

Civ. 4109.

District Court of Appeal, Third District, California.

June 7, 1930.

1. Bills and notes ⟹527(1).

Evidence *held* to sustain finding that destruction of note was without consent of payee or intention that indebtedness should be canceled.

2. Contracts ⟹28(3).

Evidence *held* to sustain finding that there was no understanding or agreement in respect to payment for board and lodging.

3. Appeal and error ⟹1012(1).

Appellate court does not weigh testimony.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Minnie C. Ewing against Lewellyn J. Smith and another. From that part of the judgment in favor of plaintiff, defendants appeal.

Affirmed.

Frank F. Oster, of Los Angeles, for appellants.

G. C. DeGarmo and H. B. Cornell, both of Los Angeles, for respondent.

PULLEN, Justice pro tem.

The facts of this case are substantially set forth in respondent's brief, as follows:

The action arises out of the failure of defendants to repay money loaned them by plaintiff. Two causes of action are set forth in the complaint. In the first one it is alleged that plaintiff loaned to the defendants the sum of $4,000, that to evidence the indebtedness defendants executed to her their promissory note for this amount bearing interest at 7 per cent. per annum, and that nothing has been paid thereon. In the second cause of action it is alleged that plaintiff advanced to defendants the sum of $500 which defendants failed to repay. The answer admits the execution of the note, but denies that it provided for interest; and admits the payment of the $500 to defendants, but alleges that it was a gift and not a loan. As a special defense it is alleged in the answer that prior to the commencement of the action the note was by agreement between the parties canceled and destroyed in partial liquidation of an indebtedness in excess of $5,000 due from plaintiff to defendants. By way of counterclaim defendants allege that at the time of the commencement of the action plaintiff was indebted to them in the sum of $5,818.96 upon a mutual, open, and current account; and in their second counterclaim they allege that this amount was due them for services rendered and money advanced to plaintiff. The court found for plaintiff according to the allegations of the first cause of action of the complaint, but as to the second cause of action, found that the $500 sought to be recovered by plaintiff was a gift and not a loan. The court also found against defendants on their special defenses and counterclaims. From the part of the judgment in favor of plaintiff, defendants have taken this appeal. No questions of law are involved in this appeal, and the only question to be decided by this court is whether the findings are supported by the evidence.

[1] Appellants contend that there is no evidence to support the finding that the destruction of the note was without the consent of plaintiff or the intention on her part that the indebtedness thereby represented should be canceled.

Respondent testified that she was leaving for New York on a visit, expecting to remain about four weeks, and that she gave appellant the note, saying to her that "in case anything should happen to her while on the trip, she wanted appellant to have the note, but upon her return she wanted it back." That direct and positive testimony was repeated several times in the testimony of respondent and is sufficient to create a conflict in the testimony and ample to support the findings complained of.

[2] Appellants also complain of the finding that there was no understanding or agreement between respondent and appellants that respondent should pay appellants anything

for her board and lodging. Upon this point, there is also ample testimony in the record to support the finding. Respondent testified that she was supposed to be one of the family, was not a boarder, but was living with them as a member of the family. It clearly appears from answers given to certain questions asked by the trial judge that the intention of appellants to claim for board and lodging was perhaps an afterthought. The testimony is as follows:

"The Court: Q. Now she had lived with you and your wife from 1919 until 1922. Had she paid you anything for her keep up to that time? A. No sir. * * *

"Q. Had your wife ever discussed the question of charging her for her keep—had she ever discussed that with you? A. Well, I wouldn't say.

"Q. Up to the time you got that $4000? A. I don't know as we had, up to that time.

"Q. And you had never talked with her about paying for her keep? A. Not up to that time.

"Q. At that time you gave her a promissory note for her $4000? A. Yes."

Complaint is made that the finding of the trial court that the board and lodging furnished to the plaintiff by the defendants did not amount to and was not worth the amount claimed by appellants, or any other sum.

[3] It would be of little profit to quote at length testimony in support of this finding, but it is sufficient to state that an examination of the testimony shows ample evidence upon which the court could base such a finding. It is not the function of an appellate court to weigh the testimony. An examination of the evidence shows that the findings are supported by testimony, which, if believed as true by the trial court, is sufficient to justify the findings as found.

The judgment is therefore affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

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106 Cal. App. 829

TURNER et ux. v. DEACON.

Civ. 230.

District Court of Appeal, Fourth District, California.

June 9, 1930.

1. Appeal and error ⚷800.

Appeal will not be dismissed for delay in filing brief, filed before notice of motion was served (District Court of Appeal Rule 5).

2. Quieting title ⚷10(2).

Mortgagee is not legal title holder, whom equitable owner cannot sue to quiet title.

3. Quieting title ⚷10(2).

Grantees of adjudicated owner of interest in property, subject to mortgage paid before recording of deed, could sue as legal title holders to quiet title.

4. Quieting title ⚷1.

Action to quiet title lies to ascertain superior equity (Code Civ. Proc. § 738).

5. Mortgages ⚷151(1).

One acquiring mortgage after decree, adjudging another than mortgagor entitled to deed of interest in property on paying prior mortgage, became final, had notice of existing equities, which are superior to mortgage lien.

6. Mortgages ⚷151(1).

One taking mortgage with notice of decree denying cancellation of mortgagor's contract to convey interest in property cannot set up fraud and misrepresentation subsequently ascertained in action by vendee's grantees to quiet title.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by Val A. Turner and wife against Theolinda Margaretta Deacon. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Glen H. Munkelt, of San Diego, for appellant.

A. T. Roark, of San Diego, for respondents.

BARNARD, J.

[1] A motion to dismiss this appeal, on the ground that the opening brief was not filed in time, was submitted with the submission of this case upon its merits. At the time the notice of this motion was served and filed, the opening brief had been filed in this court. The motion is therefore denied. Rule V.

The plaintiffs brought this action against the defendant to quiet their title to an undivided one-half interest in certain real property in San Diego county, the complaint being in the ordinary form. The answer denies that the plaintiffs are the owners of such an undivided one-half interest, and in a separate answer it is alleged that the defendant has a mortgage which is a valid lien on the entire property, and prior to any title or interest of the plaintiffs. The record shows that the property, a one-half interest in which is here involved, was conveyed by grant deed from Jessie B. Rollinson to Daniel A. Deacon,

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

and Clara E. Deacon, his wife, by grant deed dated March 31, 1920, and recorded May 3, 1920. There also appears a contract, acknowledged on April 12, 1920, between Daniel A. Deacon and one A. T. Roark, which recites that the parties had agreed to purchase as tenants in common the real property described in the deed just mentioned; that the title to the whole of said property should be taken in the name of Daniel A. Deacon and held by him until Roark should pay and satisfy a mortgage then existing on said property; and that a grant deed conveying an undivided one-half interest in said property should be executed by the said Daniel A. Deacon, and placed in escrow with a bank, with instructions to deliver the same to Roark when said mortgage was paid and satisfied. It was also agreed that the said Deacon should not in any way incumber said property while the title remained in him as trustee, without the written consent of the other party thereto.

The record also shows that on January 14, 1924, the said Daniel A. Deacon and Clara E. Deacon, his wife, filed an action in the superior court of the county of San Diego against the said A. T. Roark and the Southern Trust & Commerce Bank, alleging that the said A. T. Roark had misrepresented the facts in connection with said deal, and in particular had represented that the property was being sold by the estate of George H. Ziegler, whereas, in fact, it had been previously sold by this estate to one Jessie B. Rollinson, and was then being sold by defendant Roark for Jessie B. Rollinson; and that the price actually paid to the said Jessie B. Rollinson for the property was $2,600 less than was represented to Deacon by Roark. Because of these misrepresentations, the plaintiffs in said action asked that the contract for the conveyance of the one-half interest to the said Roark should be canceled. Lis pendens in said action was recorded on January 22, 1924. That action was tried in the superior court of San Diego county, and that court found that no misrepresentations had been made; that the said Daniel A. Deacon had entered into the contract above referred to whereby it was agreed he was holding a one-half interest in the property in trust for the defendant A. T. Roark; that the said Jessie B. Rollinson by grant deed had conveyed the premises to the plaintiffs in said action; and that in pursuance of said contract Daniel A. Deacon and Clara E. Deacon, his wife, had executed and delivered their grant deed conveying an undivided one-half interest in and to the real property to the said A. T. Roark, which deed had been placed in escrow by agreement of all the parties with the defendant Southern Trust & Commerce Bank, to be delivered to Roark upon the payment of the mortgage referred to in the contract. Judgment was entered on April 22, 1924, decreeing that the plaintiff take nothing in that action, and that the defendant A. T. Roark is the equitable owner and entitled to the possession as tenant in common with the plaintiffs, of an undivided one-half interest in the premises, subject to the payment of a certain mortgage for $6,500; and that the said A. T. Roark was entitled to the delivery to him of the deed so held in escrow by the Southern Trust & Commerce Bank, when the $6,500 mortgage was paid.

The record further shows that the $6,500 mortgage referred to in the above-mentioned judgment was released of record on November 12, 1926. On August 26, 1926, the said Daniel A. Deacon made and executed a mortgage to the defendant Theolinda Margaretta Deacon to secure a note for $8,000, the mortgage being recorded the same day, and the mortgage covering the entire property conveyed to said Deacon by the deed from Jessie B. Rollinson. The said Daniel A. Deacon had married the said Theolinda Margaretta Deacon on February 18, 1925. Under date of October 29, 1926, the said A. T. Roark and his wife conveyed said one-half interest in said property to the plaintiffs herein by a grant deed which was acknowledged on February 4, 1927, and recorded March 2, 1927.

In the present action the court found that the defendant's said mortgage was not a lien upon the plaintiffs' one-half interest in and to the real property in question, and that the plaintiffs were entitled to have their title to said interest in said real property quieted as against the defendant and all persons claiming under her, and a judgment and decree was entered in accordance with said findings. From this judgment the defendant has appealed.

It is the contention of the appellant that her mortgage is a valid lien upon the whole of said real property, including the one-half interest therein claimed by respondents. For this reason it is claimed that the judgment of the court is erroneous.

[2, 3] The main contention of appellant is that this action cannot be maintained by respondents because it is the established rule in California that "an action to quiet title cannot be maintained by the owner of an equitable estate against the holder of the legal title under a complaint containing only the usual averments commonly made in such an action." Chase v. Cameron, 133 Cal. 231, 65 P. 460; De Leonis v. Hammel, 1 Cal. App. 390, 82 P. 349. We think, however, the parties here are not within the meaning of that rule. It could hardly be claimed that the appellant was the holder of the legal title. That the holder of a mortgage has only an equitable interest in the property involved needs no citation of authorities. On the other hand, while the interest claimed by the appellant is an equitable interest, we think that at the

time this action was filed the respondents held the legal title within the meaning of the rule above set forth. They claimed under a grant deed from A. T. Roark and wife, which had been recorded. Roark had been adjudged by a court decree which had become final, to be the owner of an undivided one-half interest in the property, subject to the payment of a certain mortgage, and had been adjudged to be entitled to receive a grant deed which had been duly executed and placed in escrow, when he should pay off said mortgage. The mortgage in question had thereafter, and prior to the recording of the deed from Roark to the respondents, been paid off and released of record. The record shows that a deed from Daniel A. Deacon and Clara E. Deacon, his wife, conveying a one-half interest in the property to A. T. Roark, dated May 3, 1920, and recorded March 2, 1927, was received in evidence in this case, and later, upon stipulation of the parties, was stricken out. Why this should have been stipulated does not appear. Leaving the recording of that deed out of consideration, as we must, under the circumstances disclosed by the record a sufficient showing of legal title appears to take this case out of the bar of the rule relied upon by appellant.

[4, 5] Even if this be not true, it seems to be the settled law in California that where both parties assert mere equities in real property, an action under section 738 of the Code of Civil Procedure, to determine adverse claims or as it is usually termed to "quiet title," may be maintained to ascertain which party has the superior equity. Buchner v. Malloy, 155 Cal. 255, 100 P. 687; Tuffree v. Polhemus, 108 Cal. 678, 41 P. 806. Under this view of the case, at the time appellant acquired her mortgage a decree had become final in the other action referred to, which adjudged that Roark was the owner of an undivided one-half interest in the property, and entitled to receive a deed then in escrow, upon the payment of a specified mortgage. Appellant therefore acquired her interest in the property with full notice of the other equities existing, and such other equities must, in any event, be held superior to the lien of her mortgage.

[6] The only other point raised by appellant is that respondents acquired their title from A. T. Roark, and that appellant is entitled to set up as against the said Roark further evidence of fraud and misrepresentation which it is claimed she has ascertained subsequent to the entry of the judgment in the preceding action between Daniel A. Deacon and A. T. Roark above referred to. This claim is without merit. Appellant took her mortgage with notice of all of the proceedings in that action and the judgment therein, and in so far as her interest under the mortgage is concerned, she is bound thereby. That judgment has become final against appellant's husband, and it may not be thus indirectly set aside, under the circumstances shown by this record.

The judgment is affirmed.

We concur: MARKS, Acting P. J.; AMES, Justice pro tem.

SKAGGS v. WILLHOUR.*

Civ. 144.

District Court of Appeal, Fourth District, California.

June 3, 1930.

Rehearing Denied June 23, 1930. Hearing Granted by Supreme Court July 31, 1930.

1. Automobiles ⟹245(78).

Where injured party proceeds while unable to see, question of contributory negligence is usually one of law (California Vehicle Act, §§ 113, 121).

California Vehicle Act (St. 1923, p. 517), §§ 113, 121, requires automobile driver to drive car at careful, prudent speed not greater than is reasonable and proper under the circumstances, and to drive with due caution and circumspection under existing circumstances.

2. Automobiles ⟹211.

Automobile driver blinded by lights of approaching car, failing to stop, and merely slowing down until seeing truck when too close to avoid collision, *held* contributorily negligent (California Vehicle Act, §§ 113, 121).

Evidence showed that injured driver was driving automobile 25 miles an hour when blinded by lights of approaching automobile when he was 150 feet from point of collision with truck and trailer; that truck and trailer collided with was not seen until within approximately 15 feet thereof; and that driver did not stop but merely reduced speed of car to 15 miles per hour, though car could have been stopped within 20 feet.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by James E. Skaggs against Walter Willhour. Judgment for plaintiff, and defendant appeals.

Reversed with directions.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 292 P. 642.

Culver & Nourse, by Paul Nourse, all of Los Angeles, for appellant.

Victor A. Dunn, of Oakland, and Siemon & Garber, of Bakersfield, for respondent.

BARNARD, Acting P. J.

This is an action to recover damages for injuries received in an automobile collision. About 2 a. m. on November 30, 1926, the plaintiff was driving his automobile along the state highway about three miles north of Lebec. He was traveling north, and a truck and trailer owned by defendant, and operated by his agent, was traveling in the same direction. The highway at all points involved herein is a paved highway eighteen feet in width. It appears that another truck headed south, and with its headlights burning, had stopped with its right wheels about two feet off the paved portion of the highway. Taking the view of the evidence most favorable to the plaintiff, defendant's truck, which was proceeding north, had stopped on the highway just opposite the south-bound truck. The highway was straight for about six hundred feet south of the point of the accident, the grade of the road being about 5 per cent. down toward the scene of the accident. The plaintiff testified that as he rounded a slight curve some six hundred feet from the point of the accident he saw the lights of the parked truck, although at that time he was not sure whether it was standing still or moving very slowly; that he was traveling at a speed of twenty to twenty-five miles per hour, but as he came into the direct rays of the lights from the truck, he slowed down to not more than fifteen miles per hour; that from the time he was one hundred and fifty feet from the front of the south-bound truck he was blinded by its lights and could see nothing; that when he was within approximately fifteen feet of the rear of defendant's truck he saw it for the first time and applied his brakes and attempted to swerve to the left, but was unable to stop and collided with some pipes which were loaded on defendant's trailer. His automobile was completely wrecked, and he was injured. At the trial of the case, after a motion for nonsuit had been denied and after a request for an instructed verdict had been refused, the jury brought in a verdict for $10,000, which was later reduced by the court to $8,000, and from the judgment which followed the defendant has appealed.

Appellant insists there is no evidence to show negligence on the part of his agent. While there is some evidence that at the time of the collision his truck was moving at about five miles per hour, there is other evidence which, if believed by the jury, was sufficient to fasten negligence on the defendant.

The principal question here presented is whether under that view of the evidence most favorable to the respondent, he was guilty of contributory negligence as a matter of law. The respondent argues that the facts in the instant case are almost identical with those in Schurman v. Los Angeles Creamery Co., 81 Cal. App. 758, 254 P. 681, and that under the rule there laid down the question of contributory negligence was one of fact for the jury. In that case the court held that the driver of an automobile proceeding at twelve to fifteen miles per hour with proper headlights could not be held guilty of contributory negligence as a matter of law because he, in fact, did not see a team and wagon which was admittedly not directly in the course of his lights but was just over the center of the highway and moving toward the oncoming machine. The facts in that case are very different from those in the case before us, which is one involving the duty of the driver of an automobile who is blinded by something in front of him. A further statement of the facts in reference to this part of the case is necessary. On direct examination the respondent testified as follows:

"Q. How close were you to the truck when you first saw the headlights? A. When I first observed the headlights that I thought were standing still or moving very slow, I could not tell which, *I was possibly 150 yards away.*

"Q. How many yards? A. *About 150 yards, but there was no truck passed or no car between that distance and up to the time I came up to this truck.* * * *

"Q. How fast were you coming down there? A. Well, I was coming probably, *before I came in the rays of this headlight, twenty or twenty-five miles an hour.*

"Q. Now what did you do, if anything, when you approached the trucks standing in the road? A. As I approached the trucks, *the headlights of this truck facing me were very bright—I could not see the highway for the rays of light,* so I was slowing down until I got by the truck. When I got about fifteen feet I should judge—I was right on it anyway—I observed that there was a truck standing there and I applied my brakes and made a left swing and tried to miss it and I hit the left hind rear corner of the truck going north.

"Q. What did you do, if anything, to try to stop? A. I applied all I had to stop it.

"Q. Did your car—did you skid or run on into the truck? A. Yes, I skidded.

"Q. What truck did you strike, the one going south or the one going north? A. The one going north. * * *

"Mr. Dunn: Q. What was the reason you could not see it? A. Just as I said before, *it was impossible for me to see anyone within the rays of this headlight.*

"Q. Were the headlights very bright? A. *Very bright, yes, sir.*

"Q. Was the truck on an incline? A. The truck I was facing was coming up the hill and the one going north was going down the hill. * * *

"A. Naturally a headlight coming facing you, if they reach up an incline they throw the light in your face. In this case it was a gradual slope and *after I came within rays of the light facing me I was continually in the rays of the light until I passed the rays, and I hit the rear end of the trailer.* * * *

"Q. When did you first see the truck, the tail end of the truck going north? A. When I was within about fifteen feet of the rear end of it.

"Q. And prior to that time could you see any tail-lights or any lights of that kind? A. *You could not see anything past the rays of these lights.*

"Q. *Couldn't you even see the road there?* A. *I could not see the highway there;* that is the reason I was slowing down; when I first seen the lights I was not traveling over fifteen miles an hour."

On cross-examination respondent testified that his brakes and car generally were in perfect condition; that while traveling at twenty-five miles an hour he could stop in twenty-five feet, and while traveling at fifteen miles an hour he could stop easily in twenty feet; and that the road was straight for about two hundred yards before the point of the accident. He then testified:

"Q. *That was 150 feet from the accident?* A. *Yes.*

"Q. *And it was at that time you were blinded and could not see anything?* A. *Yes.*

"Q. Until you were within fifteen feet of the truck you hit? A. That would be my best judgment."

He further testified that the trailer was loaded with pipe which extended beyond the body of the trailer three or four feet; that there was a small regular tail-light the size of a touring car tail-light mounted on the frame of the trailer underneath the pipe, but that he did not see this light until after the collision.

Irrespective of any negligence of the appellant, some duty rested upon the respondent under the circumstances depicted here. Under section 113 of the California Vehicle Act (St. 1923, p. 517) in force at that time, it was the duty of the respondent to drive his car at a careful, prudent speed not greater than was reasonable and proper under the circumstances then existing. Under section 121 of the same act it was his duty to drive with due caution and circumspection under the existing circumstances. In Donat v. Dillon, 192 Cal. 426, 221 P. 193, 194, the court said:

"A motorist must at all times use due care to avoid colliding with another; he must be ever alert and watchful, so as not to place himself in danger, and, while he may assume that others will exercise due care, he cannot for that reason omit any of the care which the law demands of him."

In Meyers v. Bradford, 54 Cal. App. 157, 201 P. 471, the court said:

"It is part of the duty of the operator of a motor vehicle to keep his machine always under control so as to avoid collisions with pedestrians and other persons using the highway. He has no right to assume that the road is clear, but under all circumstances and at all times he must be vigilant and must anticipate and expect the presence of others."

In Havens v. Loebel (Cal. App.) 284 P. 676, 678, the court held that it was contributory negligence as a matter of law for the driver of an automobile to pass an intersection at more than fifteen miles an hour when his vision was so blinded by the sun that his view was not clear and unobstructed. In that case the court quotes the following language from the case of Hammond v. Morrison, 90 N. J. Law, 15, 100 A. 154, decided by the Supreme Court of New Jersey:

"The defendant did not deny that the decedent came to his death in the way above stated, but attempted to excuse himself upon the ground that just before the collision the street lights which he had passed were reflected into his eyes by the windshield of his car, so that he was unable to see in front of him, and that this temporary blindness was the cause of the collision. His own story demonstrates his lack of care. No man is entitled to operate an automobile through a public street blindfolded. When his vision is temporarly destroyed in the way which the defendant indicated, it is his duty to stop his car, and so adjust his windshield as to prevent its interfering with his ability to see in front of him. The defendant, instead of doing this, took the chance of finding the way clear, and ran blindly into the trolley car behind which the decedent was standing. Having seen fit to do this, he cannot escape responsibility if his reckless conduct results in injury to a fellow being."

The court also refers to the case of Budnick v. Peterson, 215 Mich. 678, 184 N. W. 493, wherein the Supreme Court of Michigan lays down the rule if the vision of an automobile driver is obscured by the glaring lights of an approaching car, it is his duty to slacken his speed and have his car under such control that he can stop it if necessary.

The case of Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 714, 41 A. L. R. 1027, was one where the facts were in many respects similar to the instant case, so far as the matter now under consideration is concerned. The court there said:

"Under the circumstances of the present case—the narrowness of the unpaved portion

of the highway, the darkness of the night and the blinding of Kennell by the glare of the lights reflected from the headlights of the approaching machine—the highway over which Kennell was traveling was beset by danger of an extraordinary character from the time his vision became so obscured as to make it impossible for him to see plainly the road before him to the time that he struck the deceased. Thus the ordinary care with which Kennell was charged in driving his car over the highway required such an amount of such care as was commensurate with the exactions of the extraordinary dangerous circumstances under which he was then operating his car."

And also the following:

"Testing the conduct of the defendant Kennell, in operating his car on the occasion in question, by the rules and principles above set out, it is clear from his own testimony that he disregarded and violated every duty which the law imposes upon drivers of automobiles when driving the same over the public highways. * * * (1) He was traveling, up to the time the glare reflected from the lights of the approaching automobile * * * at the rate of 25 miles an hour; (2) when the glare struck his eyes he was a distance of between 150 and 200 feet from where he collided with deceased; (3) the glare so obstructed his vision that he was unable to see an object on the highway before him, although his lights were in good condition and under ordinary circumstances he was able by them to discern an object before him at a distance of from 75 to 100 yards; (4) he did not see the deceased until after his car struck him; (5) when the glare first struck his eyes and blinded him, with the result as indicated, he diminished the speed of his car so that thereafter and until he struck deceased, he was still traveling at a speed of between 20 and 25 miles an hour; (6) he did not put on his brakes, nor turn off the gas or ignition; (7) his brakes were in perfect order and he said he could have stopped his car between the time the glare first struck his eyes and the time he struck deceased, but that he did not do so, nor make any attempt to do so; (8) that he was not anticipating the presence of pedestrians on the highway in front of him—in fact, his mind, he himself in effect stated, was not on the matter of whether he might or might not overtake a pedestrian. It is only necessary to compare the foregoing résumé of Kennell's own testimony with the requirements of the law with respect to the duties of operators of automobiles when driving over the highways of the state to force the conclusion that, from the time the glare from the lights of the approaching car first reflected through his windshield into his eyes, he proceeded on until he struck and killed the deceased with a degree of indifference or recklessness as to the rights and safety of others who might be ahead of him on the highway closely approaching, if indeed, not amounting, under the circumstances, as revealed by his own testimony, to gross negligence."

Testing the conduct of the respondent here with the conduct of the defendant in the case just cited, we note the following:

1. Respondent was driving at twenty-five miles an hour up to the time he came within the rays of the lights in front. 2. When the rays of these lights struck his eyes and rendered him unable to see anything, even the highway, he was one hundred and fifty feet from the point of collision. 3. His vision was so obscured that he could not see the highway, it was impossible for him to see anything within the rays of this headlight nor anything past the rays of these lights, and after entering the rays of the lights he was continually in such rays until he passed them and hit the rear end of the trailer. 4. He did not see the truck or trailer until he was within approximately fifteen feet of it. 5. When the glare struck his eyes and blinded him so that he could not see anything, he reduced the speed of his car to fifteen miles per hour. 6. He did not put on his brakes nor turn off his gas or ignition nor attempt to further diminish his speed. 7. His brakes were in perfect condition and could have easily stopped his car within twenty feet. 8. In the case at bar there is no evidence as to whether or not the plaintiff anticipated the presence of others on the highway, but he did know that the car whose lights were blinding him was either stopped or practically so.

The only essential difference between the position of the respondent here and the defendant in the case of Hatzakorzian v. Rucker-Fuller Desk Co., supra, is that in that case the deceased was not negligent, while in this case we must assume that the agent of appellant was negligent. But the question of contributory negligence must be determined without regard to any negligence on the part of the defendant. Hutson v. Southern Cal. Ry. Co., 150 Cal. 701, 89 P. 1093.

It is to be observed that the respondent here, under the circumstances here shown, would be more certainly guilty of negligence than would be the driver of an automobile who is temporarily blinded by the bright lights of a swiftly passing car, in which case there might not be sufficient time after entering the direct rays of the light to stop or slow down sufficiently to have complete control of the car before the obstruction is passed. The respondent here, after finding himself in a position where he could see absolutely nothing, proceeded blindly for one hundred and fifty feet, when, according to his own testimony, he could have stopped easily in twenty feet.

[1, 2] Under the authorities in California, where the injured party proceeds on his way

while in a position where he cannot see, the question of contributory negligence is usually one of law. White v. Davis (Cal. App.) 284 P. 1086. The inference that this respondent was negligent appears to us to be irresistible. Van Praag v. Gale, 107 Cal. 438, 40 P. 555. Taking the facts most favorable to respondent, and as testified to by him, no question of fact remained to be submitted to the jury.

Under our view of this portion of the case, it becomes unnecessary to consider the other points raised on this appeal.

The judgment is reversed, with directions to the trial court to enter judgment in favor of the defendant.

I concur: MARKS, J.

Justice Erwin W. OWEN, pro tem., deeming himself disqualified, does not participate herein.

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106 Cal. App. 293

RUSSELL v. ROSCOE et al.

Civ. 221.

District Court of Appeal, Fourth District, California.

June 7, 1930.

1. Contracts ⟹85.

Contract to assign third of emoluments from contract with parties procured through assignee to market parachute *held* properly canceled for failure of consideration.

The evidence showed that parachute being manufactured by one whom assignee introduced to assignor was not the one referred to in assignment contract.

2. Sales ⟹52(7).

Evidence *held* to warrant finding that transferor of interest in company misrepresented value thereof.

There was evidence that company had been in financial straits and losing $1,500 a month for several months, had mortgaged its assets for $6,000, and was apparently headed towards bankruptcy; that one who had been advancing money to it considered his interest therein a liability; that transferor told transferee that interest transferred was worth about $12,000; that they and owner of another interest assigned their interests to one making advancements, who was to sell business, retain amount advanced, and divide any surplus among all owners except transferee; that sale netted less than such amount; and that transferee received no dividends or other profits from company, nor anything of value, for his interest in patent.

3. Fraud ⟹11(1).

Representation by party possessing or assuming superior knowledge or special information to party rightfully relying thereon is not mere expression of opinion.

4. Sales ⟹38(3).

Representation of value of interest in business to transferee, without business experience or knowledge of value thereof, *held* not mere expression of opinion.

5. Fraud ⟹64(3).

Whether representation was mere expression of opinion is fact question for court or jury, if doubtful.

6. Sales ⟹38(7).

Transferee without business experience or knowledge of value of store *held* not precluded from holding transferor of interest therein liable for false representation of its value because of opportunity to ascertain value.

7. Sales ⟹124.

Transferee transferring interest in company to co-owner at instance of original transferor *held* not required to restore it to latter before suing for cancellation of original contract (Civ. Code § 1691).

Co-owner, to whom interests of other owners were transferred, was to sell business and pay original transferor, not latter's transferee, share of proceeds in excess of amount due such co-owner.

8. Contracts ⟹266(1).

Complete failure of consideration obviates necessity of offer to restore property received before suing to cancel contract (Civ. Code § 1691).

Appeal from Superior Court, San Diego County; E. P. Shortall, Judge.

Actions by James M. Russell against David L. Roscoe and another. Judgments for plaintiff, and defendant Roscoe appeals.

Affirmed.

Crouch & Sanders, of San Diego, for appellant.

Luce & Swing, of San Diego, for respondent.

CARY, P. J.

At the times under consideration here, plaintiff was an inventor and the owner of a patent on a parachute. Defendant owned an interest in the Melrose Confectionery Com-

pany. Plaintiff, lacking both the business experience and the means to place his invention on the market, met defendant, who undertook, in consideration of receiving an interest in the patent, to find a party who could supply the experience and the means for marketing the same. The agreements between plaintiff and defendant include a total of six contracts. In due course these contracts produced two lawsuits, which were consolidated for trial purposes, resulted in judgments for plaintiff, are here presented on a single record and are now to be considered.

[1] The plaintiff in the first action seeks cancellation of three contracts on the ground of failure of consideration. Contract No. 1, dated September 23, 1925, provides that plaintiff is to assign his interest in the patent to a corporation thereafter to be organized, provides for the division of the stock among the parties, that plaintiff is to devote all of his time to the interests of the corporation, and that defendant and one Browne (the latter not being involved in this appeal) are to deposit $10,000 in a bank within 40 days, to cover expenses of incorporation, etc. Contract No. 2, dated October 5, 1925, refers to contract No. 1 and specifies with greater particularity the amount of stock each was to receive in the new corporation. Contract No. 3, dated October 29, 1925, likewise refers to No. 1 and states that since a new and better plan for the exploitation of the parachute has been proposed by defendant he is released from that part of contract No. 1 which required him to put up money for incorporation expenses, and further provides that if plaintiff enters into any contract concerning the patented parachute with parties procured through defendant, plaintiff is to assign to defendant one-third of all "emoluments" which plaintiff might receive therefrom. The plaintiff alleges in substance that nothing called for in any of the contracts has been performed by any of the parties, and that plaintiff had received no consideration for executing them. The second count in action No. 1 asks that plaintiff's title in the patent be quieted. The findings follow the allegations of the complaint and the judgment canceled the contracts and quieted plaintiff's title in the patent.

The sole point urged is that the findings are not supported by the evidence.

Appellant admits that he has no objection to the cancellation of contracts Nos. 1 and 2, but urges that No. 3, which provides that if plaintiff enters into any contract with parties procured through defendant, plaintiff is to assign to defendant one-third of all "emoluments" received therefrom, should not have been canceled since the evidence shows that defendant had, at the time of trial, already interested one McClintock in the parachute, and that plaintiff was receiving "emoluments" as the result. We have carefully reviewed the record on this point and find that appellant's contention cannot be sustained. While McClintock, the man now engaged in financing plaintiff's parachute, was introduced to plaintiff by defendant, yet it clearly appears that the parachute now being manufactured by McClintock is not the one referred to in contracts Nos. 1, 2, and 3.

[2] The complaint in the second action seeks cancellation on the grounds of fraud and failure of consideration of the remaining three contracts, which, for the sake of continuity, we will refer to as Nos. 4, 5, and 6. In No. 4, dated October 30, 1925, plaintiff assigns a one-third interest in this same parachute patent to defendant in exchange for a quarter interest in the Melrose Catering Company, but without recourse against defendant for any indebtedness of that company. Contract No. 5, also dated October 30, 1925, provides that if the "option" (apparently referring to contract No. 1) be exercised, then the interests exchanged under contract No. 4 are to be reconveyed to their original owners, that if plaintiff enters into any contract regarding this patent with any person obtained by defendant, defendant is to receive an additional one-third interest in the patent, and that if the "option" is not exercised and a contract is entered into by plaintiff with some other person, then contract No. 4 is to be modified in that defendant is to receive a half, rather than a third interest in the patent. Contract No. 6, dated November 19, 1925, transfers to defendant a two-thirds interest in the patent, and to plaintiff a quarter interest in the Melrose Company; the latter interest being received by Russell "in its present status of assets and liabilities as shown by the books and accounts of said business, without recourse against Roscoe." The plaintiff alleges in substance that, to induce him to sign contracts Nos. 4, 5, and 6, defendant represented that he was the owner of a quarter interest in the Melrose Company, that this interest was worth $12,000, and that the contracts set forth above would transfer this interest to plaintiff, all of which was false. He further alleges a previous demand for the rescission of the contracts and defendant's refusal. It may be observed, in passing, that all six contracts were prepared by the parties without the aid of an attorney, and that the ambiguities and incongruities which they contain, render a succinct statement of their provisions a matter of some difficulty. A second count asks that plaintiff's title in the patent be quieted. The findings followed the allegations of the complaint and the judgment canceled all three contracts and quieted plaintiff's title to the patent.

The points urged are that there is not sufficient evidence to sustain the findings and that the findings do not support the judgment.

The evidence shows the following: Defendant, who had been the owner of an interest in the Melrose Confectionery Company for some two years, desired to associate some one of broader experience in the catering business. In order to secure some one who possessed such experience, he had recently sold a quarter interest in the company to one Conn; but before the latter had had time to get the company on a paying basis his health had compelled him to give up the active management. A Dr. Crabtree, owner of the remaining interest, had been advancing money to keep the ship afloat. The Melrose Company had been losing money at the rate of some $1,500 a month for several months, had been in financial straits for the same period, had mortgaged its assets for $6,000, and was apparently headed towards bankruptcy. As expressed by the witness Crabtree, "About that time I considered my quarter interest in the business a liability." Defendant revealed none of these facts to the plaintiff, but instead stated to the plaintiff prior to the transfer that defendant's quarter interest in the Melrose Company was worth about $12,000. Plaintiff made no investigation of the financial status of the company, knew nothing of its condition, was totally inexperienced in matters of business, and relied on defendant's statements. Within a few months after the transfer of the quarter interest to plaintiff, he, for the first time, ascertained the true state of affairs. Conn, Roscoe, and Russell, realizing that the situation was desperate, assigned all of their interest to Dr. Crabtree, who was to attempt to sell the business. If successful, he was first to pay himself what he had previously advanced, roughly $18,000, and all overplus was to be divided equally between Conn, Roscoe, and Crabtree. It will be noted that Russell was not mentioned in this agreement to divide the overplus. The only sale Crabtree was able to make netted less than the $18,000 the company owed him, so that there was nothing left to divide. Plaintiff at no time received any dividends or other profits from the Melrose Company and at no time received anything of value for his interest in the patent. While practically every statement in the foregoing was disputed by defendant and his witnesses, the duty of resolving the conflict rested upon the trial court and there was sufficient evidence upon which to base the findings of misrepresentation.

[3, 4] Appellant urges, however, that even though there be evidence sufficient to sustain the findings, the facts found do not support the judgment, because any statement by defendant as to value was a mere matter of opinion and thus could not constitute a false representation.

False representations in connection with the purchase and sale of property have been the subject of many decisions in this state, and the question as to when a statement may be considered a mere expression of opinion, and when a representation of a fact, has received much consideration.

The circumstances under which the statement is made are very material in determining the category within which it falls. Thus when one of the parties possesses, or assumes to possess, superior knowledge or special information regarding the subject matter of the representation, and the other party is so situated that he may reasonably rely upon such supposed superior knowledge or special information, a representation made by the party possessing, or assuming to possess, such knowledge or information, though it might be regarded as but the expression of an opinion if made by any other person, is not excused if it be false. Haserot v. Keller, 67 Cal. App. 659, at pages 670, 671, 228 P. 383; Winkler v. Jerrue, 20 Cal. App. 555, at page 560, 129 P. 804; Palladine v. Imperial Valley F. L. Ass'n, 65 Cal. App. 727, at page 737, 225 P. 291; Zwart v. Landfield, 93 Cal. App. 328, at page 333, 269 P. 740; Davis v. Monte, 81 Cal. App. 164, at page 171, 253 P. 352; Colt v. Freitas, 76 Cal. App. 278, at page 286, 244 P. 916. The facts in the case at bar bring it squarely within the rule thus enunciated. The defendant had been the owner of this candy business for approximately two years and had been active in its management. On the other hand, the plaintiff, a young man whose experience in life was limited to that of an engineer and inventor in the air service of the United States Army, totally without business experience of any kind, was wholly ignorant of the value of this business in which he received the quarter interest.

[5] It is well settled that where there is any doubt as to whether a representation was intended and understood as a mere expression of opinion or a statement of fact, the question is not one of law, but one of fact for the court or jury. Davis v. Monte, 81 Cal. App. 164, at page 170, 253 P. 352; McKeever v. Locke-Paddon Co., 58 Cal. App. 51, at page 57, 207 P. 1040; French v. Freeman, 191 Cal. 579, at page 585, 217 P. 515; Dickey v. Dunn, 80 Cal. App. 724, at pages 727, 728, 252 P. 770. The trial court, in determining the question adversely to defendant's contention was but following this rule.

[6] Defendant urges that the opportunity to ascertain the value of the store was open to the plaintiff and therefore he cannot, by neglecting to investigate, hold the defendant liable for this representation. But it has been expressly held contra. Faull v. Johnson, 94 Cal. App. 230, at page 233, 270 P. 993; Proctor v. Arakelian (Cal. App.) 280 P. 368; Dickey v. Dunn, 80 Cal. App. 724, at page 727, 252 P. 770; Teague v. Hall, 171 Cal. 668, at pages 669–671, 154 P. 851.

Defendant further urges that the provisions of Civil Code, § 1691, have not been complied

with, in that no notice of intention to rescind was given, nor any offer made to restore to defendant the quarter interest in the Melrose Company prior to beginning the action.

As to the notice of intention to rescind: At least one count in the complaint set forth that such notice had been given. The court found this to be true and the finding is supported by the testimony of the plaintiff.

[7] Regarding the failure to offer to restore, there are two reasons why this was unnecessary.

Before this action was instituted plaintiff, at the instance of defendant, had transferred such interest as he might have in the company to Dr. Crabtree. This fact, when coupled with the further fact that Dr. Crabtree was to pay to defendant, rather than to plaintiff, any share of the overplus arising from the sale of the company, obviated the necessity for any offer to restore. The defedant had, by his own act, arranged things so that he would himself receive any returns which the sale of the quarter interest would bring.

[8] Furthermore the trial court held there was a complete failure of consideration, which fact in itself would likewise obviate the necessity of any offer to restore. Abney v. Belmont Country Club Properties, Inc. (Cal. App.) 279 P. 829.

The judgments in both actions are affirmed.

We concur: MARKS, J.; BARNARD, J.

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106 Cal. App. 242

LUCCHESE v. SAN FRANCISCO-SACRAMENTO R. CO. et al.

Civ. 7328.

District Court of Appeal, First District, Division 2, California.

June 6, 1930.

1. Railroads ⚷348(6).

Evidence *held* not to sustain finding that railroad motorman was guilty of negligence under doctrine of last clear chance.

According to the uncontradicted evidence, the motorman had no reason to believe that danger of a collision existed until he was within 200 feet of the crossing and the truck in which plaintiff was riding was about the same distance from the crossing. At that point the motorman threw loose the "dead-man" and brought the train to a stop within the shortest distance possible by the use of that device. Plaintiff claimed that the train might have been stopped more abruptly by the use of another method, although such method might have thrown some of the passengers to the floor and injured them.

2. Railroads ⚷320.

Railroad motorman, in effort to avoid collision at crossing has right to use braking device not injurious to passengers.

3. Railroads ⚷320.

In approaching crossing railroad's first duty was to exercise utmost care for safety of passengers, not toward occupants of crossing truck.

4. Railroads ⚷310.

Railroad owes duty of exercising ordinary care to those using crossing.

5. Railroads ⚷348(1).

Evidence *held* not to show that railroad motorman, confronted by emergency, did not exercise ordinary care toward persons about to use crossing.

Appeal from Superior Court, City and County of San Francisco; Thomas H. Selvage, Judge.

Action by Francesco Lucchese against the San Francisco-Sacramento Railroad Company and John Spingola. From judgments against both defendants, the railroad company separately appeals.

Reversed.

See also 289 P. 189.

F. M. Angellotti and C. W. Dooling, both of San Francisco, for appellant.

H. H. Eaton, of San Francisco, and Carroll A. Gordon, for respondent.

STURTEVANT, J.

The plaintiff commenced an action against the defendants to recover a judgment for damages for injuries sustained in a collision. Both defendants answered, and the trial was had before the trial court sitting without a jury. The trial court made findings in favor of the plaintiff, and each defendant has appealed separately and each has brought up a typewritten record including the original exhibits.

Appeal of San Francisco-Sacramento Railroad Company.

On the afternoon of the 23d day of December, 1927, John Spingola was driving his truck on which he had a load of furniture. He was seated on the left-hand side, and the plaintiff, his helper, was seated at his right. The cab of the truck had a glass window in front and on the right-hand side it had a door.

The door was closed, and on the right-hand side an ordinary automobile curtain was fastened down. The curtain had a small square lookout which resembled glass but was an imitation. After the truck left Bay Point in Contra Costa county, it proceeded toward Oakland. In a short distance the highway on which it was traveling crosses the railroad track of the defendant. When the truck was approximately fifteen hundred feet from the railroad track, one of the trains of the defendant was approaching from Sacramento and traveling toward Oakland and at that time was approximately two thousand feet from the crossing. The truck was traveling fifteen or sixteen miles an hour and the train was traveling thirty-five to forty miles an hour. Each was in clear view of the other. They were approaching each other on an angle of apparently sixty degrees. Immediately ahead of the truck were four distinct signs. One is a California state automobile sign which is a combination indicating a railroad crossing and a left-hand turn ahead. The next sign is an elevated cross-arm. The next one is apparently a county or state sign, "Slow—Turn." The last one is another elevated cross which is apparently on the further side of the railroad crossing. But all of said signs are clearly within the vision of one traveling on the highway. The approaching railroad train gave several signals with its whistle. However, the truck did not reduce its speed and a collision occurred at the crossing.

[1-5] The defendant corporation attacks finding No. 12, which is the only finding which purports to charge it with negligence. That finding purports to find the defendant guilty under the doctrine of the last clear chance. In this attack the defendant is clearly right. The uncontradicted evidence is to the effect that the motorman had no reason to believe that danger of a collision existed until the motorman was within two hundred feet of the crossing and the truck in which the plaintiff was riding was about the same distance from the crossing. At that point the motorman threw loose the "dead-man" and stopped the train in the shortest distance possible by the use of that method. The plaintiff replies that there was another method for stopping the train which would have slowed it down, but more abruptly, and he argues that the latter method was not adopted because the use of the other method might have thrown some of the passengers to the floor and injured them. If the reason for selecting the method of stopping the train was as claimed, the reason was sound. The defendant owed to its passengers the first duty, and that was to exercise the utmost care for their safety. To the plaintiff it owed the duty of exercising ordinary care. It did so. The plaintiff may not complain. Moreover, if the second method had been adopted the evidence shows that under the same set of facts the accident might have been worse. The motorman was confronted with an emergency. The evidence does not show that he did not exercise the care an ordinary man would have exercised under similar circumstances.

As it is not claimed that this defendant was guilty of any other kind of negligence, the judgment as to the railroad company must be reversed.

It is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.

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106 Cal. App. 245

LUCCHESE v. SPINGOLA.

Civ. 7296.

District Court of Appeal, First District, Division 2, California.

June 6, 1930.

1. Negligence ⚷93(1).

In railroad crossing accident, negligence of truck driver was not imputable to truck passenger not himself guilty of contributory negligence.

2. Railroads ⚷350(21).

Whether, under conflicting evidence, truck passenger involved in railroad crossing collision was guilty of contributory negligence, *held* for trial court sitting without jury.

3. Appeal and error ⚷1011(1).

Finding of trial court on conflicting evidence will not be disturbed on appeal.

4. Railroads ⚷327(12).

Under circumstances, truck passenger involved in railroad crossing accident *held* not under duty to jump.

The passenger did not apprehend danger. He was seated in the truck cab beside the driver. The cab had a closed door and drawn curtains. The passenger, who was not familiar with the road, testified that he neither saw the track nor the crossing and warning signs. The truck was traveling at the rate of 15 to 25 miles per hour.

5. Railroads ⚷334.

Truck passenger is not bound to make perilous jump to avoid injury in crossing collision.

6. Appeal and error ⟹1071(1).

Finding that truck passenger, involved in crossing accident, was unable to read crossing signs, *held* not injurious to defendant in suit against driver; there being no evidence that passenger knew that driver would not stop in time.

Appeal from Superior Court, City and County of San Francisco; Thomas H. Selvage, Judge.

Action by Francesco Lucchese against the San Francisco-Sacramento Railroad Company and John Spingola. From a judgment against both defendants, the latter appeals.

Affirmed.

Joseph E. Reardon and Benjamin F. Curtaz, both of San Francisco, for appellant.

Harry H. Eaton, of San Francisco, and Carroll A. Gordon, for respondent.

STURTEVANT, J.

This is an appeal by the defendant John Spingola from the same judgment that was under consideration in the case of Lucchese v. San Francisco-Sacramento Railroad Co., 289 P. 188.

[1] The defendant Spingola asserts that in finding No. 12 the court finds all the elements constituting the doctrine of the last clear chance; that said doctrine presupposes that the plaintiff has been guilty of contributory negligence; and therefore this plaintiff may not recover against this defendant. Whatever is contained in said finding is addressed to the truck and the train and their drivers. It contains nothing about this plaintiff. Conceding, for the purposes of the argument, that said finding holds that Spingola was guilty of contributory negligence, it will not be claimed that his negligence was imputable to this plaintiff. In another finding the court held this plaintiff was not guilty of contributory negligence. There is no conflict.

[2, 3] However, this defendant says the latter finding is not supported by the evidence. He intimates that plaintiff and Spingola were drunk. He quotes the witness Skaggs to the effect that immediately before the accident they were engaged in loud, boisterous talking, and therefore heedless of their surroundings. But the plaintiff testified to a contrary story. The conflict was for the trial court and is not to be disturbed by a court of appeal.

[4, 5] It is claimed the plaintiff was negligent because he did not jump out of the truck. He was under no duty to jump before he apprehended danger. He testified that he did not remember anything because he was knocked unconscious. He was seated on the front seat beside the driver. The cab had doors and curtains. The latter were fastened. The plaintiff was not familiar with the road. He testified he did not see the track nor the signs. No time arose, therefore, when he was called upon to jump. Moreover, the truck was traveling not less than fifteen miles and up to twenty-five or thirty miles per hour. At least during a part of the time, no duty rested on the plaintiff to make a perilous jump in order to free himself of the charge of contributory negligence.

[6] The trial court made a finding that the plaintiff was unable to read the English language and was unfamiliar with the meaning and import of railroad precautionary signs. The defendant claims that finding was not supported by the evidence. We are not clear that it was not supported. However, it was not an issue made by the pleadings, but was merely a finding of a probative fact. Assuming that the plaintiff saw the signs and understood each one, there was nothing showing that he knew that the defendant Spingola would not stop in due time. It is clear, therefore, that the finding of fact complained of was not injurious to the defendant. As to the appeal of this defendant we find no error in the record.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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106 Cal. App. 101

BUSH v. SOUTHERN PAC. CO. et al.

Civ. 4072.

District Court of Appeal, Third District, California.

May 27, 1930.

Rehearing Denied June 26, 1930. Hearing Denied by Supreme Court July 24, 1930.

1. Railroads ⟹350(7).

Whether appropriate crossing signals were given by train striking automobile *held* for jury under evidence.

2. Appeal and error ⟹930(1).

It is presumed on appeal that conflict in evidence was resolved in respondent's favor.

3. Railroads ⟹348(5).

Evidence *held* to warrant inference that train striking automobile at crossing was running at very high rate of speed.

Defendants' witness testified that fire and dust flew from rails after short whistle blast 1,000 to 1,200 feet from crossing until train stopped, the conductor testified that it went between 1,800 and

2,000 feet beyond crossing before stopping, the fireman testified that they could not have stopped engine any quicker, regardless of passengers' safety, and other witnesses testified that train was not brought to stop until it reached point considerably more than 2,000 feet beyond crossing.

4. Railroads ⟹347(1).

Evidence that driver of automobile struck by train invited injured occupant to ride therein *held* admissible.

5. Automobiles ⟹147.

Act requiring vehicle driver to drive at careful and prudent speed, having due regard to traffic, etc., merely declares common-law obligation, noncompliance with which constitutes negligence, though statutory commands were literally obeyed (California Vehicle Act, § 113, subd. (a).

6. Negligence ⟹6.

While violation of regulatory statute or ordinance constitutes negligence as matter of law, compliance therewith does not necessarily absolve one from negligence.

7. Railroads ⟹350(6).

Whether more than minimum care, required of persons in charge of dangerous instrumentalities by statute, was required in operating train under circumstances is for jury.

8. Railroads ⟹351(2).

Evidence *held* to warrant instructions submitting questions whether statutory signals constituted reasonable warning of train's approach to crossing and whether proper warning devices were maintained thereat (Civ. Code, § 486).

There was evidence that train was traveling at high speed down grade with little noise, that road to crossing was up grade and view of track therefrom obstructed, and that cross-arms were located near track on side of road opposite that from which train was approaching.

9. Railroads ⟹348(4).

Evidence *held* to warrant jury's conclusion that emergency whistle should have been sounded when fireman first saw automobile approaching railroad track when from 500 to 700 feet from crossing.

The fireman testified that he saw the automobile approaching the track from behind some trees 75 or 100 feet therefrom at about 12 or 13 miles per hour when train was from 500 to 700 feet from crossing; that car seemed to be slowing down; that he thought it was going to stop; and that he signaled engineer to stop when automobile was within 6 or 8 feet of track and train about 100 feet from crossing.

10. Appeal and error ⟹930(4).

It cannot be presumed that verdict for plaintiff was based on allegations of negligence, which plaintiff made no effort to prove.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Irene Davidson Bush against the Southern Pacific Company and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

W. I. Gilbert, of Los Angeles, for appellants.

Oliver O. Clark and Charles R. Nelson, both of Los Angeles, for respondent.

FINCH, P. J.

The defendants have appealed from the judgment herein in favor of the plaintiff for personal injuries sustained by her in a railroad grade crossing accident.

The accident occurred at a country crossing in Los Angeles county at the intersection of the Otterbien road and the defendant's railroad. The railroad is straight for a distance of 1,653 feet east of the crossing and then curves to the north. The elevation of the track at the crossing is about 10 feet lower than at the westerly end of the curve. Adjacent to and along the north side of the railroad right of way is Valley boulevard, stipulated to be "a heavily traveled boulevard." The Otterbien road crosses the railroad in a northerly direction into Valley boulevard. There were trees along the easterly side of the Otterbien road, up to a point 63 feet south of the railroad tracks, of such density as to obstruct the view to the east.

The accident occurred on Sunday, October 11, 1925, at about 4:30 in the afternoon. As one of the company's passenger trains, the Sunset Limited, made up of ten cars, approached the crossing from the east at a speed variously estimated by the witnesses at from 50 to 75 miles an hour, the plaintiff, riding in a seven-passenger Buick sedan, which was "in A-1 condition," with her son, her father and mother, and her brother, approached the crossing from the south. The brother owned the automobile and was driving it, and the plaintiff was riding as his guest in the rear seat. Apparently they were all oblivious of the approach of the train. The company's fireman testified: "When we got within approximately five or six or seven hundred feet of the crossing—I am not quite positive about the distance because it was all so quick—I saw an automobile come up from the left; that is, coming from the south, headed north, out from be-

hind some trees I should judge 75 or 100 feet from the railroad tracks, * * * and it seemed to me they were making about 12 or 13 miles per hour; and as they came up towards the crossing they seemed to be slowing down, and I surely thought they were going to stop. And when they got within six or eight feet of the track I saw the distance they had to travel and the speed they were making that they was not going to be able to stop, so I immediately gave a violent stop signal to the engineer to stop and also hollered up to him to stop, 'Hold it hard,' * * * Well, they were about 100 feet in front of us. We hit them." All in the automobile were killed except the plaintiff, who was seriously injured. A witness for the plaintiff, who was driving his own automobile in an easterly direction along Valley boulevard at the time of the accident, testified: "I had a pretty good view of the automobile as it went along, and it seemed as though it tried to stop. I couldn't say where it was when it seemed to try to stop. It was very close to the track, about 50 feet, and I think it tried to stop then. * * * As near as I can fix it, it is my judgment that these people drove 50 feet while the train was going 75." The foregoing is substantially all of the evidence in relation to the movements of the automobile immediately before the accident. The plaintiff testified: "After we left the house we went to an oil station at Hobart and Wilshire and got some gas. * * * I have no recollection of anything that occurred thereafter during that day. I next recall coming home in an ambulance from the Pomona hospital. * * * I do not recall at all of having seen a railroad train on that day. I do not recall any of the circumstances whatsoever of the accident which occurred on that day."

[1, 2] Eight witnesses, who were in positions to hear, testified that they did not hear any bell or whistle as the train approached the crossing, except the emergency whistle immediately before the accident. As many other witnesses testified that they heard the regulation whistle or bell or both. As said in appellant's reply brief, "there being a conflict of evidence upon the question of the giving or failure to give the appropriate signals or warnings, it was for the jury to decide whether or not such signals were given, or that warning signals could be seen or heard." On appeal it must be presumed that the conflict in the evidence was resolved by the jury in favor of the plaintiff. Keena v. United Railroads, 197 Cal. 148, 154, 239 P. 1061; Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 752, 134 P. 709; Vaca v. Southern Pacific Co., 91 Cal. App. 470, 474, 267 P. 346; Badostain v. Pacific Electric Ry. Co., 83 Cal. App. 290, 294, 256 P. 576; Jones v. Southern Pacific Co., 74 Cal. App. 10, 26, 239 P. 429.

[3] In addition to the estimates of witnesses, there is other evidence tending to show that the train was moving at a high rate of speed. A witness for the defendants testified: "I did notice sparks and dust coming from the engine just a few moments before he hit the crossing. I couldn't say the distance, because I didn't measure it, but I should say they were somewhere in the neighborhood of 1,000 or 1,200 feet from the crossing. As near as I can describe it, after the short blast of the whistle, why, the fire and dust began to fly from the rails, and as near as I could see, I thought he was pulling up the ties, and the fire flew from the wheels on the rails; looked just like one streak of lightning had hit the rails; and at the same time the dust rolled up so that you couldn't see the wheels of the car after that until he stopped." The train conductor testified: "Before the train stopped it had gone past the crossing approximately 2,000 feet, between 1,800 and 2,000 feet." The fireman testified: "We couldn't have stopped any quicker, regardless of safety to passengers." Some of the witnesses testified that the train was not brought to a stop until it reached a point considerably more than 2,000 feet west of the crossing. From the fact that the train traveled more than a half mile in making an emergency stop the logical inference arises that it was running at a very high rate of speed.

It may be conceded, for the purposes of this opinion at least, that the driver of the automobile in which the plaintiff was riding was guilty of negligence.

Appellants contend that "the evidence discloses that respondent herself was guilty of contributory negligence." It is deemed sufficient to say that there is not the slightest evidence tending to sustain that contention.

[4] It is contended that it was error to permit witnesses to testify to a conversation between the driver of the automobile and the plaintiff and others who rode in the machine, substantially to the effect that the driver invited the plaintiff to take the ride. The complaint alleges that the plaintiff was riding in the automobile at the time of the accident as the guest of her brother, and the answer denies that allegation. Proof of the invitation was certainly admissible as tending to show that the plaintiff was riding in the automobile as a guest. Such proof tended to show the relation between the driver and the plaintiff in the same manner that proof of the agreement between any other carrier and his passenger shows the relation between them.

The court instructed the jury substantially in the language of section 486 of the Civil Code, relating to ringing a bell and sounding a whistle on the approach of a railroad train to a crossing, and then stated:

"Whether or not a signal or warnings required by said code section, coupled with the rate of speed at which the train was running, was a reasonable warning, under the circum-

stances shown, to persons about to cross that track, is a question for you to determine after considering all of the evidence under the instructions and definitions you have been given as to what is ordinary care."

"It is for you to determine, from all of the evidence in this case, whether or not the defendant Southern Pacific Company maintained at the crossing in question, and at the place or places at said crossing where the same, if any, in the exercise of ordinary care should have been maintained, such warnings or devices, if any, for the reasonable protection of persons using said crossing, as, in the exercise of ordinary care, should have been maintained at said crossing by said defendant."

The appellants contend that "the reasonableness of the signals or warnings, or the rate of speed or the maintenance of warning or devices were not questions to be determined by the jury," but by the Legislature or the Railroad Commission.

"There are some authorities for the proposition that when a railroad company has followed the statutory directions as to giving signals, etc., it has discharged its whole duty in the premises, but the sounder doctrine is that the whole duty of a railroad company in respect of signaling the approach of its trains to highway crossings is not necessarily performed by a naked compliance with the statute in that behalf, and that such compliance does not necessarily relieve the railroad company from the necessity of taking such additional precautions as are essential to the safety of passers on the highway. * * * Neither the legislature nor the railroad commissioners can arbitrarily determine in advance what shall constitute ordinary care or reasonable prudence in a railroad company at a crossing, but each case must stand upon its own merits and be decided upon its own facts and circumstances; and for this reason it is usually a question for the jury whether or not precautionary measures in addition to the ringing of the bell or the sounding of the whistle ought to have been adopted to prevent a collision, and whether, under the circumstances of the case, the company used reasonable care." 22 R. C. L. 998.

"It is also held, in many of the states (in fact, the rule is well-nigh, if not quite, universal), that a railroad company, under certain circumstances, will not be held free from negligence, even though it may have complied literally with the terms of a statute prescribing certain signals to be given, and other precautions to be taken by it, for the safety of the traveling public at crossings. * * * The reason for such rulings is found in the principle of the common law that every one must so conduct himself and use his own property as that, under ordinary circumstances he will not injure another, in any way." Grand Trunk R. Co. v. Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. Ed. 485. See, also, Panama Railroad Co. v. Pigott, 254 U. S. 552, 41 S. Ct. 199, 65 L. Ed. 400, 60 A. L. R. 1096; Tisdale v. Panhandle & S. F. R. Co. (Tex. Com. App.) 228 S. W. 133, 16 A. L. R. 1273.

[5-7] The instructions under consideration state a rule of daily application in negligence cases. Section 113, subd. (a), of the California Vehicle Act (St. 1923, p. 517) provides: "Any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway." This is but a statutory declaration of a common-law obligation which would be equally binding if omitted from the statute, and a failure to comply with it would constitute negligence, even though every express command of the statute were literally obeyed. Reaugh v. Cudahy Packing Co., 189 Cal. 335, 340, 208 P. 125; Gross v. Burnside, 186 Cal. 467, 469, 199 P. 780. While the violation of a regulatory statute or ordinance constitutes negligence as a matter of law, "it does not follow that merely because one has complied with the terms of a statute or ordinance that he is thereby absolved from negligence." 19 Cal. Jur. 634. The great weight of authority is to the effect that statutory regulations constitute only the minimum measure of care required of persons in charge of dangerous instrumentalities, and a railroad company, equally with the driver of an automobile, must, in a proper case, submit to the judgment of a jury the question of whether something more than the minimum of care was required under the facts and circumstances given in evidence.

[8, 9] Considering the high speed of the train, the quietness of its approach, and the difficulty of stopping it on the down grade, the up grade along the Otterbien road to the crossing, the obstructed view from that road to the east, and the position of the railroad cross-arms near the track and to the left of the road, it cannot be said as a matter of law that there is no evidence to which the instructions in question are applicable. It is highly probable, however, that the jury based the verdict on the testimony tending to prove that no bell was rung or whistle sounded, and the evidence warrants the conclusion that an emergency whistle should have been sounded when the fireman first saw the automobile appear from behind the trees along the road.

[10] The other grounds urged for a reversal of the judgment which have any semblance of merit are sufficiently disposed of by what has already been said. The complaint contains several specific allegations of negligence which the plaintiff made no effort to prove, and it is

not to be presumed that the verdict of the jury was based on any of them.

The judgment is affirmed.

We concur: R. L. THOMPSON, J., PLUMMER, J.

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106 Cal. App. 759

Irene Davidson BUSH, Plaintiff and Respondent, v. SOUTHERN PACIFIC COMPANY (a Corporation) and John W. Reinhardt, Defendants and Appellants.

Civ. 4073.

District Court of Appeal, Third District, California.

May 27, 1930.

Rehearing Denied June 26, 1930. Hearing Denied by Supreme Court July 24, 1930.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

W. I. Gilbert, of Los Angeles, for appellants.

Oliver O. Clark and Chas. R. Nelson, both of Los Angeles, for respondent.

PER CURIAM.

This is an appeal by the defendants from a judgment in favor of the plaintiff for damages sustained by her in the death of her son in a railroad grade crossing accident. The facts involved in this case and the grounds urged for a reversal of the judgment are substantially the same as those in Bush v. Southern Pacific Co., 289 P. 190, this day decided by this court. In appellants' opening brief it is said: "By stipulation the same evidence offered and introduced in that action was made a part of the evidence in this case, being tried by the same jury and under the same and additional instructions."

On the grounds stated in the opinion filed in the case referred to, the judgment herein is affirmed.

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106 Cal. App. 179

PEOPLE v. DAVIS et al.

Cr. 1897.

District Court of Appeal, Second District, Division 2, California.

June 3, 1930.

1. Robbery ⟹11.

Felonious taking of money from immediate presence of person in possession, by force and fear, by one armed with dangerous and deadly weapon, is "first degree robbery" (Pen. Code, §§ 211, 211a).

[Ed. Note.—For other definitions of "Robbery in the First Degree," see Words and Phrases.]

2. Criminal law ⟹534(1).

Voluntary and deliberate confessions after prima facie proof of corpus delicti are sufficient in themselves to warrant conviction, regardless of other evidence.

3. Criminal law ⟹741(1), 742(1).

Weight of evidence and credibility of witnesses are for jury.

4. Criminal law ⟹739(2).

Whether alibi of defendant, prosecuted for robbery, was proven, *held* for jury.

5. Robbery ⟹24(1).

Evidence *held* sufficient to convict of robbery, although defendant did not himself commit act constituting crime, but aided in its perpetration (Pen. Code, §§ 31, 971).

According to the people's evidence, defendant waited in an automobile outside while his accomplice held up the cashier of a motion picture theater, and, after his accomplice had returned, drove away to elude capture. The evidence was chiefly circumstantial, consisting of confessions and defendant's conduct before and after the holdup.

6. Criminal law ⟹59(2).

In California, common-law distinction between accessory before fact and principal in cases of felony has been abrogated (Pen. Code, §§ 31, 971).

7. Criminal law ⟹404(3).

Instruments of crime are admissible in evidence after prima facie identification as those with which crime has been committed.

8. Criminal law ⟹404(3).

Accomplice's revolver, shown by defendant to officers and identified as revolver used in robbery, *held* properly admitted against accessory, tried as principal.

9. Criminal law ⟹404(3).

In trial of accessory to robbery, tried as principal, revolver and cartridges used by principal *held* admissible as necessary link in chain of evidence.

10. Criminal law ⟹404(4).

Defendant's wearing apparel is admissible, provided some connection between it and defendant and between it and crime be shown.

11. Criminal law ⟹404(4).

Defendant's coat and vest, which contained money from robbery, and bloody shirt worn on night of robbery, *held* admissible.

12. Criminal law ⟹438.

In trial of accessory to robbery, photographs of dead principal at morgue who was killed in perpetration of robbery *held* admissible for purpose of identification.

13. Criminal law ⟹438.

Photographs, where relevant, are admissible in evidence, even though tending to awaken feelings of horror and indignation in minds of jury.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

James J. Davis was convicted of robbery, and he appeals.

Affirmed.

R. E. Parsons, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

GATES, Justice pro tem.

Appellant and Vincent Berbalas were tried jointly under an indictment accusing them in count 1 of conspiracy to commit robbery and in counts 2, 3, 4, and 5 of the offense of robbery. At the conclusion of the evidence, the court dismissed counts 1, 4, and 5 as to both defendants, count 2 as to appellant, and count 3 as to Berbalas. Thereafter appellant was found guilty on count 3—the robbery of one Alice Schnauer, cashier of the Mar-Cal Theater, Hollywood, Los Angeles. He appeals from such judgment of conviction and from an order denying his motion for a new trial.

In view of appellant's contention that the evidence presented before the jury is insufficient to sustain the verdict rendered, we will give a rather extended statement of such evidence. On the evening of April 8, 1929, between the hour of 6 and 7:30, the appellant, in company with one "Gazick," now deceased, went to the auto rental place of Nicholas Macela at 1015 West Seventh street, Los Angeles. Mr. Macela had only two automobiles on the lot at that time for rent, a Buick coupé and a Jordan coupé. After some discussion as to the relative speed of the two cars, during which appellant asked which car was the faster of the two, he rented the "Blue Boy Jordan Convertible Coupé," which car he was told by the proprietor was the faster of the two. He paid the proprietor $25 therefor. Appellant then signed his name as "J. J. Daley." Mr. Gazick, who accompanied Davis was described as being about five feet six inches in height and wearing a gray sweater and a cap. Appellant was dressed in a suit of dark clothes.

About 8:30 of the same evening Miss Schnauer, the cashier of the Mar-Cal Theater, at 6021 Hollywood boulevard, Los Angeles, was held up while sitting in the box office of the theater. As she was rolling up some of the money that she had collected that evening, a person described as about five feet six inches in height and who wore a gray sweater and a cap came into the box office. He pointed a gun at Miss Schnauer, who thereupon screamed and ran to the door of the theater, where she shouted to the door boy that some one was taking her money. One Alexander, a police officer, who was at that time sitting in the theater, heard her. He opened the front door of the theater and saw a man coming out of the box office with a gun in one hand and what looked to be money in the other hand. The officer fired a shot at the robber, and then jumped back into the theater, where he remained for a period of thirty to sixty seconds. A man in the street pointed to a Jordan coupé which was parked near the theater, and as he pointed he said, "There they go." Alexander then fired another shot, which went high. He then commandeered an automobile that was going in the same direction as the Jordan coupé, but, after a little time, lost sight of the latter on a side street leading off Hollywood boulevard. The scream of the cashier attracted the attention of a man across the street, a Mr. Tate, who saw a man coming out of the lobby of the theater with a gun in his right hand and what resembled money in his left hand. The man fell down several times, stumbled and faltered, but proceeded to go and get into the Jordan coupé, which was parked, as stated before, near the entrance of the theater. As Mr. Tate came across the street to the Jordan coupé, while the holdup man was getting into his car, he saw another man in the automobile. The two told him to go back where he had come from. The floor of the lobby of the theater was bloody and was strewn with money.

At about 9:30 that evening appellant entered a drug store at 5401 Central avenue, Los Angeles, and inquired of the soda clerk as to where the doctor was. Appellant at the time was without a coat, and there were bloodstains on his shirt. The clerk pointed to Dr. Syer, who at that time was on the opposite side of the store and who had his office above the store. Appellant approached Dr. Syer and told him there was a man in very bad shape who needed medical attention—that the man had been shot—and asked the doctor to go with him at once to see his friend. Dr. Syer asked why he did not take his friend to the receiving hospital. Davis then stated that he did not want to take him there if he could avoid it, as it was an accident, but that, if the doctor, after seeing him, thought it was necessary to send his friend to the hospital, they should do it. Thereupon the doctor, in his own car, followed appellant to 973 East Forty-Seventh street, where

the latter took the doctor to a shack at the rear of the lot. In this shack the doctor found a man wounded, lying on a bed. His clothing was partly open and covered with blood. Appellant asked the doctor if he thought the man was going to die, and the doctor replied, "Absolutely." Davis then went with the doctor to a neighbor's house, where the latter telephoned to the receiving hospital for an ambulance. The police officers preceded the ambulance. Appellant was standing on the sidewalk when they arrived. He had no coat on, and his face was covered with blood. Officer Nolan asked if he was the man who had been shot. Appellant pointed to the rear of the property, and said that the man was back there in the shack, leading the officer to the place. The wounded man was lying on the bed and bleeding profusely. The officer asked the wounded man if he had been shot and he said, "Yes." At about that time the ambulance arrived and he was taken to the hospital.

Officer Nolan then asked appellant where he had met the wounded man. Davis stated that as he was coming out of a restaurant on Avalon boulevard near Vernon avenue he bumped into him; that the wounded man said he had been shot and asked him to get a doctor. Appellant also stated that he knew the injured man—that he met him a few days before in town. The officer then asked if appellant or the injured man lived at this shack, and appellant said, "No." Asked as to how he knew about the shack, appellant stated that he at one time had lived there, and that was why he had taken the injured man to the place. Officer Nolan then inquired of appellant as to where the car was in which he had brought the man to the shack. Appellant stated that it was outside, and, upon the officer's request to be shown the car, Davis took him to the front of the premises, where he pointed to a Jordan coupé. The right-hand side of the seat was covered with blood. There was a pool of blood on the floor of the car and also on the running board. Thereafter appellant was taken by the officers to the receiving hospital. In the meantime the wounded man, who was later identified as John Gazick, had died. Nolan then asked the appellant as to where the gun was that was used in the holdup, and appellant stated that he did not use any gun. Davis was then allowed to see the dead boy, and was asked if he was going to put all the blame upon him. Appellant asked if he would be charged with murder. The officer told that he could not be charged with murder because the boy had been killed by a police officer while committing a felony. Appellant then said, "All right, then, I will tell you." Thereupon he told Officer Nolan that he had rented the Jordan coupé under the name of "J. J. Daley"; that he did not have a gun, but that he would show the officer where the gun was that was used in the robbery and the money that was taken in the holdup of the Mar-Cal Theater. A number of police officers and appellant then went to the premises where the shack was located, and the latter directed the officers where to look for the weapon. Thereafter Officer Alexander found a revolver in a vacant lot on East Forty-Seventh street to the west of the shack in some tall grass alongside of some rubbish—the exact spot designated by appellant, who positively identified the gun as the one used by Gazick in the robbery of the Mar-Cal Theater.

After the gun was found, the appellant told Officer Stevens that he would show him where the money was. He then took Officers Stevens and Robbins to the rear of the shack, and lifted up a board from a box, in which there was a blue coat. In the left-hand pocket of this coat a quantity of currency was found, all wadded up in a chunk and saturated with fresh blood. There were some thirty-nine one-dollar bills and eleven five-dollar bills wadded together. Officer Robbins then asked appellant if the coat was his, and the latter said that it was. He was then asked if that was all the money that had been taken from the Mar-Cal Theater, and he replied that it was all that he knew anything about. He stated that he thought a Buick car was chasing him when he left the theater, but that he was not in any danger, because at one time he was traveling seventy miles an hour. Appellant asked as to who shot his partner, and, upon being told that it was an officer, said that he could not understand it, because he thought the "kid," Gazick, would shoot it out. Testimony was given by Officer Stevens that the number on the revolver identified by Davis had been filed off. The revolver was loaded with five shells. Officer Robinson stated that the gun was found approximately forty feet from the shack, on the vacant lot, and that it could not have been thrown there, for the reason that it was covered over with grass; also that the sidewalk leading from the street to the shack was splattered with blood. He further testified that blood was all over the inside of the shack.

Another officer, Taylor, testified that appellant told him that he and Gazick were driving on the boulevard and stopped just a few feet west of the entrance to the theater; that Gazick got out of the car and went to hold up the theater while he stayed in the car; that he heard shots, and Gazick came to the car; that he got out and helped Gazick get into the car; that he then drove away; that another car was following him, but that this car did not have a chance, for his car would make ninety miles an hour. The officer then asked appellant why he went to this particular place on the other side of town with the wounded boy, and appellant told him that he used to live there in the shack and that he

had to get the boy somewhere in order to do something for him, as the latter was in a serious condition; that he drove to the front of the property, picked up the boy and carried him into the shack; that he hid the gun and the money, and then went for a doctor.

Another police officer, Higgins, also testified to a certain confession made by the appellant, which confession was substantially as follows: Davis said he was present at the Mar-Cal Theater holdup, and that he had been on three other jobs; he said that they were going along Hollywood boulevard, and as they were about to pass the Mar-Cal Theater a fellow whom he called Jack said, "I'm going to take this place;" that they stopped and went in and pulled the holdup of the Mar-Cal Theater, and after he was shot that he got out of his car and helped "Jack" into the car. Other confessions were made by appellant wherein he admitted his participation in the robbery.

The cashier of the theater identified the deceased, Gazick, as the man that pointed a gun at her. Macela, who rented the Jordan coupé to appellant, also identified a photograph of the deceased as a likeness of the man who was with appellant at the time he rented the car. Officer Alexander, who did the shooting at the theater, identified this photograph as a likeness of the man that he shot.

Practically all of the foregoing facts were corroborated by competent evidence as well as by many incriminating circumstances.

Appellant, who had been convicted of a felony, to wit, the crime of robbery in San Diego some years ago, took the stand in his own behalf and denied any participation in the Mar-Cal Theater robbery. He stated that he had known his codefendant Berbalas and Gazick for a month and a half or two months. All had roomed together at the same place. He denied the various confessions which he is alleged to have made, and gave his version as to what happened on the 8th of April of last year. He claimed to have left Venice at 2:30 or 3 o'clock that afternoon, and that he stayed around Central avenue in Los Angeles until about 5:30, and then met a fellow who owned a Jordan roadster. He stated that this car had quite a knock in it. The car was at a garage. He went to the Ardale Apartments, at Forty-Seventh and Central, and they left the car there because they were afraid to drive it in the shape it was in. The friend, who later turned out to be Gazick, asked him to go with him on Seventh street where they could rent a car. He wanted the defendant to rent the car because he could not speak English very well and he had never rented a car in Los Angeles. He went there with Gazick, and asked the proprietor about the renting of a car. The friend, Gazick, told him that he wanted to use the car, that he had a date with a friend, Mr. Berbalas. The reason appellant rented the car instead of Gazick was that he had references in Los Angeles, and Gazick was not known here. He rented the car and paid the cash, and left a deposit and was given a slip, which he signed. He turned the car over to Gazick. Gazick took the car to Vernon and Central, where he left Davis at about fifteen minutes to 8. Davis stayed around Central and Vernon, where Gazick was to meet him at about 9 o'clock, but the latter did not show up. In the meantime appellant was at Central and Vernon, and there was a party there who had met him at the garage. This party was pointed out in the courtroom and turned out to be the witness Anthony Krajne. Davis went back to the Ardale Apartments between 9 and 9:30. He could not state the exact time, as he did not have a watch. The Jordan coupé, the one that had been rented, was standing there behind the apartment house, Forty-Seventh and Central, where "this fellow" generally parked his roadster. He went over to the coupé and opened the door and as he did the man was leaning to one side. He thought he was intoxicated. He asked him what the reason was, and the other said, "My God, get me a doctor quick, as I have been shot." He did not talk to appellant any more about being shot or anything about it.

Appellant further testified that he drove the car across the street, about three hundred yards from the corner of Wadsworth and Forty-Seventh—973 East Forty-Seventh street. He knocked on the door, and a gentleman whom he had known for three years came to the door. He asked him for a bed or a room where he could leave the man, as he was bleeding to death, while he looked for a doctor. He told Davis that he could leave Gazick on the bed. Appellant left the wounded man there and rushed for a doctor. The officers tried to make him confess, but he did not know anything to confess, so finally they gave it up and asked him if he saw a gun, and he told them he presumed it was a gun or something that this man had thrown when he took him out of the car, and that it had lit in the grass alongside of the fence by the house where he had taken him. He took the officers there voluntarily and showed them where the gun was—where he saw the gun thrown—and he, the officer, asked Davis if there was any money. He told the officer that when he took the man out of the car he had handed him some money, but he did not know how much there was, as the money was in his coat pocket which he had laid on the bench by the side of the house. He further stated that he could not drive an automobile by reason of some eye affliction, and that it had been a number of years since the last time he had driven an automobile.

Appellant endeavored to establish an alibi by the witness Anthony Krajne, who testified in substance as follows: That he is a marine

engineer and lives at 694 South Rio street, Los Angeles. On the evening of April 8th, which was Monday, he worked until 5 o'clock, and then went down to Sixty-Eighth and Central avenue to Paul's Service Station. He was getting gas down there. His son was running the gasoline station. He left the station at 8:15. The reason he knew it was 8:15 was because he looked at the Goodyear clock at the Goodyear Tire & Rubber Company plant. He saw Mr. Davis. He was at Vernon and Central, in front of the Allen drug store, on the northeast corner. He, Krajne, excused himself for running into and knocking Davis; looked him in the face; had seen him prior to that time; had seen him several times on previous occasions—the previous Saturday, over at Emil's Garage, Fifty-Sixth and Central.

[1] As to appellant's claim of insufficiency of the evidence to sustain the verdict, it may be said that if "Gazick," who is now deceased, defendant's friend and partner, were appealing to this court from a judgment of conviction upon the evidence contained in the record now before us, we would ineluctably hold that this evidence establishes his guilt beyond all reasonable doubt, because all the necessary elements of first degree robbery: the felonious taking—an intent to steal (People v. Keefer, 65 Cal. 232, 233, 3 P. 818; People v. White, 5 Cal. App. 329, 90 P. 471; People v. Foss, 85 Cal. App. 269, 259 P. 123); the ownership of the property (People v. Anderson, 80 Cal. 205, 22 P. 139; People v. Remington, 74 Cal. App. 371, 240 P. 526), the taking from the immediate presence of the one in possession, Miss Schnauer, of the money (Pen. Code, § 211; People v. Stevens, 141 Cal. 488, 75 P. 62; People v. Sylvis, 72 Cal. App. 632, 237 P. 802) by force and fear (People v. Wilson, 119 Cal. 384, 386, 51 P. 639; People v. Sharp, 58 Cal. App. 637, 209 P. 266; People v. Ortega, 7 Cal. App. 480, 94 P. 869), and the perpetration of the crime by a person armed with a dangerous and deadly weapon (People v. Seawright, 72 Cal. App. 414, 237 P. 796; Lipscomb v. State, 130 Wis. 238, 109 N. W. 986; People v. Shaffer, 81 Cal. App. 753, 254 P. 666; People v. Freeman, 86 Cal. App. 374, 260 P. 826; People v. Egan, 77 Cal. App. 279, 246 P. 337; sections 211, 211a, Pen. Code) —have been positively, definitely, and overwhelmingly proven.

[2, 3] Independent of the many incriminating acts of the defendant and of the surrounding circumstances, and after prima facie proof of the corpus delicti, the confessions of the defendant, which were freely, voluntarily, and deliberately made and identified, would have been sufficient in themselves, as substantive evidence of guilt of a most satisfactory character, to warrant a verdict of guilty. People v. Ford, 25 Cal. App. 388, 143 P. 1075; People v. Jones, 32 Cal. 80; People v. Richardson, 161 Cal. 552, 120 P. 20; People v. Vuyacich, 57 Cal. App. 233, 206 P. 1031; People v. Ruef, 57 Cal. App. 230, 206 P. 775. The weight of the evidence and the credibility of the witnesses are questions for the jury to determine. 22 Cal. Jur. 871, and cases there cited.

[4] As to appellant's alibi, we may repeat what was said in People v. DeVerre, 68 Cal. App. 742, 744, 230 P. 197, 198: "The defendant's story is plausible, but the jury had the advantage of the presence of the defendant and evidently came to the conclusion that the recital of what took place lacked the essential element of truth." See People v. Seawright, supra, pages 417, 418, of 72 Cal. App., 237 P. 796.

[5, 6] How can it be said after a careful examination of all of the evidence before us that appellant, who was prosecuted as a principal under sections 31 and 971 of the Penal Code, is not guilty of the crime of first degree robbery? In concluding appellant's first point, we may say here, as was said by this court in the recent case of People v. Clensey et al., 274 P. 1018, 1020, that "it cannot be seriously questioned that the testimony amply supports the determination of the jury, when we bear in mind the oft-stated rule prevailing in California, codified in section 971 of the Penal Code, that there is no distinction between an accessory before the fact and a principal. Here the actual robbery is not in dispute, nor can it be successfully argued that the appellants were not found to be in possession of the stolen property, which, together with their admissions, renders almost impossible any other conclusion than that they were instrumental in plotting and bringing about the commission of the crime, although they may not have actually participated in the physical acts of the robbery."

[7, 9] Appellant contends that the trial court erred in permitting the introduction in evidence of the gun found on the premises in East Forty-Seventh street on the night of April 8th and identified by him as the gun used in the robbery of the Mar-Cal Theater, over the objection of defendant's counsel. Appellant cites in support thereof the well-known case of People v. Mullen, 69 Cal. App. 548, 231 P. 588. The facts in People v. Mullen are not analogous to the facts in the instant case. In that case, which was a prosecution for robbery, there was admitted in evidence, over defendant's objection, a pistol and some cartridges which were tossed, at the time of defendant's arrest and after the robbery, by another who was riding with defendant in an automobile, into the tonneau of the car, which objects were not identified as having any connection with the robbery. It was not even shown that the defendant knew that his companion had a revolver or cartridges. In the instant case the revolver was positively identified by appellant as the one used by

Gazick in the Mar-Cal Theater holdup. He (Davis) pointed out this revolver to the police officers, and showed them where it was hidden. It was conclusively shown that this was the same weapon. Nor is the instant case like People v. Smith, 55 Cal. App. 324, 203 P. 816, cited by appellant. In that case, where the defendant was charged with murdering his wife by means of cyanide administered to her, it was not shown that the defendant had ever seen or had any knowledge of the can of cyanide. It is a well-settled principle of law that instruments of crime may be admitted in evidence after they have been identified, prima facie, as those with which the crime was committed. People v. Miller, 177 Cal. 404, 170 P. 817; People v. Stoerkel, 87 Cal. App. 336, 262 P. 825; People v. Hale, 81 Cal. App. 734, 254 P. 639; People v. Ferdinand, 194 Cal. 555, 229 P. 341; People v. Smith, 74 Cal. App. 510, 241 P. 267. There was no error in admitting the revolver, as it was clearly shown that the crime had been committed with the aid of the identical weapon offered, and that defendant was within a few feet of the theater when the crime was committed. 8 Cal. Jur. 145; People v. Sansome, 84 Cal. 449, 24 P. 143; People v. Hope, 62 Cal. 291; People v. Winters, 29 Cal. 658. The admission of the revolver and the cartridges was a necessary link in the people's chain of evidence.

[10, 11] As to appellant's claim that the bloody shirt, as well as the coat and vest worn by him on the night of April 8th, were erroneously admitted in evidence over the objection of his counsel, these articles were positively identified by one of the police officers as having been worn by Davis on the night in question. The federal case of Sorenson v. United States (C. C. A.) 168 F. 785, does not aid appellant in his contention, for the reason that it appears in that case that it was not shown that the articles in possession of the defendant were used in the commission of the burglary nor that the defendant was in the vicinity at or near the time of its commission. Likewise, in the case of Hauger v. United States (C. C. A.) 173 F. 54, cited by appellant, there was nothing in the evidence to connect the defendant with the counterfeit coins exhibited to the jury. The rule regarding the admissibility of articles of clothing is well settled. 8 California Jurisprudence, 145, clearly states it as follows: "Wearing apparel of the accused is admissible, provided some connection between it and the accused, and between it and the supposed crime is shown." See People v. Nakis, 184 Cal. 105, 193 P. 92; 16 Cal. Jur. 549, § 1053. Defendant Davis admitted hiding the coat which contained the money from the robbery. He admitted that it was his coat. The shirt admitted in evidence was the one worn by him on the night of April 8th. All of these articles were relevant and pertinent, and were properly admitted.

[12, 13] Appellant makes the claim that photographs taken of Gazick at the morgue were improperly admitted. These photographs were offered for the purpose of establishing the identity of the deceased as the one who committed the crime. The rule is well settled that photographs may be admitted even though they may tend to awaken feelings of horror and indignation in the minds of the jury. 8 Cal. Jur. 137, 138; 16 Cor. Jur. 744; People v. Saenz, 50 Cal. App. 382, 195 P. 442; People v. Balestieri, 23 Cal. App. 708, 139 P. 821. They are also admissible in evidence to show identity. 22 C. J. 915; People v. Durrant, 116 Cal. 179, 213, 48 P. 75.

Judgment and order affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

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106 Cal. App. 264

McCLUNG v. JOHNSON, County Auditor.

Civ. 3327.

District Court of Appeal, Third District, California.

June 6, 1930.

1. Clerks of courts ⟹1.

Clerk of justice's court, empowered to administer oaths, prepare bonds, etc., was an "officer," not mere "employee."

[Ed. Note.—For other definitions of "Employee" and "Officer," see Words and Phrases.]

2. Statutes ⟹225¾.

Statute which has been judicially construed and is re-enacted must be considered as adopting interpretation given.

3. Statutes ⟹181(1).

Intention of Legislature should be given effect in construing statute if it can be ascertained.

4. Clerks of courts ⟹31.

Salary of clerk of justice's court in city of two and three-fourths class having police court *held* payable by county (Code Civ. Proc. § 103½; Pol. Code, §§ 4014, 4288; Const. art. 11).

Pol. Code, § 4288, provides that salaries of officers named in title shall be paid monthly out of county treasury, etc., and section 4014 found in same title provides

for justices of the peace, constables, and such subordinate officers as are provided by law.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Ruby F. McClung against F. H. Johnson, as County Auditor of San Joaquin County, for a writ of mandate to compel the payment of salary as Clerk of Justices' Court of the City of Stockton. From a judgment for defendant, plaintiff appeals.

Reversed, with directions.

Gumpert & Mazzera, of Stockton, for appellant.

Guard C. Darrah, Dist. Atty., and T. S. Louttit, Deputy Dist. Atty., both of Stockton, for respondent.

PLUMMER, J.

The appellant in this action was, during all the times mentioned herein, the duly appointed, qualified, and acting clerk of the justices' court of the city of Stockton. The city of Stockton is a municipal corporation of two and three-fourths class. It is incorporated under a freeholders' charter, duly ratified and approved by the Legislature. Under the charter of the city of Stockton there was created a police court in and for said city. This court is presided over by a police judge, and also has a duly appointed, qualified, and acting clerk.

The section of the Code of Civil Procedure under which the appellant was appointed and qualified as the clerk of the justices' court of the city of Stockton provides a salary of $1,500 per year. On or about the 1st day of February, 1927, the appellant applied to the county auditor of the county of San Joaquin for a warrant in her favor in the sum of $125, payable out of the county treasury of the county of San Joaquin, as and for her salary for the month of January, 1927. The respondent, as the county auditor of said county, refused to issue or deliver to the appellant a warrant in said sum, or any sum, as and for her salary as clerk of said court. Upon the refusal of the auditor to issue the warrant as herein referred to, this action was begun in the superior court of the county of San Joaquin, praying that a writ of mandate be issued by said court, directed to the respondent as the auditor of said county, to issue the warrant as requested by the appellant as and for her salary for said month of January, 1927, as clerk of the justices' court of the city of Stockton. The respondent appeared in this cause and filed a demurrer to the appellant's petition, which demurrer was sustained, and judgment thereafter entered in favor of the respondent denying the appellant any relief herein. From this judgment, the plaintiff prosecutes this appeal.

Only one question is involved in this action, to wit, Is the salary of $1,500 per year, to which the appellant is entitled, payable out of the county treasury of the county of San Joaquin? No question is presented as to whether appellant is entitled to any salary, nor is any issue tendered as to the amount thereof.

It appears from the record that the appellant was denied relief by reason of the wording of section 103½ of the Code of Civil Procedure, as said section read and was in force during the time involved in this proceeding. After the providing for a clerk of the justice's court in cities of the two and three-fourths class, and fixing the salary at $1,500 per annum, and also fixing the salaries of other clerks, the section concludes as follows: "Said salaries shall respectively be payable in equal monthly installments out of the treasury of said cities."

This section was re-enacted by the Legislature in 1925 (St. 1925, p. 183), containing the language which we have above set forth, after the decision of the Supreme Court in the case of Graham v. Mayor of Fresno, 151 Cal. 465, 91 P. 147, 149, to which case reference will be hereafter made.

In 1923, section 103 of the Code of Civil Procedure was amended (St. 1923, p. 1011), in such a manner as to provide for the election of a justice of the peace in cities of the two and three-fourths class, which includes the city of Stockton. This section specifies the salary to be received by the justice of the peace of such court, and also provides for the payment of all fees collected by such justice, into the county treasury. No change was then made in the reading of section 103½ Code of Civil Procedure. Subsequently, in 1927, section 103½ of the Code of Civil Procedure was amended (St. 1927, p. 1657) relative to the payment of salaries, to read as follows: "Said salaries shall respectively be payable in equal monthly installments by warrants drawn each month upon the salary fund, or if there be no salary fund, then upon the general fund, of such city or county as the case may be, such warrants to be audited and paid as salaries of any other city or county officials respectively," etc.

In the case of Graham v. Mayor of Fresno, supra, the Supreme Court had before it the question as to whether the cost of maintaining a justice's court in and for cities having a police court created by charter, could be made chargeable against such cities. In that case it is held that section 8½ of article 11, Const., giving to cities having a freehold charter, the power to create police courts, vested in such city the exclusive right to create such police courts, and left to the Legislature the power only of creating justice's courts, the expenses of maintaining which could not be made chargeable against the mu-

nicipality in which such court was created. The language of the Supreme Court, in this particular, is as follows: "The effect of subdivision 1 of section 8½ of article 11 was to make the matter of such police courts purely a municipal affair as to any freeholders' charter city which subsequently made appropriate provision in its charter for such court. It confided the subject-matter of such courts, and the election and compensation of the judges thereof, to any such city desiring to assume, and assuming, control thereof, just as, by the same section, the matter of fixing the compensation of county officers in consolidated cities and counties was confided to the city and county to be provided for in its freeholders' charter. Such jurisdiction could not coexist in both the Legislature and the city, and the provision for the assumption of such jurisdiction by the city necessarily contemplated the removal of the same from the Legislature, whenever the jurisdiction was assumed by the city. Any act of the Legislature relative to such subject-matter would necessarily be inconsistent with a charter provision in regard to the same subject-matter. As to such matters as the Constitution authorizes to be provided for in freeholders' charters, the provisions of the charter are supreme, superseding all laws inconsistent therewith (section 6, art. 11, Const.), and being exempt from any control by any subsequent act of the Legislature."

The effect of this decision was to write out of section 103½ of the Code of Civil Procedure that portion which specified that the salary of the clerk of a city justice's court was payable out of the city treasury. Applied to the case at bar the effect of the decision was and is to write out of section 103½, Code of Civil Procedure, the provision that the salary of the appellant is payable out of the city treasury. This leaves the section as though it simply read: The salary of the clerk of the justice's court of the city of Stockton is the sum of $1,500 per year, payable in equal monthly installments.

[1] We have thus the simple proposition of the Legislature creating a justice's court for the city of Stockton, providing for a clerk of said court at an annual salary of $1,500 per year, payable in equal monthly installments, with all fees collected to be turned over to the county treasury. By reference to the sections of the code which we have mentioned, it will be noticed that the clerk of the justice's court is impowered to perform a number of functions, such as the administration of oaths, the preparation of bonds, justification of bail, etc., which under the decision of this court in the case of Cunning v. Carr, 69 Cal. App. 230, 230 P. 987, would constitute such person an officer and not a mere employee. It is further provided, in this section for the appointment of the clerk, that the appointment must be approved by the board of supervisors. In every particular except the actual naming of the payor, provision has been made for the salary of the appellant. Is the actual naming of the payor necessary to effectuate the intention of the Legislature?

In the case of Jenks v. City of Oakland, 58 Cal. 576, we have a parallel situation, the only difference being that the case at bar is a county affair, whereas in the Jenks Case it was a municipal question. Section 103 of the Code of Civil Procedure as enacted in 1880 (see Amendments to the Codes 1880, p. 34), read as follows, in so far as it is pertinent here: "In every city having 10,000 and not more than 20,000 inhabitants, there shall be one justice of the peace, and in every city having 20,000 and not more than 100,000 inhabitants, 2 justices of the peace, to be elected in like manner by the electors of such cities, respectively. * * * Every justice of the peace in any city having over 10,000 inhabitants shall receive an annual salary of $2,000 per annum, and shall be provided by the city authorities with a suitable office in which to hold his court. All fees which are by law chargeable for services rendered by such justice of the peace in the city's affairs shall be by them, respectively collected, and on the first Monday in each month, every such justice of the peace shall make report, under oath, to the city treasury, of the amount of fees so by him collected, and pay the amount so reported to the city treasury to the credit of the general fund."

The court in the Jenks Case held that the city of Oakland was chargeable for the salary. We take the following from the opinion: "It is objected that it is not provided in the statute that the salary is to be paid by the City of Oakland. It is not expressly so stated, but we are of opinion that it was the intention of the Legislature that the salary should be paid by the city. This intention is in our judgment clearly manifested by the requirement that the fees of office collected by the Justice should be paid into the City Treasury.

[2] As we have stated, the Legislature, after the decision of the Supreme Court in the Graham Case, re-enacted section 103½ of the Code of Civil Procedure without eliminating the provision naming cities as the payer of justice's clerks. However, the law is very well settled that when a section of the Code or a statute has been judicially construed, and is again re-enacted, it will be considered that the Legislature re-enacted the statute in view of the decision of the court, and as adopting the interpretation so given.

In 23 California Jurisprudence, page 723, we find the following: "But where a statute has been judicially construed, a law subsequently enacted upon the same subject is to

be considered in the light of the interpreting decisions. And if a statute is re-enacted in substantially the same language, the legislature is presumed to have adopted the construction given the prior law." Again, as set forth in the same volume of California Jurisprudence, page 791: "The general rule is that provisions of the four codes must be construed with relation to each other, 'as though all such codes had been passed at the same moment of time and were parts of the same statute.' * * * All code sections relating to a particular subject are in pari materia, and should be read and considered together, or as a whole, or by the light of each other, if the language of any one section or part of the law is such as to render the legislative intent uncertain." Thus, whatever is said in relation to justice's courts, the establishment of the same, the officering of the same, to whom the fees collected shall be paid, are all to be taken into consideration in determining the intent of the Legislature as upon what particular treasury warrants shall be drawn for the payment of salaries. Also, what we have here quoted is applicable to sections of the Political Code hereafter to be mentioned. The justice's court in this case is not a municipal office. It does not exist under any of the provisions of the charter of the city of Stockton. The clerk, as an officer of that court, does not occupy such office by virtue of any charter provision. The creation, the existence, and the duties of the justice's court of the city of Stockton and of the clerk thereof, depend wholly and exclusively upon the act of the Legislature. The salaries are fixed by the Legislature. The office and all the duties connected therewith are a part and parcel of the county government of the county of San Joaquin, and not of the city of Stockton. See People v. Cobb, 133 Cal. 74, 65 P. 325, 326. In that case we find the following language: "It may be admitted that city justices of the peace do not come, or at least do not altogether come, within the category of county or township officers; but it is equally clear that they do not come altogether within that of city officers. * * * More accurately speaking, they, as well as county justices, form part of the judicial system of the state; and both come equally within the provisions of section 11, art. 6, of the constitution, which authorizes the legislature to 'determine the number of justices of the peace to be elected in townships, incorporated cities and towns,' " etc. It is further said, however, that: "It does not follow, however, from the peculiar nature of their offices, that justices of the peace or other judicial officers do not constitute part of county or city governments." See 21 Cal. Jur., p. 830.

With reference to the construction of the Code under consideration, respondent calls our attention to section 1858, Code of Civil Procedure, which reads: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

The argument based upon this section, however, overlooks the fact that everything in substance relative to the salary of the appellant, is contained in the code provisions which we have cited, when read in connection with the decisions of the Supreme Court. The substance is the creation of the office, the fixing of the duties of the officer, and the naming of the salary. The payer is incidental. The duties are all performed in this case for the benefit of the county of San Joaquin. The fact that the city of Stockton is a portion of the county of San Joaquin or even may possibly contain considerably more than half of the population of the county of San Joaquin, does not change the fact that the services are all performed for the county of San Joaquin, and the county of San Joaquin receives all the benefits by reason of the due administration of its laws, and the receipt of fines and fees collected. We do not, by the construction given to the statute, write anything into it, or take out of it anything which the Legislature had power to insert.

[3,4] While not specially referred to herein, we find nothing in the cases cited by respondent limiting any of the foregoing statements contained in this opinion. Nor do we need to set forth at length herein any of the rules relative to the construction to be given to a statute, further than to state that if the intent of the Legislature can be ascertained, it should be given effect. That it was the intent of the Legislature that the appellant, as the clerk of the justice's court of the city of Stockton, should receive an annual salary of $1,500 per year, cannot be gainsaid, and that it was the intent of the Legislature that the body politic, receiving all the benefits, should likewise bear the burdens, seems to us likewise clear. We think, also, that the following provisions of the Political Code are applicable. Section 4288 of the Political Code reads: "The salaries of such officers named in this title as are entitled to salaries shall be paid monthly out of the county treasury," etc. Said section also provides that the county auditor shall draw his warrant for such salaries monthly. This section is found in title 2, article 58. The same title of the code in section 4014, Political Code, provides for justices of the peace, constables, and such subordinate officers as are provided by law.

That the clerk of the justice's court is a subordinate officer provided for by law, appears from the code sections and decisions which we have considered herein.

The authority of the Legislature having been exercised under the provisions of article 11 of the Constitution in creating a justice's court for the city of Stockton, as a part of the county government of the county of San Joaquin and a part of the judicial system of the state, the salary of the appellant having been fixed, all the benefits from the creation of the office of which the appellant is a subordinate part, appearing to be for the benefit of the county of San Joaquin, we see no escape from the conclusion that the intent of the Legislature, following the decisions which we have mentioned, and the various provisions of the code which we have set forth, was and is that the county of San Joaquin is chargeable with the salary of the appellant. The writ of mandate should have been granted.

The judgment of the trial court is reversed, with directions to overrule the respondent's demurrer to appellant's petition.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

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106 Cal. App. 339

BENTON v. CITY OF SANTA MONICA.

Civ. 3953.

District Court of Appeal, Third District, California.

June 10, 1930.

1. Municipal corporations ⟹724.

Functions of municipality to conserve health and in exercise of police control are "governmental."

[Ed. Note.—For other definitions of "Governmental Function," see Words and Phrases.]

2. Municipal corporations ⟹729.

Functions of municipality exercised as means of obtaining revenue and ordinarily exercised by private persons are "proprietary."

[Ed. Note.—For other definitions of "Proprietary," see Words and Phrases.]

3. Municipal corporations ⟹849.

Permitting pole to float in ocean waters at municipal beach would constitute "dangerous condition," rendering city liable after notice and failure to remedy condition within reasonable time (St. 1923, p. 675, § 2).

Public Liability Act 1923, § 2 (St. 1923, p. 675), relating to liability of municipalities, renders municipality lable for injuries to persons and property resulting from dangerous or defective condition of grounds, if officers of municipality having authority to remedy condition had knowledge or notice of defective or dangerous condition and failed or neglected for reasonable time thereafter to remedy such condition or take such action as may be reasonably necessary to protect public.

[Ed. Note.—For other definitions of "Dangerous Condition," see Words and Phrases.]

4. Evidence ⟹5(2).

It is common knowledge that débris may be washed ashore by waves of ocean and that removal is necessary for safety of persons using public beaches.

5. Municipal corporations ⟹857.

Complaint against city for personal injuries sustained at bathing beach, not alleging lapse of reasonable time to remedy dangerous condition after notice, *held* insufficient (St. 1923, p. 675, § 2).

Plaintiff, a minor, while bathing at a municipal beach, was struck by telephone pole floating in water and washing back and forth by waves of ocean. Complaint alleged negligence in maintenance of beach and that injuries occurred after city had received actual notice of existence of dangerous condition, but failed to show reasonable time had been allowed for removal of obstruction as required by Public Liability Act 1923, § 2 (St. 1923, p. 675).

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Jane Benton, a minor, by her guardian, Boren R. Benton, against the City of Santa Monica. From a judgment dismissing the action, plaintiff appeals.

Affirmed.

Walter J. Little, William B. Gilroy, and Randall & Bartlett, all of Los Angeles, for appellant.

Chester L. Coffin and Orlando H. Rhodes, both of Santa Monica, for respondent.

PLUMMER, J.

The respondent had judgment of dismissal for failure of the appellant to file an amended complaint within the time allowed by the order of the court, after the court had sustained a demurrer to the appellant's first amended complaint.

Omitting the preliminary allegations of the complaint as to the minority of the plaintiff, the appointment of a guardian, and the municipal character of the defendant, the complaint alleges that the respondent city is built and constructed adjacent to the shore of the Pacific Ocean, and has within its confines a

strip of beach land owned by the respondent, and over which the respondent, at all the times mentioned in the complaint, exercised complete dominion and control; that said dominion and control consists in the patrolling of the beach land referred to, in the erection and construction of a wharf and other structures thereon, in the regulation and supervision of amusement concessions thereon, in the regulation and control of persons using said beach land for pleasure purposes, in keeping said strip of land clean, in the operation of various safety devices, in the renting and leasing of portions thereof. Without following the allegations of the complaint as to the particularity of the dominion and control exercised by the respondent, it satisfactorily appears therefrom that the leased portions returned some revenue to the city. The complaint then alleges: "That on the 14th day of June, 1925, the parents of the said Jane Benton having knowledge of the aforesaid acts on the part of said defendant, took the said plaintiff herein upon the beach land adjacent to the said defendant city, and more particularly, took the said plaintiff to a point on said beach land approximately 200 feet north of the municipal pier located in said city, and at the westerly terminus of that certain public street in said city known as 'Colorado Street.' That while on said beach land, said plaintiff received injuries which were occasioned by having a loose pile or telephone pole approximately 30 feet long, and which was washing back and forth in the waves of the Pacific Ocean, and up and on said strip of land, falling across her body. That said injuries were occasioned by reason of the negligent and careless manner in which said defendant was, on said date, exercising its control and dominion over said beach land, and more particularly because the defendant was, on said date, through its agents and employees, carelessly and negligently patrolling said beach, and carelessly and negligently protecting the public thereon. That said injuries occurred after said defendant had received actual notice of the existence of dangerous instrumentality, to-wit, the piling or telephone pole which injured the said plaintiff." Damages are then prayed for in the sum of $20,000. As just stated, the court sustained the defendant's demurrer to the plaintiff's amended complaint, and in the order sustaining the demurrer, gave the plaintiff ten days within which to file a second amended complaint, if so advised. No such amended complaint having been filed, judgment went for the defendant. We do not need to set out the specific grounds of demurrer, because they cover every proposition necessary to be considered.

[1, 2] It will be noticed that, while the complaint states certain portions of the beach land belonging to the city are leased, and from such leased portions the defendant derives some revenue, the allegations of the complaint do not show that the portion of the beach upon which the plaintiff is alleged to have received injuries was where the defendant was acting in any proprietary capacity. The complaint simply shows that the injury was received on said beach at a point approximately 200 feet north of a municipal pier belonging to the defendant. A consideration of all the allegations of the complaint would lead to the conclusion that this portion of the beach is open to the public for purposes of bathing, pleasure, and recreation; that this portion of the beach is used, maintained, and controlled by the city in the same capacity as city parks and playgrounds are maintained by municipalities. We do not need to enter into a discussion of the law relative to the maintenance of parks and playgrounds, and the responsibility of cities in relation thereto as it existed prior to the adoption by the Legislature of the Public Liability Act in 1923 (see Stats. 1923, p. 675), as the citation of one case is sufficient to show that, before the passage of the act to which we have referred, the complaint contains no facts establishing the liability of the city. We refer to the case of Kellar v. City of Los Angeles, 179 Cal. 605, 178 P. 505. This case had to do with the injury of a child upon one of the playgrounds maintained by the city of Los Angeles. That case and the cases cited show that the maintenance of playgrounds, parks, etc., are a part of the proper governmental functions of cities in conserving the health of its citizens, and that the exercising of control and dominion thereover belongs properly to the police functions of a city. Whatever the law may have been declared to be in other states is wholly immaterial. The case of Chafor v. City of Long Beach, 174 Cal. 478, 163 P. 670, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106, and other cases having to do with similar questions, all deal with circumstances entirely different from those presented here. The distinction between governmental functions and proprietary functions is drawn along the line of conserving the health of the inhabitants of a municipality and the exercise of police control, as distinguishable from functions which have nothing to do with the health or police control that furnish means of obtaining revenue, or are especially such functions as are ordinarily exercised by private persons, wholly distinct from any relation to the health of the inhabitants of a city. There is nothing in the appellant's amended complaint showing that the city of Santa Monica was exercising any functions over the portion of the beach belonging to the city, in any proprietary capacity whatever. The fact that other portions may have been leased for revenue purposes, or the fact that the city may have built a municipal pier, tends in no degree to establish any proprietary activity over what appears to be an unleased and

open portion of the beach to which the public may have been invited.

[3-5] The cases which we have cited, and which have been presented to us by counsel are no longer controlling in this state. Section 2 of the Act of the Legislature, approved June 13, 1923 (Stats. 1923, p. 675), relating to the liability of municipalities, etc., reads as follows: "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition." Measured by the provisions of this act, the complaint before us is vitally defective. The section to which we have referred provides that, before a municipality can be charged with the negligence of its officers, it must appear that the city, through its officers, failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy the defective condition complained of. The complaint in this action simply avers that the injuries complained of occurred after defendant had received actual notice of the existence and location of the dangerous instrumentality, to wit, the piling or telephone pole floating in the water which caused the plaintiff's injuries. For aught that appears in the complaint, it may be that the telephone pole had just floated in, or had just been washed in by the waves of the Pacific Ocean. There is nothing in the complaint to show that the information or knowledge alleged to have been received by the defendant, was at a time sufficiently prior to the injury to admit of remedying the condition. While the respondent has argued that the telephone pole floating upon the waters of the Pacific Ocean, and being thrown up on the beach, would not constitute a dangerous condition, within the terms of the statute, we are of the opinion that there is no merit in such contention, and that, if such a dangerous instrumentality were allowed to ride upon the waves or breakers of the beach to which the city had invited the public, it would constitute an act for which the city would be liable in the event of injury, provided that the city did not take steps, within a reasonable time after acquiring knowledge of the presence of such dangerous instrumentality, to remove it. On the other hand, it is common knowledge that wreckage, timbers, or what may generally be classed as débris, may be washed ashore, and are washed ashore by the waves of the ocean, and that the removal of the same is necessary for the safety of persons using such beaches for bathing or pleasure purposes, and that at the same time it requires some effort and some skill to remove the same, necessitating the allowance of a reasonable time so to do. A complaint which fails to show that a reasonable time has been allowed for the removal of such obstructions, fails to bring the cause of action within the terms of the statute herein considered.

The appellant calls our attention to the cases of Rafferty v. City of Marysville (Cal. Sup.) 280 P. 118, Dawson v. Tulare Union High School District (Cal. App.) 276 P. 424, and Huff v. Compton City Grammar School District, 92 Cal. App. 44, 267 P. 918, as authority for the sufficiency of the complaint in this action. The facts in all those cases show that a sufficient time had elapsed after the creation or the inception of the dangerous condition, and the reception of knowledge thereof, before any action was taken to remedy the condition, and that no such action was taken. Here it is not a question of what the facts might show; it is a question of pleading. No questions of pleading were presented in any of the cases referred to. Whether the complaints would have been held sufficient upon demurrer is beside the question. Having gone to trial without raising the sufficiency of the complaint, whether the complaint set forth that a reasonable time after the reception of knowledge of the dangerous condition had elapsed for the removal or remedying of such condition, those cases are not authority as to the sufficiency of a complaint where the question is raised, not upon the facts, but upon the pleadings. That the complaint in this action might have been amended to comply with the provisions of the act which fixes liability upon municipalities is not before us. The appellant was given ten days within which to amend, and, if a reasonable time had elapsed after receiving knowledge, by the city, of the alleged dangerous condition, and no steps had been taken to remove the same, the allegations of the complaint could easily have been amended to comply with the law.

Having failed to take advantage of the opportunity offered by the trial court to amend the complaint, and the complaint being manifestly insufficient, we have no recourse but to affirm the judgment, and it is so ordered.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

106 Cal. App. 388

HARTKE v. ABBOTT.

Civ. 6928.

District Court of Appeal, Second District, Division 2, California.

June 12, 1930.

1. Appeal and error ⟹158(2).

Statute cannot abridge right of appeal, where judgment has been satisfied against appellant's will (Code Civ. Proc. § 1049).

The statute referred to, Code Civ. Proc. § 1049, provides that an action is deemed to be pending from time of its commencement until its final determination on appeal, or until time for appeal has passed, unless judgment is sooner satisfied.

2. Appeal and error ⟹158(1).

Voluntary payment of judgment does not deprive party of right to appeal, unless it is shown payment was by way of compromise or with agreement not to appeal.

3. Judgment ⟹580.

Judgment was not final where appeal was pending, and therefore no property rights could be predicated on it.

4. Appeal and error ⟹158(2).

Where money paid into another court by insurers was paid in satisfaction of judgment against insured under decree, such payment did not deprive insured of right of appeal.

Creditor commenced action in Superior Court, and caused attachment and garnishment to be issued and levied on insurance companies, attaching and garnishing moneys in their possession belonging to debtor. Later the debtor recovered judgments against the insurance companies in another state, and creditor obtained judgment against debtor in the Superior Court. Subsequently, insurance companies filed complaints in federal court in Arizona, and the money represented by judgments against them was deposited with clerk of federal court. The creditor referred to, as well as others who were parties to federal court action, entered into stipulations allowing federal court to enter its decree distributing funds deposited with court in accordance with allegations of pleadings in the action, and under the decree rendered the judgment in Superior Court was paid in full.

5. Appeal and error ⟹781(1).

Where there is left any material question for determination, court should not dismiss appeal on ground question has become moot.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by C. H. Hartke against F. C. Abbott. From a judgment for plaintiff, defendant appeals. On motion to dismiss the appeal.

Motion denied.

Patrick F. Kirby, of Los Angeles, for appellant.

Dryer, Castle & Hartke and Woodruff, Musick, Pinney & Hartke, all of Los Angeles, for respondent.

GATES, Justice pro tem.

This case is before us on motion of respondent to dismiss an appeal of appellant from a judgment in an action on a promissory note. After the demurrer of plaintiff to defendant's answer was sustained without leave to amend, judgment was granted as prayed. The present motion to dismiss the appeal therefrom is based upon the pleadings, records, papers, and files in the action, including the transcript on appeal, together with the respondent's affidavit. The grounds relied upon for a dismissal are that the judgment has been completely settled and compromised; that all questions involved have become moot and abstract by reason of the payment of the amount claimed and the settlement of all issues, and that a decision in the cause would serve no useful purpose.

The salient facts may be gleaned from the affidavits of the respective parties. It appears that on December 8, 1925, respondent filed in the superior court of Los Angeles county an action against this appellant. He caused an attachment and garnishment to be issued and levied upon the Home Insurance Company of New York and upon the Springfield Fire & Marine Insurance Company attaching and garnishing moneys in their possession belonging to appellant by reason of certain fire insurance policies written by them in his favor, and by reason of fire which destroyed certain property of appellant, which property was covered by the policies. On January 16, 1929, judgment was rendered in certain actions instituted by appellant against the insurance companies in Yuma, Ariz., in the sum of $2,100 in each case, based upon the fire insurance policies. On January 20, 1929, respondent received judgment against appellant in the sum of $3,016; this being the judgment upon which this appeal is based. No stay bond was filed. On June 12, 1929, each of the insurance companies filed their respective complaints in the United States District Court in Phœnix, Ariz. In these cases the parties herein were named as well as all other parties claiming an interest in appellant's judgment which he obtained by reason of his policies and the fire.

The parties, as well as all others who were interested therein, filed pleadings in the suits in the United States District Court.

The money represented by the judgments obtained by appellant was deposited with the clerk of the United States District Court to be distributed in accordance with the decree to be rendered by such court. Respondent filed his answer and cross-complaint in each of the actions, asserting a claim to the funds superior to the claims of any of the other defendants. This claim was grounded upon the theory that the judgment he had obtained in the Superior Court of Los Angeles county and the attachment theretofore issued in said action gave to him this right. Appellant answered the cross-complaint in each action, admitting the judgment was granted after a demurrer was sustained without leave to amend, and alleging that he intended to prosecute an appeal therefrom. The demurrers filed by respondent to the answers, and each of them, were sustained by the federal court, with leave to file amended answers. Appellant did not file amended answers in either of said actions.

On January 13, 1930, appellant and respondent, as well as the other parties to the United States District Court actions, entered into certain stipulations allowing the District Court to enter its decree distributing the funds deposited with the court in accordance with the allegations of the pleadings in the actions. The stipulation, after the opening part thereof, states: "* * * That the Court may enter its decree herein distributing the funds deposited with said Court, in accordance with the rights of the respective parties as shown by the facts as alleged in the pleadings herein." Thereafter, pursuant to the stipulation, the money in the District Court was distributed to the parties who were found by that court, upon the facts stated in the pleadings, to be entitled thereto. Respondent in the federal actions obtained the full amount due him on his Superior Court judgment. Thereafter, without the consent or knowledge of appellant, he executed and filed a satisfaction of judgment in the Superior Court case.

Respondent contends that the United States District Court judgments, wherein the money was distributed, have fully satisfied the Superior Court judgments. He further contends that this appeal should be dismissed, claiming that all questions involved herein have become moot by reason of the judgments or decrees of the District Court, which decrees were rendered pursuant to stipulation of all parties, and that the decrees, in ordering distribution of the money to the various claimants, had the effect of satisfying the Superior Court judgment upon which this appeal is based. The general rule that the voluntary satisfaction of a judgment deprives a party of the right of appeal is, however, subject to certain other well-established principles of law.

[1] Section 1049, Code of Civil Procedure, cannot be used to abridge the right of appeal where a judgment has been satisfied against the will of the appellant. 2 Cal. Jur. 228. And further, mere enforced satisfaction of a judgment does not prevent the prosecution of an appeal therefrom by the defendant. Knight v. Marks, 183 Cal. 354, 191 P. 531; Sunset Lumber Co. v. Bachelder, 167 Cal. 512, 517, 40 P. 35, Ann. Cas. 1916B, 664; Patterson v. Keeney, 165 Cal. 465, 132 P. 1043, Ann. Cas. 1914D, 232; Buckeye Refining Co. v. Kelly, 163 Cal. 8, 124 P. 536, Ann. Cas. 1913E, 840; Warner Bros. v. Freud, 131 Cal. 639, 63 P. 1017, 82 Am. St. Rep. 400; Yndart v. Den, 125 Cal. 85, 89, 57 P. 761; Vermont Marble Co. v. Black, 123 Cal. 23, 55 P. 599; Kenney v. Parks, 120 Cal. 22, 52 P. 40; Ramsbottom v. Fitzgerald, 6 Cal. Unrep. 214, 55 P. 984; Preluzsky v. Pacific Co-operative Cafeteria Co., 195 Cal. 290, 232 P. 970; Graham v. Alchian, 51 Cal. App. 263, 197 P. 134.

[2] It has been held by our Supreme Court that the voluntary payment of a judgment will not deprive a party of his right to appeal, unless it is shown that the payment was by way of compromise or with an agreement not to take or prosecute an appeal. Warner Bros. v. Freud, supra; Hayes v. Nourse, 107 N. Y. 577, 14 N. E. 508, 1 Am. St. Rep. 891. This principle is stated in 2 Ruling Case Law, p. 65, § 47, as follows: "As a general rule, however, one against whom a judgment or decree for a sum of money has been rendered does not, by voluntarily paying or satisfying it, waive or lose his right to review it upon a writ of error or appeal unless such payment or satisfaction was by way of compromise or with an agreement not to pursue an appeal or writ of error. * * * The better view accordingly is, that though the execution has not issued the payment of a judgment must be regarded as compulsory, and therefore as not releasing error, nor depriving the payer of the right to appeal. Certainly the fact that the satisfaction of the judgment is coerced by execution or other process, such satisfaction being in invitum, does not operate as a waiver of the right to an appeal or writ of error." The foregoing rule finds support in Warner Bros. v. Freud, supra; Nashville, C. & St. L. R. Co. v. Bean, 128 Ky. 758, 109 S. W. 323, 129 Am. St. Rep. 333; Hayes v. Nourse, supra; Burrows v. Mickler, 22 Fla. 572, 1 Am. St. Rep. 217; Cassell v. Fagin, 11 Mo. 207, 47 Am. Dec. 151; Green v. Hall, 43 Neb. 275, 61 N. W. 605, 47 Am. St. Rep. 761; Johnson v. State, 172 Ala. 424, 55 So. 226, Ann. Cas. 1913E, 296; Workman v. Salzer Lumber Co., 51 N. D. 280, 199 N. W. 769; Hogue v. McAllister, 122 Wash. 347, 210 P. 671; Ricketts v. J. G. McCrory

Co., 138 Va. 548, 121 S. E. 916; Culp v. Sandoval, 22 N. M. 71, 159 P. 956, L. R. A. 1917A, 1157; Farmers' & Merchants' State Bank v. Michael, 36 S. D. 172, 153 N. W. 1008; The Barge No. 25 (C. C. A.) 14 F.(2d) 107; Dakota County v. Glidden, 113 U. S. 222, 5 S. Ct. 428, 28 L. Ed. 981; Hoogendorn v. Daniel, 202 F. 431, 120 C. C. A. 537; Josevig-Kennecott Copper Co. v. James F. Howarth Co. (C. C. A.) 261 F. 567; Preluzsky v. Pacific Co-operative Cafeteria Co., supra.

In Patterson v. Keeney, 165 Cal. 465, 132 P. 1043, Ann. Cas. 1914D, 232, the Supreme Court, speaking through Justice Shaw, said: "It is the established rule in this state that satisfaction of a judgment does not prevent the prosecution of an appeal therefrom by the defendant. Kenney v. Parks, 120 Cal. 24, 52 P. 40; Vermont M. Co. v. Black, 123 Cal. 23, 55 P. 599; Yndart v. Den, 125 Cal. 85, 89, 57 P. 761; Warner Bros. v. Freud, 131 Cal. 639, 645, 82 Am. St. Rep. 400, 63 P. 1017. * * * It appears therefrom that the great weight of authority elsewhere is in accordance with the present rule in California. It must be admitted that the rule allowing such relief is more in accordance with justice than the rule which denies it. Such cases should not be confused with those which deny to a party who has availed himself of the part of a judgment which is beneficial to him, the right to prosecute an appeal from dependent parts thereof which are against him. Estate of Shaver, 131 Cal. 221, 63 P. 340; San Bernardino County v. Riverside County, 135 Cal. 620, 67 P. 1047; Storke v. Storke, 132 Cal. 349, 64 P. 578; People v. Burns, 78 Cal. 646, 21 P. 540." For an elaborate statement of the above rule see 3 C. J. 675–678. Practically the same principle is set forth in 15 Cal. Jur. 268, in the following language: "A *judgment debtor* who has paid a judgment may nevertheless appeal from it, though not so in the case of a *judgment creditor* who has accepted payment." (Italics ours.) The above distinction is pointed out in Union Lithograph Co. v. Bacon, 179 Cal. 53, 175 P. 464.

The logic of the foregoing rule may be found in the quotation from Freeman on Judgments, § 480a, which is quoted in full in Warner Bros. v. Freud, supra, as follows: "One against whom a judgment is entered, if he fails to satisfy it, must expect to see his property seized and sold at a sacrifice; and it is difficult to conceive how his payment of the judgment can give rise to any estoppel against his seeking to avoid it for error. The better view, we think, is that, though the execution has not issued, the payment of a judgment must be regarded as compulsory, and therefore as not releasing errors, nor depriving the payor of the right to appeal."

[3] In the instant case the Superior Court judgment was not final, for the reason that an appeal was pending. Smith v. Smith, 134 Cal. 117, 66 P. 81; Ramish v. Workman, 33 Cal. App. 19, 164 P. 26; Feeney v. Hinckley, 134 Cal. 467, 468, 66 P. 580, 86 Am. St. Rep. 290. No property rights, therefore, could be predicated upon it. By the above statements we do not wish to be understood as saying that a judgment from which an appeal is pending cannot in a proper matter be considered for any other purpose, for such is not the rule. Lincoln v. Superior Court, 95 Cal. App. 35, 271 P. 1107.

[4] Had the court ruled as it did without any stipulation, there is no doubt but that the payment to respondent would be considered involuntary. Did the execution of the stipulation make the payment voluntary? Conceding, but not deciding, that it did, can it be said that such payment had the effect of a compromise or a settlement of the obligation? We are sure that it had not. It is perfectly clear that there was no agreement to refrain from further prosecuting the appeal from the judgment. A fair and liberal interpretation of the stipulation shows that the parties agreed to a distribution of the money in the hands of the clerk "in accordance with the *rights of the respective parties as shown by the facts alleged in the pleadings herein.*" (The italics are ours.) The facts alleged by respondent showed that he had a valid judgment, even though not final, against appellant for a certain amount, and that the same was unpaid; also that he had previously obtained a preference over the money by reason of an attachment and garnishment. The stipulation amounted to nothing more than saying to the federal court that it could make a distribution of the money in accordance with the rights of the parties as shown by the facts alleged therein.

Undoubtedly, if the judgment is reversed, the appellant will not be without his remedy. The Superior Court judgment, as stated, was not final. If we dismiss the appeal, and the dismissal becomes final, it will be tantamount to an affirmance of the judgment. Code Civ. Proc. § 955. We would by such affirmance forever preclude appellant from having an appellate tribunal determine whether the trial court erred in sustaining the demurrer to his answer without leave to amend, which ruling ultimately resulted in the judgment that appellant is now endeavoring to have this court reverse. The question presented in this appeal, which question concerns the action of the superior court, could not have been raised in the federal courts, but only in the state courts.

[5] The rule is well settled as to when a matter is moot and when it is not. The Supreme Court of South Dakota, in Clarke v. Beadle County, 40 S. D. 597, 169 N. W. 23, has laid down the rule as follows: "However, both reason and authority support the propo-

sition that, whenever the judgment, if left unreversed, will preclude the party against whom it is rendered as to a fact vital to his rights, such as to the validity of a contract upon which his rights are based, it cannot properly be said that there is left before the appellate court but a moot question, even though on account of changed conditions the relief originally sought by appellant cannot be granted upon the reversal of such judgment." The same rule is announced in 2 R. C. L. 170 and also in 4 C. J. 576, 577. The principle is also discussed in Kaufman v. Mastin, 66 W. Va. 99, 66 S. E. 92, 22 L. R. A. (N. S.) 855. In City of Albany v. Georgia-Alabama Power Co., 152 Ga. 119, 108 S. E. 528, the Supreme Court of Georgia refused to dismiss an appeal because the showing was not made that the questions were "completely moot."

From the foregoing authorities it clearly appears that, where there is left any material or vital question for determination—and we have found that such question exists here—the court should not dismiss the appeal, but should permit it to be heard on the merits.

Motion to dismiss is denied.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

FINK v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR LOS ANGELES COUNTY, et al.

Civ. 7312.

District Court of Appeal, Second District, Division 2, California.

May 20, 1930.

Hearing Denied by Supreme Court July 7, 1930.

Prohibition ⟹24.

Appellate court will quash alternative writ of prohibition to prevent expiration of period to move for new trial (Const. art. 6, § 4c).

An order denying the peremptory writ would not become conclusive on rights of parties for period of sixty days after decision under provisions of Const. art. 6, § 4c, and hence while this time was running jurisdiction of lower court to entertain motion for new trial might conceivably expire, which result should be avoided if possible.

Amending opinion in 288 P. 124.

Henry E. Carter and Wheeler & Wackerbarth, all of Los Angeles, for petitioner.

Smith & Breslin and Freston & Files, all of Los Angeles, for respondents.

IRA F. THOMPSON, J.

The opinion in this action is amended by inserting the following paragraph after the last paragraph of the opinion and immediately preceding the order as follows:

The petition for the writ in this case made it appear that the law of the states of Minnesota and North Dakota required the motion in arrest of judgment to be worded in the alternative at the peril of waiving the right to make a motion for a new trial. A further perusal of the authorities from those jurisdictions have convinced us that the law is to the contrary and is as we have already expressed it. It is manifest that an order of this court denying the peremptory writ would not become conclusive upon the rights of the parties for a period of 60 days after decision under the provisions of section 4c of article 6 of the Constitution, and hence while this time was running the jurisdiction of the respondent court to entertain the motion for a new trial might conceivably expire. Such a result should be avoided if it be possible. We entertain no doubt concerning our right to undo what we have done and leave the parties to this proceeding in the same position as though the alternative writ had never been issued. This can be accomplished by setting aside and vacating the order that the alternative writ issue, or, in other words, by quashing the writ.

I concur: CRAIG, Acting P. J.

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106 Cal. App. 272

SMITH v. MERTZ et al.

Civ. 4117.

District Court of Appeal, Third District, California.

June 6, 1930.

1. Appeal and error ⟹1011(1).

Finding proceeds of check delivered to partnership constituted loan was conclusive, where evidence was conflicting whether it was loan or purchase of partnership interest.

2. Partnership ⟹146(2).

One partner had authority to borrow money to carry on partnership business and to execute note binding on other partner without other's express consent (Civ. Code, § 2429).

Civ. Code, § 2429, provides that every general partner is an agent for the part-

nership in the transaction of its business, and has authority to do whatever is necessary to carry on the business in the ordinary manner, and for this purpose may bind his copartners by an agreement in writing.

3. Partnership ⟹146(2).

Notes executed by general partner in ordinary course of business are binding on copartners (Civ. Code, § 2429).

4. Partnership ⟹290.

Finding defendant was member of firm when copartner negotiated loan *held* justified in action on partnership note, where defendant was paid for interest in partnership from moneys received, and dissolution had not been advertised (Civ. Code, § 2453).

It did not appear that the plaintiff knew the purpose for which the proceeds of the loan were to be used or that he had any notice that defendant had ceased to be a member of the firm. Advertisement of dissolution of partnership is required as to creditors by Civ. Code, § 2453.

5. Partnership ⟹146(2).

Plaintiff's recovery on partnership note *held* not defeated by fact that defendant's copartner, acting for bank, made loan to plaintiff of sum which plaintiff in turn loaned partnership.

6. Appeal and error ⟹1011(1).

Suspicious circumstances did not warrant setting aside findings on conflicting evidence.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Samuel Smith, doing business under the fictitious name and style of the Regal Cloak & Suit Company, against Joseph S. Mertz, W. W. Gogel, and H. B. Miller, individually and as copartners doing business as the Tulsa Motors Company. Judgment for plaintiffs against the defendants Miller and Mertz, and the defendant Miller appeals.

Affirmed.

Willebrandt & Horowitz and Holcomb & Holcomb, all of Los Angeles, for appellant.

Victor Ford Collins and Arnold M. Cannan, both of Los Angeles, for respondent.

FINCH, P. J.

The plaintiff brought this action to recover the amount of a promissory note for $5,000, with interest, dated April 18, 1921, and signed "Tulsa Motors Co. by Jos. S. Mertz." The complaint is in the usual form. The defendants Mertz and Miller filed separate answers. The other defendant did not answer. Judgment was entered in favor of the plaintiff against Mertz and Miller, and Miller has appealed.

The answer of defendant Miller denies that he was a member of the defendant partnership on April 18, 1921, or at the time his answer was signed; denies that he executed the promissory note sued on; denies that Mertz "was ever authorized by this defendant to sign the promissory note"; and alleges "that on April 18, 1921, he was not a copartner of the other defendants named herein, nor a member of said fictitious firm name of Tulsa Motors Company, and that he did not authorize the making or delivering of the note described in the plaintiff's complaint, and that he did not receive any of the consideration therefor as a partner of said defendants, or as a member of said Tulsa Motors Company, and that he had no knowledge of the making or delivering of said note until the summons was served upon him."

The court found "that all of the allegations of the complaint are true; * * * that the defendants herein are copartners and were on April 18, 1921, copartners doing business under the fictitious firm name and style of Tulsa Motors Company"; that Mertz was "duly authorized to sign said promissory note for and on behalf of all of the defendants * * * and that the said partnership * * * received the $5,000 loaned by the plaintiff to said defendants; * * * that it is not true that on the 18th day of April, 1921, plaintiff and defendants Joseph S. Mertz and W. W. Gogel entered into an agreement wherein the said Joseph S. Mertz and W. W. Gogel sold to the plaintiff an undivided one-third interest in the business and partnership known as Tulsa Motors Company for the sum of $5,000. That it is true that $3,000 of said money received from plaintiff by the Tulsa Motors Company, for said promissory note, was used for the purpose of paying to H. B. Miller for his one-third interest in said partnership, and that the remainder was used for the purpose of said partnership business." The negative findings are responsive to issues raised by the answer of the defendant Mertz.

It appears by stipulation that on February 7, 1921, the defendants Mertz and Gogel filed the partnership certificate required by section 2466 of the Civil Code, stating their purpose of doing business under the fictitious name of "Tulsa Motors Co." On March 28, 1921, a similar certificate was filed by Mertz, Gogel, and Miller. On April 19, 1921, a third and similar certificate was filed by Mertz and Gogel, omitting the name of Miller as a partner.

[1, 2] The evidence is sharply conflicting as to whether the $5,000 delivered by the plaintiff to the partnership was a loan as alleged by the plaintiff or was paid as the purchase

price of a one-third interest in the partnership business as alleged by Mertz. The finding on that issue in favor of the plaintiff, therefore, is conclusive.

There is no evidence tending to show that Miller individually authorized Mertz to borrow the money in question or execute the note. Mertz, however, had authority as a general partner to borrow money to carry on the business of the partnership, and to execute the promissory note. The partnership, as its name implies, was engaged in "the automobile business," and had the agency for the Tulsa motor cars. At the time the note was executed, the partnership had "four or five, possibly six, carloads of cars on the road." It had no money in the bank, and was "running short all the time." Section 2429 of the Civil Code then read as follows: "Every general partner is agent for the partnership in the transaction of its business, and has authority to do whatever is necessary to carry on such business in the ordinary maner, and for this purpose may bind his co-partners by an agreement in writing."

[3] Promissory notes executed by a general partner in the ordinary course of business are binding on the other partners, even though they had no knowledge of the execution thereof. Jacobson v. Lamb, 91 Cal. App. 405, 409, 267 P. 114.

[4] The parties agree that the plaintiff's check for $5,000 was delivered to Tulsa Motors Company and the amount thereof deposited to the credit of its bank account April 16, 1921, and that on the same day, out of the moneys so received Miller was paid for his interest in the partnership business. The appellant contends that he had ceased to be a member of the partnership before the promissory note was given. As stated in appellant's opening brief, plaintiff's "check was originally made out 'April 18th' and afterwards in another handwriting it was changed to the 16th." The plaintiff testified: "Mr. Mertz made out the note, and I think he made out the check. * * * The note and the check were issued on the same day. It was one transaction. * * * I am positive it was done in one day. If there is any difference in the dates, I never noticed it until now." Whatever inference may be drawn from this confusion as to dates, the evidence is sufficient to show that the appellant was paid for his interest in the partnership business out of the money received from the plaintiff, and it necessarily follows that the firm's obligation to the plaintiff was incurred before such payment to appellant and while he was still a member of the firm; it not being contended that he ceased to be a member before he received payment for his interest.

It does not appear that the plaintiff knew the purpose for which the $5,000 was to be used. He testified that he knew, prior to the loan of the money, that Miller and Gogel were members of the partnership, but that he had "never met Mr. Miller or had any conversation with him," and that he loaned the money "on the faith and credit" he had in Mertz "and including the Tulsa Motors Company, * * * on Mr. Mertz mostly." He also testified that no notice was "ever given him that Mr. Miller had gone out of the firm." It further appears that dissolution of the firm of Mertz, Gogel, and Miller, if it had been dissolved, had not been advertised prior to the time the note was executed, as then provided by section 2453 of the Civil Code. Under such circumstances, Miller's liability as a general partner continued, even if it be conceded that the partnership was dissolved before such liability was incurred by Tulsa Motors Company.

[5] At the time the note was executed, "Mertz was the credit man" in the Guaranty Trust & Savings Bank. He was indebted to that bank in the amount of $10,000 or $12,000, and was "in financial difficulties." The bank through Mertz as "credit man," loaned the plaintiff the additional sum of $5,000, which he, in turn, loaned to the Tulsa Motors Company, taking therefor the promissory note upon which this suit is based. This double transaction was had at the request of Mertz. Whatever cause of complaint the bank may have in respect to the transaction, it does not appear that the appellant's rights were in any manner prejudiced by the manner in which the plaintiff secured the money which he loaned to the partnership. The double transaction carried out by Mertz and the plaintiff is a circumstance which the trial court had a right to consider in determining the credibility and weight of their testimony, but those are questions within the exclusive province of the trial court.

[6] This court is without power to set aside the findings of the trial court, made on conflicting evidence, on the mere ground that there are suspicious circumstances in connection with such evidence.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

106 Cal. App. 247

PEOPLE v. WESTLAKE.

Cr. 1896.

District Court of Appeal, Second District, Division 1, California.

June 6, 1930.

Rehearing Denied June 17, 1930. Hearing Denied by Supreme Court July 3, 1930.

1. Homicide ⟹228(1).

Evidence of dismembered body identified as that of person alleged to have been murdered, and which indicated murder, *held* sufficient to prove corpus delicti.

Evidence disclosed that head and torso of dismembered body found were parts of same person, that dentist rendering professional services for many years to person named in indictment identified jaws and teeth as belonging to such person by shape of mouth, teeth, and crown of tooth, and that skull was fractured, which had caused death.

2. Homicide ⟹234(8).

Evidence of defendant's appropriation of decedent's property and of evasions and false attempt to show decedent was alive sustained inference of defendant's guilt for murder.

Evidence disclosed that defendant was intimate with decedent, who intrusted defendant with her business affairs and caused property to be conveyed to defendant; that defendant withdrew money from joint bank account of defendant and decedent; that defendant misrepresented source of money in bank account and falsely sought to make it appear that decedent was still alive.

3. Criminal law ⟹730(3).

District attorney's statement, cross-examining defendant charged with murder, that certain doctor "writes all your death certificates," disapproved by court, was not reversible.

Defendant was prosecuted for murder of deceased, whose body was found dismembered in river. District attorney in cross-examining defendant asked whether doctor referred to by defendant was doctor who wrote death certificate for defendant's wife and death certificate of defendant's wife's aunt, and on receiving affirmative answer stated, "He writes all your death certificates." Objection was sustained to such question, and jury instructed to disregard same.

4. Criminal law ⟹1171(3).

Argument of district attorney that defendant prosecuted for murder wrapped body in sheet was improper as not in evidence, but not reversible error.

Evidence authorized district attorney to argue that defendant had killed deceased and carried to river dismembered parts of deceased's body, but there was no testimony that body was ever wrapped in a sheet. District attorney in argument stated defendant, "after he killed deceased, wrapped the body in a sheet, carried it to Los Angeles river."

5. Criminal law ⟹918(1).

New trial should not be ordered if result was just and would have been reached without error.

6. Criminal law ⟹763, 764(24).

Requested instruction that single fact inconsistent with guilt raised reasonable doubt *held* on weight of evidence.

7. Criminal law ⟹805(2).

Instructions to apply tests for determining credibility of witnesses given in another instruction to defendant's testimony *held* proper.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Frank P. Westlake was convicted of murder, and he appeals.

Affirmed.

Hearing denied by Supreme Court; PRESTON, J., voting for a transfer.

W. T. Kendrick, Jr., of Los Angeles (William T. Kendrick, Sr., of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Wayne Jordan, Deputy Dist. Atty., both of Los Angeles, for the People.

CONREY, P. J.

By rule VIII, governing appellate court practice, it is provided that briefs "must present each point separately, under an appropriate heading, showing the nature of the question to be presented." In this case if we had been informed that the last paragraph of the closing brief contains a summary of the grounds upon which the appellant relies, we would have been saved the time wasted in hunting for them in the text of the opening brief.

The grounds of appeal are that the evidence is insufficient to support the verdict; that the corpus delicti is not established by the evidence; that the district attorney was guilty of misconduct prejudicial to the rights of the defendant; that the court erred in

relation to instructions given and in its refusal to give requested instructions.

The information charges that the defendant, on the 28th day of March, 1929, did willfully, etc., kill and murder one Laura B. Sutton. The evidence shows that on and prior to March 28, 1929, Mrs. Sutton was living at 2012 West Thirtieth street, in the city of Los Angeles. In the late afternoon of March 29th she visited the office of her attorney, who had been representing her in a divorce action. They left the office together, and he left her on Seventh street. So far as the evidence shows, that is the last time that she was seen alive. On the 4th day of April a schoolboy found in the Los Angeles river bed a headless body, from which the arms and legs had been cut off. This body, or torso, was turned over to officers, and later was examined by the county autopsy surgeon, Dr. Wagner.

[1] On the 18th day of April a group of schoolboys found in the Los Angeles river bed, some distance below the place where the torso had been found, a human skull. This skull was delivered to officers and it also in due course came to Dr. Wagner for examination. In the testimony of Dr. Wagner we find abundant evidence that the head and the torso above mentioned were parts of the same person. There were articular surfaces of the vertebræ which joined thoroughly and were of the same size and general appearance. There were overlapping knife cuts on the head and torso which appeared to have been made in a straight line and were opposed to each other. Without making a statement in further detail, it is sufficient to say that according to the evidence it is abundantly established that these remains of a human being were of one and the same person, and belonged to a woman of the same general appearance and age as Mrs. Sutton. There is also very conclusive evidence that this deceased person was Mrs. Sutton. Without extended review of the evidence, it is sufficient to refer to the testimony of Dr. Hyde, a dentist who had rendered professional services to Mrs. Sutton at various times during a dozen or more years. He examined the jaws and teeth attached to the skull and identified them as belonging to Mrs. Sutton. For example, referring to the crown of a tooth, he positively recognized it as being his own work. He further recognized the shape of the mouth, the condition of the processes of the roots of the teeth, the prominence of the front teeth, the unusual spaces between them, and the location of certain fillings which corresponded with a chart on which they were shown and which he had made during the lifetime of Mrs. Sutton.

Concerning the cause of death, the evidence goes definitely further than the mere finding of the dismembered and severed body which some one must have endeavored to hide away in the sands of the river bed. Dr. Wagner testified that he found a fracture on the left side of the skull behind the ear, and that in his opinion this fracture of the skull was the cause of death; also, that in his opinion the fracture had been caused by a hammer or an instrument shaped like a hammer. There are numerous other details of facts shown in the evidence, bearing upon the question of identity and the question of cause of death. All of this evidence has been carefully examined. We are satisfied that the evidence is amply sufficient to prove the corpus delicti; that is to say, that Mrs. Sutton is dead and that she was the victim of a murder.

[2] But it is further contended by the defendant that even if Mrs. Sutton was murdered by somebody, the evidence is insufficient to prove that the murder was done by him. The evidence contains a long story concerning the relations of Mrs. Sutton to various persons during the last years of her life, including her relations with the defendant. It appears that for some time there had been considerable intimacy between her and the defendant, and that she had trusted him very fully in her business affairs. Having purchased for $3,000 a parcel of real property, she caused the deed to be made to her brother, who afterwards, at her request, conveyed this property to the defendant, and the defendant caused the deed to himself to be recorded on the 3d day of April, 1929. A joint bank account of Mrs. Sutton and the defendant had been created by her, consisting wholly of her money, and money was withdrawn from that account by him at various times. Mrs. Sutton had four shares of stock of the Southern California Edison Company. During the month of April, after her disappearance, the defendant used the certificate of this stock by pledging it as security for a loan which he obtained at a bank. When he applied for the loan and exhibited the certificate at the bank, her signature had not been indorsed thereon. Later he brought it back with her name indorsed. The evidence indicates that he imitated her signature. When this loan was made the defendant was given a deposit credit of $98. This was on the 24th day of April, 1929. On the 28th day of May, in making a statement at the sheriff's office in the presence of several persons there present, and in response to a question about this $98, the defendant said that he got some of it from his son. In a later statement he said that he had borrowed the $98 from the bank. After some further questioning he admitted that he had used the Edison stock as security. It further appears that in obtaining the loan Mrs. Sutton's name was signed with that of the defendant as a comaker of the note. At the trial of this case the defendant admitted that he signed

her name to the note and indorsed her name on the back of the stock, but claimed that she had given him authority to use her name in that way.

The foregoing items are only a part of the facts and circumstances showing that after the disappearance of Mrs. Sutton, and probably after the time of her death, defendant appropriated to his own use substantially all of her property, and that at the time of her disappearance her affairs had been so arranged that her property was in his possession or in a situation to easily come into his possession and under his control. His conduct in relation to her property, his evasions and misrepresentations, and his attempts to falsely make it appear that Mrs. Sutton was still alive, are facts which strongly support and sustain the inference of guilt.

[3-5] Appellant claims that in two instances the district attorney was guilty of misconduct at the trial. It appeared in the evidence that at some time in the spring of 1929 the defendant had received an injury to his right hand, so that the hand was bandaged for a time. Counsel have not made clear to us how this fact was relevant to the case, nor have they assisted us to find in the voluminous record how the circumstance happened to be in evidence. It appears, however, that the defendant introduced in evidence, in connection with his own testimony, a letter received by him from an insurance organization, which referred to information given by one Dr. Solomon to the effect that in February, 1929, the defendant's right hand had been injured. On cross-examination the district attorney asked the witness if this Dr. Solomon was the doctor who wrote the death certificate for the defendant's wife, and also the death certificate of Mrs. Brown, an aunt of defendant's wife. On receiving affirmative answers to these two questions, the district attorney asked: "Q. He writes all your death certificates?" The attorney for defendant objected to this question and assigned it as misconduct. The witness answered: "He is the family physician." The court said: "Objection sustained. The jury is instructed to disregard the question of counsel."

The second assignment of misconduct relates to an incident which occurred during the argument of the district attorney to the jury. After reciting certain portions of the evidence, for the evident purpose of convincing the jury that Mrs. Sutton had been murdered by the defendant, the district attorney said: "Dr. Westlake, after he killed Laura Sutton, wrapped the body in a sheet, carried it to the Los Angeles river and —" Interrupting at this point, counsel for defendant objected and assigned it as misconduct, as being unfounded upon any evidence in the case. The remainder of this passage reads as follows:

"Mr. Stahlman: Merely a conclusion.

"Mr. Kendrick: There is no basis whatsoever for the statement. I am sorry to interrupt counsel, but I want to object.

"The Court: What statement do you object to?

"Mr. Kendrick: Because it is not based upon any evidence in the case.

"The Court: What statement?

"Mr. Kendrick: He made the statement that Dr. Westlake, after he killed Laura Sutton, wrapped her in a sheet and carried her down—carried her body to the Los Angeles river.

"The Court: Oh, he can draw any conclusions he wants, if they are reasonable. If they are not reasonable the jury won't pay any attention to them. If they are reasonable they will consider them. He can draw conclusions from the facts."

In both of these instances of alleged misconduct we think that the district attorney is justly subject to criticism. The questions asked about Dr. Solomon carried a vague sort of innuendo, not fair to the defendant. But it has not been made to appear that the item was or could have been seriously prejudicial to the defendant. In relation to the second act of alleged misconduct, it is apparent that the district attorney was dealing with circumstances concerning which there was no direct eye witness. From the evidence he was entitled to argue that the defendant had killed Mrs. Sutton and had carried to the river the dismembered parts of her body. It is not claimed that there was any testimony that the body ever was wrapped in a sheet. Therefore such statement should not have been made. But while a prosecuting officer, in addressing the jury, should be expected and required to confine himself to the facts in evidence, this rule should not be enforced to the extent of reversing judgments on account of occasional inappropriate or improper phrases of small relative importance. We think that the rule should apply to the verdict here that, "if it appears to our satisfaction that the result was just, and that it would have been reached if the error had not been committed, a new trial is not to be ordered." People v. O'Bryan, 165 Cal. 55, 130 P. 1042, 1047.

In rule VIII it is provided that: "Where instructions given to a jury are attacked as erroneous, all other instructions given, bearing upon that subject, must be printed in full in the appellant's brief. If it be claimed that instructions requested were erroneously refused, the refused instructions must be printed in full in appellant's brief, and all instructions given, bearing upon the subjects covered by the refused instruction, must be printed in appellant's brief in full, or the substance thereof clearly stated, with citation to the line and page of the transcript where

such instructions may be found." Appellant's brief does not conform with this rule, but it has been assisted by the brief of the Attorney General. There are two specifications of error in refusing to give instructions requested by the defendant. In each instance the subject-matter of the proposed instruction was properly covered by other instructions given to the jury.

[6] Defendant requested the court to give the following instruction: "The jury are instructed that in cases of circumstantial evidence the jury must not only be satisfied beyond a reasonable doubt that all the circumstances proved are consistent with the defendant having committed the act, but they must also be satisfied that the facts are such as to be inconsistent with any other reasonable conclusion than that the defendant is the guilty person. *If there is any one single fact proved to the satisfaction of the jury by a preponderance of the evidence, which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt and the jury should acquit the defendant.*" The court gave the first sentence but omitted the second, and of this omission the appellant complains. The court did not err in refusing to instruct the jury in the language of said omitted sentence. To have given such instruction would have been to instruct upon the weight of the evidence, and thereby unwarrantedly trench upon the province of the jury.

[7] Appellant contends that the court erred in giving the instruction found in the clerk's transcript at page 39, lines 22–25, and in giving the instruction found in said transcript at the bottom of page 35 and first 15 lines of page 36. These instructions relate to matters which may be taken into consideration in determining the credibility of witnesses, and especially their application to a defendant who has testified at the trial. We find no error in these instructions as given by the court. The assignment of error upon the first of these instructions is directed to the following language: "And the tests for determining credibility of witnesses as given you in another part of the instructions are to be applied to his testimony alike with that of all other witnesses." Counsel have not offered either argument or authority in support of their claim that this was error. The second of said instructions is substantially in conformity with instructions which, from time to time, have been approved. People v. Newcomer, 118 Cal. 263, 268, 50 P. 405; People v. Bernal, 40 Cal. App. 358, 361, 180 P. 825.

The judgment and order are affirmed.

We concur: HOUSER, J.; YORK, J.

106 Cal. App. 216

PEOPLE v. HAWLEY.

Cr. 1920.

District Court of Appeal, Second District, Division 1, California.

June 4, 1930.

Rehearing Denied June 16, 1930. Hearing Denied by Supreme Court July 3, 1930.

1. Indictment and information ⟹71.

Indictment for attempt to commit grand theft charging defendant with willfully, unlawfully, and feloniously attempting to take property, was sufficiently certain (Pen. Code, § 951, as amended by St. 1927, p. 1043, and § 952, as amended by St. 1929, p. 303).

2. Indictment and information ⟹19.

Information or indictment in form prescribed by statute is sufficient (Pen. Code, § 951, as amended by St. 1927, p. 1043, and § 952, as amended by St. 1929, p. 303).

3. Larceny ⟹28(1).

Indictment for attempt to commit grand theft sufficiently charged criminal offense (Pen. Code, §§ 484, 663, 664).

4. Criminal law ⟹1186(4).

Refusal to strike out portions of indictment containing aliases of defendant *held* not error resulting in miscarriage of justice (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Jack Hawley was convicted of attempt to commit grand theft, and he appeals.

Affirmed.

James E. Fenton, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for the People.

HOUSER, J.

Defendant appeals from a judgment of conviction of the crime of attempt to commit grand theft, as well as from an order by which his motion for a new trial was denied.

The indictment against defendant in effect charged him with the commission of the crime of "attempt to commit grand theft" in that defendant "did wilfully, unlawfully and feloniously attempt to take property," etc.

In urging a reversal of the judgment, appellant contends that the indictment fails to state the commission of a public offense; that it does not conform to the requirements of sections 950 and 952 of the Penal Code in that it is neither direct nor certain either in

regard to the offense charged or to the circumstances thereof; and that the indictment fails to inform the defendant "of the nature and cause of the accusation against him," and contains no statement of the acts constituting the offense "in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended."

[1] It is possible that, in accordance with rulings contained in authorities cited by appellant, all of which were rendered prior to statutory amendments in 1927 and 1929 to sections 951 (St. 1927, p. 1043) and 952 (St. 1929, p. 303) of the Penal Code, the claimed defects in the indictment might be considered as well taken. But by such recent legislation a sufficient form of an indictment or an information is set forth, and, in addition thereto, it is provided in general that an indictment or information shall be considered sufficient if in substance it contain a statement that the accused committed the public offense therein specified, and particularly, in charging theft, that it shall be sufficient to allege that the defendant unlawfully took the property of another.

[2, 3] A comparison of the form of indictment prescribed by section 951 of the Penal Code with the indictment returned by the grand jury against defendant discloses not only a substantial compliance with the requirements of the statute, but that additional information for the benefit of the defendant is contained therein. Repeatedly it has been held that an information or an indictment in the form prescribed by statute is sufficient, especially as relates to the amended statutes hereinbefore cited. People v. Plum, 88 Cal. App. 575, 263 P. 862, 265 P. 322; People v. Campbell, 89 Cal. App. 646, 265 P. 364; People v. Manchell, 91 Cal. App. 788, 267 P. 718; People v. Lalor, 95 Cal. App. 242, 272 P. 794. It is apparent that if in charging theft it is sufficient to allege that the defendant unlawfully took the property of another (section 952, Pen. Code), likewise in charging an attempt to commit theft (even in the absence of direct statutory authorization therefor), it should be sufficient to allege that he unlawfully attempted to commit the same offense. The suggestion by appellant that no criminal offense is charged is met and overcome by the provisions of sections 484, 663, and 664 of the Penal Code, wherein the offense of grand theft is defined and the punishment for an attempt to commit such crime is prescribed. See, also, People v. Burns, 138 Cal. 159, 69 P. 16, 70 P. 1087, 60 L. R. A. 270; People v. Gardner, 98 Cal. 127, 32 P. 880.

[4] As the indictment was drawn and presented, defendant was accused by the name of Jack Hawley, with twelve different aliases following. Before the action went to trial defendant formally objected to the reading to the jury of that portion of the indictment which included the several alias names of defendant, which objection was by the court overruled, with the result that the indictment was read by the clerk of the court to the jury as originally drawn. Defendant now complains that such action on the part of the trial court created a prejudice against him; and respondent admits that "there is little doubt that the court erred in denying defendant's motion to strike out that portion of the indictment containing the aliases." See People v. Maroney, 109 Cal. 277, 281, 41 P. 1097. However, it is contended by respondent that the error did not result in a miscarriage of justice.

Although the circumstance establishes nothing, nor may it be used against defendant, an examination of the transcript of the evidence adduced on the trial of the action shows that he offered no evidence in defense of the charge against him. Furthermore, that the guilt of defendant of the offense of which he was charged was practically demonstrated.

Section 4½ of article 6 of the Constitution in effect declares that no judgment shall be set aside or new trial granted on account of any error as to any matter of procedure, "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

In a qualified concurrence in the opinion rendered in the case of People v. Fleming, 166 Cal. 357, 384, 136 P. 291, Ann. Cas. 1915B, 881, the term "miscarriage of justice" was defined by the then Chief Justice Beatty as "the conviction of a person who is probably innocent." And in People v. O'Bryan, 165 Cal. 55, 66, 130 P. 1042, and again in People v. Wilson, 23 Cal. App. 513, 525, 138 P. 971, the controlling principle is declared that "if it appears to our satisfaction that the result was just, and that it would have been reached if the error had not been committed, a new trial is not to be ordered."

Considering the fact that the evidence herein pointed almost conclusively to the guilt of defendant, it would seem wholly improbable that error of the trial court in the premises had any effect upon the verdict of the jury.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

106 Cal. App. 286

NEFF v. CAMPBELL.

Civ. 4113.

District Court of Appeal, Third District, California.

June 7, 1930.

Rehearing Denied July 7, 1930. Hearing Denied by Supreme Court Aug. 4, 1930.

1. Appeal and error ⟹1010(1).

Trial court's fact finding, supported by sufficient testimony, will not be disturbed.

2. Automobiles ⟹372.

Evidence *held* sufficient to support trial court's finding in action for conversion of automobile that defendant agreed to store it for plaintiff until called for.

Plaintiff's husband testified that defendant told him she would keep car for him at stated sum per month until he returned from another state and called for it after he told her he could not pay anything on storage charges already accrued, but would try to send her some money from such state, and that he wrote her three months before she sold car for charges that he would be back, though not as soon as he had anticipated.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Action by Elise Marie Neff against Z. Pearl Campbell. Judgment for plaintiff, and defendant appeals.

Affirmed.

Willebrandt & Horowitz, of Los Angeles, for appellant.

Zach Lamar Cobb and Earl A. Littlejohn, both of Los Angeles, for respondent.

PULLEN, Justice pro tem.

This was an action for the conversion of an automobile.

The court found the following to be the facts:

"2. That on the 15th day of June, 1924, plaintiff was the owner of and entitled to the possession of a certain 1924 Flint Six Sedan automobile, * * * and that on said day the said automobile was stored by plaintiff with the defendant, at said defendant's garage, to be held and stored by the said defendant on behalf of plaintiff, for the consideration of $10.00 per month as storage charges.

"3. That pursuant to said agreement the defendant continued to store said automobile for plaintiff until on or about the 10th day of November, 1924, at which time plaintiff informed defendant that she was leaving the state of California, and going to the city of Tyler, in the state of Texas, and would probably return some time in the spring of 1925, and it was thereupon agreed by and between plaintiff and defendant, and said defendant then and there agreed and undertook that she would continue to hold and store said automobile for plaintiff until plaintiff returned and called for the same and upon plaintiff calling for the same would deliver said automobile to plaintiff or her order at any time thereafter, upon plaintiff paying to the defendant the storage charges due thereon, together with whatever further storage charges should have become due up to the time of the delivery of said automobile."

Some time probably in April, 1925, respondent returned to California, but did not call upon nor communicate with appellant until late in the fall of 1925, at which time respondent was informed the car had been sold for storage and other charges on the 14th day of May, 1925, whereupon she instituted this action for conversion.

Appellant contends that whether she had any right to sell the automobile would depend upon the construction of the contract of the parties or sections 3051 and 3052 of the Civil Code.

[1] The trial court has found upon conflicting evidence the facts as set forth above, that appellant "would continue to hold and store said automobile for plaintiff until she returned and called for the same." While it may appear somewhat unusual that a garage keeper would make such an agreement, still, the trial court having so found, and an examination of the record contains sufficient testimony to support such finding, it is not the province of this court to hold otherwise.

[2] The testimony of Mr. W. H. Neff supports this contention. A portion of his testimony is as follows:

"Q. What was the conversation on that accasion? A. I told Mrs. Campbell then we were going back to Texas the next day, and we didn't know just how long we would be gone, and I wanted to leave the car on dead storage with her until I returned, at the same price. She asked me if I could not pay some on the storage that had already accrued. I told her I was not in a position then to do so. I did not know just exactly what my expenses back to Texas would be, but after I got there I would try to send her some money, I would not be sure I could, but I would try to send her some, and she agreed to—said she would keep the car for me until I returned and called for it, at $10 a month, and agreed to keep the battery in condition so that it would not run down. * * *

"Q. Did you communicate with her in any way after returning to Texas, while you were there? A. In February, I wrote her a letter I would be delayed, I could not tell how long

I would be delayed, but I would not get back as soon as I anticipated, but I would be back, and to please be assured I wanted the car kept nice."

The trial court heard the testimony, found the facts as herein given upon sufficient evidence, and this court will not disturb them.

The judgment is accordingly affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

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106 Cal. App. 202

MABERTO et al. v. WOLFE et al.

Civ. 7074.

District Court of Appeal, First District, Division 1, California.

June 4, 1930.

Rehearing Denied June 25, 1930. Hearing Denied by Supreme Court July 31, 1930.

1. Trial ⟹139(1).

Verdict may be directed only when court would be compelled to set aside contrary verdict as unsupported by evidence.

2. Trial ⟹178.

In determining whether verdict should be directed, opposing evidence must be taken as true and every legitimate inference drawn in its favor.

3. Automobiles ⟹242(6).

Where ownership of automobile was undisputed, inference was warranted that driver was operating as owner's agent.

4. Automobiles ⟹244(26).

Evidence *held* to support conclusion that operator of automobile was driving it at request and for accommodation of owner.

There was evidence that the owner had called the operator of the car and requested him to take his family on a trip, and that the operator was actually complying with this request at the time of the accident. Furthermore, after the accident, the owner assured the operator not to worry because, if there were any trouble or liability, he would take care of it.

5. Automobiles ⟹193(1).

Owner of automobile at whose request and for whose accommodation driver was operating it *held* liable under principle of qui facit per alium facit per se, not under doctrine of respondeat superior.

6. Trial ⟹295(6).

Instruction that owner, although not at scene of accident, was liable if driver was operating automobile as his agent, *held* not erroneous in light of whole charge.

The court fully charged the jury on the law of negligence, proximate cause, and contributory negligence, as well as on the burden of proof and of necessity of a preponderance of evidence in favor of plaintiff in order to find a verdict in his favor. In the light of these instructions, it is clear that the instruction complained of places no absolute obligation on the owner of the car for the act of the driver regardless of the negligence of the driver, nor could the jury have understood it as such. The purpose of the instruction complained of was to show that the absence of the owner from the scene of the accident would not preclude the existence of the relationship of principal and agent.

7. Evidence ⟹222(2).

Declaration by automobile owner, after accident, that he was insured and would "take care" of any matter of liability, *held* admissible.

After the accident, the owner told the driver who had been operating the car at his request that he need not worry, that the car was insured, and that if any trouble came up or any matter of liability he would take care of it. The declaration was admissible as an admission of liability.

8. Automobiles ⟹247.

Where owner and driver of automobile were codefendants, verdict against owner which was silent as to driver was not void.

The owner contended that the verdict was void for the reason that a verdict against a principal which exonerates the agent cannot stand. However, in this case, the verdict was merely silent as to the driver of the car and did not exonerate him.

Appeal from Superior Court, City and County of San Francisco; Thomas H. Selvage, Judge.

Action by Ettore Maberto and Benedetta Maberto against Mark Rambo Wolfe and J. W. Dees. From a judgment against J. W. Dees, he appeals.

Affirmed.

Cooley, Crowley & Gallagher, of San Francisco, for appellant.

Paul F. Fratessa and Stanislaus A. Riley, both of San Francisco, for respondents.

CAMPBELL, Justice pro tem.

On February 22, 1927, Benedetta Maberto (who will hereafter be referred to as respondent) was struck and injured by an automobile owned by appellant Dees and driven by defendant Wolfe. Respondent at the time she was struck was standing within the legally established safety zone on Market street just west of Powell street in the city of San Francisco. She was knocked unconscious and sustained a fracture of the fingers of her left hand and other injuries. No complaint being made that the award of damages is excessive, we will not refer further to her injuries.

There is but one question of fact concerning which a dispute arises, namely, was defendant driving the automobile for or on behalf of appellant Dees? Defendant Wolfe testified that on the morning of February 22d—the date of the accident—appellant called him on the telephone at Stockton and asked him to drive his (appellant's) car and take appellant's family from Stockton to San Francisco; that he did so, and was driving the car at the time of the accident. Subsequently Wolfe spoke to appellant about it, and appellant informed him that there was no need for him to worry, that the car was insured, and that if any trouble came up or any matter of liability, he would take care of it. Appellant denied that he communicated with Wolfe on the morning of February 22d. Wolfe, however, is corroborated concerning appellant having telephoned him on that morning by Miss Craighead, a niece of defendant Wolfe, who received the call when Dees telephoned, and Mrs. Dees, appellant's wife, who testified that her husband called Wolfe on the telephone "in regard to this trip to San Francisco." At the time the accident occurred, Mrs. Dees was giving the directions Wolfe should take in driving the car. The jury found a verdict in favor of plaintiffs and against defendant Dees in the sum of $2,000, which verdict did not in any way mention defendant Wolfe, and from the judgment entered upon such verdict defendant Dees has appealed and urges the following objections: That the trial court erred in not directing a verdict in favor of the defendant J. W. Dees; that no relationship of principal and agent existed as between Wolfe and Dees; that the seventh instruction given to the jury was erroneous and materially prejudicial to the defendant; and that it was prejudicial error to allow in evidence the testimony of Wolfe relative to the fact that the defendant Dees had, or believed he had, a policy of insurance covering his car against public liability.

[1, 2] If defendant Wolfe were the agent of appellant, the court did not err in refusing to direct a verdict in favor of defendant Dees, as the evidence amply supports the conclusion that defendant Wolfe was operating the automobile at the time of the accident at the request and for the accommodation of defendant Dees. A verdict may only be directed when upon the whole evidence the court would be compelled to set a contrary verdict aside as unsupported by the evidence (Estate of Caspar, 172 Cal. 150, 155 P. 631; Duggan v. Forderer, 79 Cal. App. 343, 249 P. 533), giving opposing evidence all the value to which it is legally entitled and indulging every legitimate inference which may be drawn therefrom which would support a verdict contrary to the one directed (California Packing Corporation v. Lopez [Cal. Sup.] 279 P. 664, 64 A. L. R. 1412). Appellant, however, contends that no relationship of principal and agent, employer and employee, nor any other relationship that would render appellant responsible for the act or omission of defendant Wolfe has been established.

[3, 4] It being conceded that appellant was the owner of the automobile driven by defendant Wolfe, the jury was warranted in drawing the inference therefrom that defendant Wolfe was operating the automobile as the agent of the owner. Maupin v. Solomon, 41 Cal. App. 326, 183 P. 198. Whether the evidence of ownership of the automobile raises a prima facie presumption of agency, as was held in McWhirter v. Fuller, 35 Cal. App. 288, 170 P. 417; Randolph v. Hunt, 41 Cal. App. 739, 183 P. 358; Grantham v. Ordway, 40 Cal. App. 758, 182 P. 73; and Dierks v. Newsom, 49 Cal. App. 789, 194 P. 518, cited by respondent, or merely raises a prima facie inference as was stated by the Supreme Court in its opinion denying a rehearing in Maupin v. Solomon, supra, is of no moment, as the testimony amply supports the conclusion that defendant Wolfe was driving the automobile at the request and for the accommodation of appellant Dees.

[5] Appellant urges the nonapplicability of the doctrine of respondeat superior to the situation presented here and cites authorities in which such doctrine is considered. In the present case, however, appellant is held liable under the principle of qui facit per alium facit per se. The distinction in these doctrines is clearly expressed by the Supreme Court of South Carolina in Sams v. Arthur, 135 S. C. 123, 133 S. E. 205, 207, wherein it is said: "The principle qui facit [per alium facit per se] must not be confounded with that of respondeat superior. It is a common misconception to attribute the liability of a master for the delicts of his servant in every case to the principle of respondeat superior. The servant may cause injury in doing the very thing that the master directs him to do. In that case the master is held liable because the law holds that the act is that of the master, although done through the servant, under the principle qui facit per alium facit per se. He is therefore held responsible for his own act. But, on the other hand, the servant may cause an injury, while engaged within the line or scope of his employment, in doing an act which the master has not directed him to do or has specifically

directed him not to do. It is the act of the servant, not the master, and the latter is held responsible upon grounds of public policy; the liability in such case being expressed by the phrase respondeat superior. The principle is entirely distinct from that of qui facit, and owes its origin to an entirely different source; the one to public policy and the other to the fixed principles of law and justice."

[6] Appellant complains of the following instruction: "'If you find from the evidence in this case that at the time and place mentioned in the pleadings herein, and also in these instructions, the defendant Mark Rambo Wolfe was driving the automobile of defendant W. J. Dees at the request of said W. J. Dees, and for the purpose of said W. J. Dees, then in such event W. J. Dees is liable for all damages, if any inflicted by said defendant, Mark Rambo Wolfe, in the driving of said car, even though said W. J. Dees was not then and there present at the scene of the accident." This instruction deals with the agency of Wolfe, which arose from the fact that Wolfe at the time of the accident was driving the automobile. The court had instructed the jury that "where an injury is inflicted upon one, without any fault of his own, which injury is proximately caused through the negligent and careless act of the other, a cause of action arises in favor of the person injured"; that if at the time and place in question defendant Wolfe was guilty of a violation of any municipal ordinance and if such violation was the proximate cause of the accident and injuries and if plaintiff was not guilty of contributory negligence, and if defendant Wolfe was driving the automobile at the request and on behalf of Dees, the jury should return a verdict in favor of plaintiffs. The next instruction deals with the ordinance in question and instructed the jury that its violation would constitute negligence per se, and then follows the instruction complained of. Following these are correct instructions on the burden of proof and preponderance of evidence, and an instruction in which the jury was instructed that before any liability could be fastened upon defendants, negligence must be shown. In the face of these instructions it cannot be said that the instruction complained of places an absolute obligation on appellant, as the owner of the car, for any damages or injuries inflicted by the driver regardless of the negligence of such driver. Nor can we see how the jury could have been misled in view of the other instructions given. The whole purpose of the instruction, as distinguished from the other instructions, was to show that the absence of Dees from the scene of the accident would not preclude the existence of the relationship of principal and agent and must have been so understood by the jury.

As to appellant's assignment that the court erred in allowing reference to be made that appellant carried public liability insurance, it may be said that the facts in James Stewart & Co. v. Newby (C. C. A.) 266 F. 287, cited by appellant, are not analogous to those presented here. In that case persistent and repeated efforts were made by counsel for complainant to get before the jury the fact that defendant carried employer's protection by liability insurance, and while the jury was ultimately instructed to disregard such fact, it was not until the conclusion of the testimony that it was finally excluded. In the present case the objection made to the question asked of defendant Wolfe, whereby it was sought to elicit statements made by appellant Dees tending to show acknowledgment of his liability, was: "These things that took place after the accident are not within the scope of the accident, and it is immaterial." And again: "I am not objecting to him telling what conversation he had relative to the accident, but I am objecting strenuously to bringing in this testimony as to what would be the best thing to do, and what their legal liability would be. Those are questions that do not concern this case at all, and what Mr. Fratessa said he would do." The court, with respect to the question of appellant being insured, stated: "So far as the reference to the insurance carried, the court and the jury have nothing to do with that. It is only the relation that existed between Mr. Dees and Mr. Wolfe, as to whether or not Mr. Dees did secure the services of Mr. Wolfe in driving to San Francisco." After some discussion the witness testified "that Dees told him that he was a policyholder on the car, that if there was any trouble come up or any matter of liability, or anything, that he would take care of it," and again: "He told me that, as he was a policyholder on the car, that if there was any trouble come up or any matter of liability, or anything, that he would take care of it. * * *"

[7] If the objection was intended to and did go to the witness being permitted to state that appellant told him that he carried public liability insurance and would take care of any liability, it was not immaterial. The statement concerning the insurance being coupled with the statement "that he would take care of it," referring to the damages, tended to show an acknowledgment of his liability. As was said in McPhee v. Lavin, 183 Cal. 264, 269, 191 P. 23, 25: "The errors of law assigned upon admission of testimony over defendant's objections and motions to strike, so far as in any way suggestive of prejudice, arise upon the admission in evidence, as part of a conversation had with defendant, of defendant's declaration to plaintiff, immediately after the collision that he carried accident insurance that would provide for plaintiff if he had suffered injury. As this was admitted as tending to show an acknowledgment of responsibility

by defendant for the accident, we think it was proper evidence."

[8] We do not agree with appellant in his final contention that the verdict—under the facts here presented—is void for the reason "that a verdict against a principal which exonerates the agent is a self-stultifying verdict and cannot stand," as the verdict does not exonerate defendant Wolfe, but merely is silent as to him. In Bosse v. Marye, 80 Cal. App. 109, 250 P. 693, 695, decided by this court and in which a petition for a hearing in the Supreme Court was denied, a situation similar in principle is presented. In that case Miss Spreckels and a companion, Miss Marye, each seventeen years of age, occupied a roadster owned by Miss Spreckels and being operated by Miss Marye. Rudolph Spreckels, the father, was named in the certificate as the legal owner and had signed the application of his minor daughter for an operator's license and thereby became liable for any negligence of his daughter in operating or driving a motor vehicle upon the public highway. The verdict was against defendant Rudolph Spreckels. No verdict was found as to either of the young women. The verdict was upheld by reason of defendant Spreckels having signed the application of his minor daughter for an operator's license. In that case it is said: "The verdicts of the juries in the cases cited by appellant were manifestly 'self-stultifying,' as was said in Tolley v. Engert, [71 Cal. App. 439, 235 P. 651] supra, and in the instant case, if the jury by its verdict had exonerated either or both of those charged with direct responsibility for the accident, the verdict against appellant necessarily could not be upheld. But, as already shown, such is not the case. * * * We therefore conclude that, although not driving the automobile at the time of the accident, Miss Spreckels was nevertheless in control of its movements, and was operating the same over the highway under the authority of her license; and that being so, that she was primarily responsible jointly with Miss Marye for its negligent operation. If we are correct in this conclusion, it follows that her negligence was, under the statute, imputed to appellant, for which he became jointly and severally liable." So in the present case, defendant Wolfe driving the automobile as directed by Dees for the purpose of conveying Dees' family from Stockton to San Francisco, the negligence of Wolfe was imputed to appellant Dees and made him jointly and severally liable, or as is said in Sams v. Arthur, supra, "the master is held liable because the law holds, that the act is that of the master, although done through the servant, under the principle qui facit per alium facit per se."

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

106 Cal. App. 409

HOPKINS v. J. D. MILLAR REALTY CO.

Civ. 4120.

District Court of Appeal, Third District, California.

June 12, 1930.

1. Pleading ⚷403(3).

In action on note for deficiency remaining after foreclosure, defect of complaint in failing to allege note was secured was cured by allegation in answer.

2. Appeal and error ⚷1050(1).

Admission of notice addressed to trustee requesting sale of property under trust deed *held* not reversible error in action for deficiency (Code Civ. Proc. § 1963, subds. 20, 23).

There was no evidence that the writing was not delivered to trustee on the day it bore date, and on the following day the trustee executed the notice of default and of election to sell the property required by Civ. Code, § 2924. Under Code Civ. Proc. § 1963, subds. 20, 23, there is a disputable presumption that a writing is truly dated and that the ordinary course of business has been followed. The trustee's deed, admitted in evidence, recited that plaintiff authorized the trustee to sell the property, and further provided that recitals thereof should be conclusive.

3. Evidence ⚷383(7).

Recitals of trust deed with respect to proceedings taken on default were sufficient to establish facts recited where there was no contrary evidence.

4. Mortgages ⚷335.

Notice of default preparatory to foreclosure was properly signed by trustee, where trust deed authorized sale under statute, and statute as subsequently amended permitted recordation of such notice by trustee (Civ. Code, § 2924, as amended by St. 1923, p. 755).

5. Mortgages ⚷329.

When parties provide in mortgage that method of enforcement shall be in accordance with particular procedural statute, statute as it exists at time of enforcement is referred to.

6. Appeal and error ⚷1051(3).

Rulings on evidence relating to execution of note and findings relative thereto were harmless, where execution of note was admitted by pleadings.

7. Appeal and error ⚷1051(1).

Admission of deposition, if error, was harmless, where matters stated therein were otherwise proved.

8. Mortgages ⟹369(3).

In action for deficiency remaining after foreclosure, evidence offered to prove value of property sold was inadmissible, where there was no claim of fraud.

9. Mortgages ⟹369(3).

Inadequacy of price is insufficient ground for setting aside foreclosure, unless sale was fraudulent.

10. Appeal and error ⟹719(6).

Sufficiency of evidence to support findings cannot be considered on appeal, where there was no specification of insufficiency (Code Civ. Proc. § 648).

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Mary F. Hopkins against the J. D. Millar Realty Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

L. B. Stanton, of Los Angeles, for appellant.

McKee, Tasheira & Wahrhaftig, of Oakland, and I. R. Rubin, of Los Angeles, for respondent.

FINCH, P. J.

The complaint alleges that on July 21, 1920, the defendant executed and delivered to the plaintiff its promissory note for $22,490, setting out the note in full, the note reciting that it is "secured by a deed of trust of even date herewith"; that "the defendant has paid on account of said note, the sum of $10,371.70," including the net amount on foreclosure trust deed sale $1,725.40 as of the date of sale under foreclosure, "to wit, December 2, 1925," leaving due for principal and interest a balance of $12,073.13; that the said sale under foreclosure was held on December 2, 1925, "pursuant to a notice of default recorded by the plaintiff herein in the office of the county recorder, * * *" and notice of trustee's sale duly given.

The answer denies, in the form of a negative pregnant, which therefore constitutes an admission, "that only the sum of $10,371.70 has been paid on account of the principal and interest of said promissory note"; denies "that the net amount realized upon sale of property under the trust deed was only the sum of * * * $1,725.40, or any other sum less than $12,073.13; * * * that any sale whatsoever was held on the 2d day of December, 1925, or at any other time whatsoever, either pursuant to a notice of the default recorded * * * or in any other manner whatsoever; * * * that notice of trustee's sale was published; * * * that there has been any demand whatsoever made"; and alleges as an affirmative defense "that a certain concern known as the Oakland Bank of Savings was nominated as trustee in that certain deed of trust referred to in the complaint of plaintiff herein; that said Oakland Bank of Savings is not such a corporation as is entitled to take or hold trusts of any nature, character or kind; that said trust deed was and is therefore void and of no effect as to any actions or powers on the part of said Oakland Bank of Savings therein; that said Oakland Bank of Savings had no power or authority whatsoever to make or execute any deed whatsoever under or upon a foreclosure of said trust deed or otherwise or at all; that on or about the 21st day of July, 1920, this defendant made and executed to plaintiff herein a deed of trust wherein said Oakland Bank of Savings was named as the grantee to hold as trustee said described real property; that by reason of the inability of said Oakland Bank of Savings to hold said property in trust or to act as trustee, said deed of trust constitutes merely a mortgage upon said described real property; that there has been no action taken or brought by plaintiff herein to foreclose said mortgage and that the claim of plaintiff herein is therefore immature."

The complaint goes into unnecessary details by setting forth an itemized account of payments and other receipts and also expenditures made, and the answer contains a number of repetitions, but the foregoing statement substantially covers the issues.

The court found the foregoing allegations of the complaint to be true and that the allegations of the answer are untrue except as stated in the findings to be true. It therefore appears from the findings that the defendant's allegations to the effect that the Oakland Bank of Savings was without power or authority to act as trustee are untrue. The court further found "that said promissory note was secured by a deed of trust, dated July 21, 1920, duly executed and delivered by J. D. Millar Realty Company, a California corporation, grantor, to The Oakland Bank of Savings (whose name was thereafter, by due order of court, changed to The Oakland Bank), as trustee, to secure the repayment of said note to plaintiff; * * * that in accordance with the provisions of said deed of trust, and after the due filing of a notice of default on July 6, 1925, in book 83 of official records * * * of the county of San Joaquin, * * * as provided for in section 2924 of the Civil Code, * * * and after due posting and publication as provided for by said section 2924 of the Civil Code * * * and section 692 of the Code of Civil Procedure, * * * in full accordance with the terms and provisions of said deed of trust, and pursuant to law, the property described in said deed of trust was by the trustee therein

named, sold on the 2d day of December, 1925, to the highest and best bidder therefor, at public auction; * * * that said sale was duly and regularly held in accordance with the terms and provisions of said deed of trust, and in accordance with law;" and that the net proceeds of the sale amounted to $1,852.77, which sum was credited on the promissory note, leaving a balance due the plaintiff of $11,945.76.

Judgment was entered in accordance with the findings, and the defendant has appealed, bringing up the record by a bill of exceptions.

[1] Appellant contends that its demurrer to the amended complaint should have been sustained. It must be conceded that such complaint is defective in failing to allege that the promissory note was secured by a trust deed. The note recites that it was so secured, but there is no direct allegation to that effect. The allegation in the answer, however, that the defendant executed the trust deed cures this defect in the complaint. 21 Cal. Jur. 277. The complaint is far from being a model pleading in other respects, but, when considered in connection with the denials and allegations of the answer, there is no uncertainty as to the real issues between the parties.

[2, 3] The plaintiff introduced in evidence, over the defendant's objection, a notice, dated July 1, 1925, signed by the plaintiff, addressed to the trustee, stating that the defendant was in default in making payments due on the note and requesting the trustee to sell the property pursuant to the provisions of the trust deed. No foundation was laid for the introduction of the writing, except testimony that it bore the signature of the plaintiff. Appellant contends that the admission of the writing was error. There is no evidence that the writing was not delivered to the trustee on the day it bears date. On July 2, 1925, the trustee executed and acknowledged the notice of default and of election to sell the property required by section 2924 of the Civil Code. There is a disputable presumption that a writing is truly dated and that the ordinary course of business has been followed. Code Civ. Proc. § 1963, subds. 23 and 20. The trustee's deed was admitted in evidence without objection. It recites that the plaintiff "did * * * on July 1, 1925, authorize and direct in writing said The Oakland Bank, as such trustee named in said deed of trust, to sell the real property hereinbefore described." The trust deed provides that in the event of a sale of the property by the trustee the recitals in the trustee's deed "of default, request to sell, publication of notice of the time and place of sale, * * * and of any other fact or facts affecting the regularity or validity of such sale shall be conclusive evidence" of such facts against the defendant. If it be conceded that, as bearing on the issues in this case, such recital is not conclusive evidence but hearsay, it is sufficient to establish the fact recited, in the absence of any evidence to the contrary. Lucy v. Davis, 163 Cal. 611, 615, 126 P. 490; Menefee v. Raisch Improvement Co., 78 Cal. App. 785, 789, 248 P. 1031.

[4, 5] The notice of default and of election to sell the property was signed by the trustee and not by the plaintiff. At the time the trust deed was executed, section 2924 provided for the recordation of such a notice by "the mortgagee or beneficiary." St. 1917, p. 300. In 1923 (St. 1923, p. 755) this section was so amended as to provide for such recordation by "the trustee, mortgagee or beneficiary." The trust deed empowers the trustee, in case of default by the defendant, to sell the property "in the manner and upon the notices prescribed in section 2924 of the Civil Code." In United Bank & Trust Co. v. Brown, 203 Cal. 359, 362, 264 P. 482, 483, it is said: "When parties to such instruments provide therein that as to the method of their enforcement it shall be in accordance either with law generally or with the terms of a particular procedural statute, the provisions in such instrument thus providing must be interpreted to mean the law or the statute in the form in which it exists at the time of such enforcement." It appears, therefore, that the procedure followed in this case is the proper one.

[6] Complaint is made of certain rulings relating to evidence bearing on the execution of the promissory note and the findings in relation thereto. This complaint is without merit, as the execution of the note and the trust deed was admitted by the pleadings.

[7] It is urged that it was prejudicial error to admit in evidence the deposition of Herbert C. Coblentz to the effect, among other things, that he posted copies of the notice of trustee's sale as required by law. There was other evidence, however, which was sufficient to show such posting, there being no evidence to the contrary. Another witness testified: "Each of 220 lots were posted, also posting made in three public places in the city." The trustee's deed, admitted in evidence without objection, as stated, recites with particularity that copies of the notice of sale were duly posted as required by law. Even if hearsay, this recital is sufficient proof of posting. The other matters stated in the deposition were proved by uncontradicted evidence. It follows that if it was error to admit the deposition the error was not prejudicial.

[8, 9] The court sustained the plaintiff's objection to evidence offered by the defendant to prove the value of the property sold under the trust deed. "Mere inadequacy of price is not sufficient ground for refusing to give full effect to such a sale as this," but where it is charged that the sale was fraudulent and unfair, evidence of great inadequacy of price

is admissible. Winbigler v. Sherman, 175 Cal. 270, 275, 165 P. 943; English v. Culley, 85 Cal. App. 291, 297, 259 P. 355. In this case the defendant did not allege that the sale was conducted unfairly or fraudulently. Plaintiff's objection to such evidence was made on the ground, among others, that it was "not within the issues in this case, and the further ground there is no pleading * * * of any unfairness as to price." The objection was properly sustained.

[10] Appellant contends that the evidence does not support the finding negativing the allegation in the answer that the Oakland Bank of Savings was without power or authority to act as trustee. It is sufficient to say that there is no specification of insufficiency of the evidence to justify the finding. Code Civ. Proc. § 648; Townsend v. Mercantile Inv. Co., 90 Cal. App. 213, 218, 265 P. 876. The bill of exceptions does not purport to contain all of the evidence, but merely "all of the evidence * * * pertinent or material to all or any question or questions raised by defendant, J. D. Millar Realty Company, in their motion for a new trial and it particularly contains all of the evidence raised by said defendant in its specification of errors and insufficiency of said evidence hereinafter set forth." Had the defendant's draft of the bill of exceptions specified that the evidence is insufficient to justify the finding in question, the plaintiff might have proposed amendments to the bill showing sufficient evidence to support the finding.

The only conclusion to be drawn from the record is that the contentions of the appellant are highly technical, devoid of substantial merit, and that the errors complained of have not resulted in a miscarriage of justice.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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106 Cal. App. 380

HELMICK v. HOLADAY et al.

Civ. 7261.

District Court of Appeal, First District, Division 2, California.

June 12, 1930.

1. Appeal and error ⟹1011(1).

Finding that attorney procured guaranty of note by fraud on client, based on conflicting evidence, cannot be disturbed on appeal.

2. Guaranty ⟹20.

Guaranty of note secured by mortgage on property sold, procured by misrepresentations that holder's consent was necessary to subsequent sales of property, *held* without consideration and void.

Lease and furniture of apartment were sold, and note for purchase price was sold to plaintiff, secured by chattel mortgage. Subsequent sales of lease and furniture were made to others, who were induced by plaintiff to sign an instrument guaranteeing payment of note, on misrepresentation that plaintiff's consent was necessary to sale in one instrument containing no promise or agreement to pay chattel mortgage or note thereby secured.

3. Chattel mortgages ⟹262(1).

Sale of mortgaged personalty not at place of sale, and made by agent of chattel mortgagee who became purchaser, *held* illegal (Civ. Code, §§ 2967, 3005; Code Civ. Proc. § 694).

Chattel mortgagee of personal property attempted to sell property under Civ. Code, § 2967, as pledge of personalty. Section 3005 provided that sale of property pledged must be made at public auction in manner and on notice of sale of personal property under execution; and section 296, Code Civ. Proc., required sale of property under execution to be made at auction to highest bidder, and that property must be within view of those attending sale where capable of manual delivery, and that neither officer holding execution nor his deputy can become purchaser or be interested in any purchase at such sale. Agent of chattel mortgagee conducted sale, and chattel mortgagee became purchaser of property, which was not within view of parties who attended sale.

4. Chattel mortgages ⟹267.

Chattel mortgagors of personalty illegally sold were entitled to such credit as property would have brought at legal sale.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by John N. Helmick against Orville Holaday and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Robert E. Austin, of Los Angeles, for appellant.

Albert E. Dunning and Frank W. Walden, both of Los Angeles, for respondents E. J. and Anna M. Almony.

C. R. Ogg, of Eagle Rock, for respondents Evalyn and W. M. Byrd.

BURROUGHS, Justice pro tem.

This is an action to recover the sum of $3,320.44 and interest, according to terms of

a certain promissory note. Judgment was entered in favor of the defendants, and the plaintiff appeals.

Appellant contends that certain findings of fact are not sustained by the evidence and the judgment should therefore be reversed.

The evidence discloses that on December 5, 1924, the defendant Anna M. Almony was the owner of a lease of an apartment house in the city of Los Angeles, known as the Auburn Apartments and that she owned all of the furniture used in connection therewith; that on said day she sold to her codefendants Orville Holaday and Nellie Holaday, the lease and the furniture above mentioned for the sum of $9,250; the Holadays paid $4,250 of said sum by executing and delivering to said Anna M. Almony a promissory note payable in monthly installments of $100 or more, commencing on January 15, 1925, and continuing until the balance was paid. The Holadays also executed a chattel mortgage on said property, including the lease, to secure the payment of the note. The mortgage provides that, upon failure to pay any installment of the note according to its terms "then the said mortgagee may take possession of said property using all necessary force so to do, and may immediately proceed to sell the same in the manner provided by law, and from the proceeds pay the whole amount of said note and all costs of sale including counsel fees in the sum of ten per cent. upon the amount due * * * all the said costs and attorneys fees being hereby secured by the property described herein." On the same day Anna M. Almony sold said note to the plaintiff and assigned to him the chattel mortgage securing the same. On the following day Anna Almony and her husband signed a letter addressed to the plaintiff, in which, among other things, they guaranteed their title to the note and mortgage above referred to and also guaranteed the payment of said note. The transaction took place in the plaintiff's office. The Holadays sold the said lease and furniture to the defendants Evalyn Byrd and W. M. Byrd, and on August 1, 1925, the Byrds signed a document addressed to this plaintiff, in which it was stated that, in consideration of the plaintiff consenting to their selling said property, they guaranteed the payment of the unpaid balance on said note, amounting to the sum of $3,680. The Holadays thereupon transferred title to the Byrds. The Byrds having sold the above-described property to Alice Getz, the latter also signed a letter addressed to the plaintiff in which she guaranteed the payment of the note. During all of the above transactions plaintiff was a practicing attorney and had his office and was associated with an attorney named Robert E. Austin. The amount due on the note not having been paid, and the property being in the possession of Alice Getz, the plaintiff, through his attorney, said Robert E. Austin, recovered a judgment in replevin against said Alice Getz, took possession of all of the property and sold it for $500; plaintiff being the purchaser at said sale. From this sum the plaintiff deducted $338 attorney fees and $71.25 costs. The net sum credited on the note amounted to $65.95. This action was thereafter commenced to recover the balance alleged to be due on the note.

It is first claimed by appellant that the finding of the trial court that the attorney's fees and costs were not secured by the chattel mortgage is not sustained by the evidence. Conceding this to be true, this is not an action to foreclose the chattel mortgage, nor is there any attorney's fee provided for in the note in suit. It is therefore an immaterial finding. The court found that, on January 5, 1925, and for some time prior thereto, the plaintiff had been and was at that time acting as attorney for the defendants Almony in their various business affairs, especially in matters of law; that, when the contract of guaranty above mentioned was made by them, it was their custom to sign without question any papers prepared by plaintiff for their signature; that both said defendants had every confidence in his ability and honesty, and fully relied upon his advice at all times; that on said day, and while plaintiff was acting as attorney for these defendants as aforesaid, the plaintiff purchased the said note from the said defendants; that at the time the plaintiff presented the contract of guaranty to said defendants and asked them to sign it, and, after said defendants had read the same, the defendants did not understand it and asked plaintiff to explain it to them, whereupon the plaintiff, with intent to cheat and deceive said defendants, informed them that the signing of said instrument would not create any liability against them or either of them, and that the signing of said instrument was a mere matter of form; that these defendants believed and relied upon said statements of plaintiff with reference to their nonliability in signing said instruments, and, acting upon such belief, and relying upon the integrity and honesty of the plaintiff as their attorney aforesaid, signed said instrument in writing purporting to guarantee the payment of said promissory note; that, in advising these defendants to sign said instrument in writing, the plaintiff was acting in his own interest and not that of the defendants and deliberately violated the confidence of these defendants, and fraudulently and dishonestly, and with intent to cheat, deceive, and defraud these defendants, secured said guaranty; that, had either of the defendants not been advised by their attorney, the plaintiff herein, to sign said instrument, or had they been informed as to the legal liability they

were assuming in so doing, they would never have signed the same; that the defendants Almony did not receive any consideration for making the written guaranty of payment; and that they signed the guaranty believing it was necessary to complete the transaction.

In support of these findings, defendant Anna M. Almony testified, in substance, that the plaintiff became attorney for herself and her husband, E. J. Almony, in August, 1924, in an action whereby the Almonys first obtained title to the property involved in this dispute, and was their attorney in the apartment house transaction now before the court; that he remained their attorney until December, 1925; that, when they sold the lease and furniture in December, 1924, plaintiff represented them in the preparation of the papers and advised them in connection with the transaction. She further testified that, "in the early part of January, 1925, I sold him the note and the chattel mortgage I received from the Holadays. At that time plaintiff asked me to sign a paper, and my husband and I signed it (the guarantee of the payment of the note). The guarantee was signed in plaintiff's office. I asked plaintiff what the paper was for and he told us it was a mere matter of form. That no liability would be concerned in it, and that papers like that were always signed in deals of that kind and then I signed it. If he had not made the statement that there would be no liability on my part, and that it was only a matter of form and that papers like that were always signed in such transfers, I would not have signed it. The first business I ever had with the plaintiff was this deal and selling him the note." On cross-examination, she testified that "the consideration for the note and mortgage paid me by plaintiff was a home in Inglewood that he sold us and we gave him for it the note in suit valued at $4,250, a lot in San Fernando at $1,500 and an equity in another lot in Lamanda Park at $685, and $315 in cash. We looked the property over at Inglewood that he traded to us. I told him the San Fernando lot was worth about $1,500; he knew about the value of the note, but I told him it was worth $4,250. My husband was present. He heard our conversation. I do not know if he read the papers, I merely glanced at them in a casual way. At the time of signing the guarantee I also signed the note on the back. My husband also signed them. My husband signed because plaintiff asked him to. He pushed the papers toward us and asked us to sign them and we did." E. J. Almony testified that plaintiff became their attorney in August, 1924, and continued in that capacity until December, 1925, and that they had no other attorney during that time. He further testified: "We followed his advice, we had confidence and trust in him. In December, 1925, we sold him the note and chattel mortgage. Plaintiff, my wife and myself were present in plaintiff's office. He shoved the papers up to me and asked me to sign, and I asked him what are these papers for, and he said that is merely a matter of form. No liability. That is always done in a deal of this kind. I would never have signed it if I had known it was a note and that he said there was no liability and a mere matter of form. He continued to be our attorney until December, 1925." On cross-examination, the witness testified: "I talked with the plaintiff about the deal a number of times before it was consummated. I signed the note on the back because plaintiff asked me to." John N. Helmick, the plaintiff, testified that he prepared the promissory note and chattel mortgage for the Holadays and Almonys and subsequently, January 5 or 6, 1925, he purchased the note and mortgage, trading them a house for it of the value of $6,000.

[1] There was other evidence received on behalf of plaintiff to combat the above testimony of the defendants, but it appears from the foregoing that the court's findings of fraud and deceit were based upon conflicting evidence, and therefore may not be disturbed by this court.

[2] The court found that the defendants E. J. Almony and Anna M. Almony did not receive any consideration for making said guaranty, that they signed the same upon the request of plaintiff, relying upon his representations that it was necessary to do so in order to complete the transaction and that said guaranty was void. The court also found that the purchase of the furniture and lease by Evalyn Byrd from Orville Holaday and Nellie Holaday was made by one instrument; that there was no promise or agreement to pay the chattel mortgage or note thereby secured; that Evalyn Byrd and W. M. Byrd signed the written guaranty to pay the note upon the representation of plaintiff that it was necessary to have his consent to such transfer and said guaranty was without consideration; that on October 21, 1925, W. M. and Evalyn Byrd sold said furniture and assigned the lease of the apartment house to the defendant Alice Getz, who entered into possession thereof; that said Alice Getz never promised to pay the said note; that the guaranty signed by Alice Getz was represented to her by the plaintiff as necessary to make said transfer legal, and that his consent was necessary for that purpose; that, relying upon said representations and not otherwise, she made and delivered said paper to plaintiff, but without any consideration. It is clear from the evidence that the plaintiff represented to the defendants E. J. and Anna M. Almony, defendants W. M. and Evalyn Byrd, and defendant Alice Getz, that his consent was necessary to a transfer of the above property, and that he said to Anna

Almony and E. J. Almony that the guaranty was a mere matter of form, that no liability would be attached to it, and that papers like that were always signed in that kind of deals. Evalyn Byrd testified that, when she signed the guaranty, not a word was said by the plaintiff about any personal liability, and that plaintiff said the indebtedness was secured by the furnishings in the apartment house. Alice Getz testified that when she took the apartment house she did not sign any guaranty of the payment of the note and that plaintiff said it was a form of law and did not obligate her to pay anything other than it was to go on with the mortgage. There can be no question that the consent of the plaintiff was unnecessary to a sale of the furniture subject to the debt secured by the chattel mortgage. It therefore follows that the guaranty as to each one of the defendants above named was given without consideration and is therefore void.

[3] The evidence and the findings are to the effect that, after the plaintiff recovered the mortgaged property in the suit in replevin, he endeavored to sell the same in the manner provided by section 2967 of the Civil Code as a "pledge" of personal property. It is provided by section 3005 of the Civil Code that a sale of property pledged must be made at public auction in the manner and upon the notice of sale of personal property under execution. Section 694 of the Code of Civil Procedure lays down the rule that the sale of property under execution must be made at auction, to the highest bidder. When it is of personal property capable of manual delivery, it must be within the view of those who attend the sale; neither the officer holding the execution nor his deputy can become a purchaser or be interested in any purchase at such sale. In the case at bar, the property was sold by Mr. Austin, the agent of the plaintiff; the plaintiff became the purchaser; furthermore, the evidence discloses that the property was not within the view of the parties who attended the sale. Although the sale was not made in the course of judicial proceedings nor by a duly licensed auctioneer, nevertheless it should have been made in accordance with the statute. In Henderson v. Fisher, 38 Cal. App. 270, 272, 176 P. 63, it is said: "Since it appears, both from the pleadings and the evidence, that the mortgagee, through his agent, conducted the sale and became a purchaser of the mortgaged property at such sale the position of appellant was analogous to the sheriff in conducting an execution sale; and hence the effect as to appellant of said sale would be the same as if the sheriff had bid at an execution sale. But in the latter instance, under the decisions, there can be no doubt that the sale would be at least voidable, if not void." In Sherlock v. Alturas State Bank, 73 Cal. App. 391, 398, 238 P. 816, 818, it is held: "The law is well settled that a power of sale, if given in a chattel mortgage, must be exercised in accordance with the provisions thereof. Henderson v. Fisher, 38 Cal. App. 270, 176 P. 63. This was a case in which this court said: 'The failure to sell in accordance with the manner provided by law rendered the sale void.'"

The court found, and the evidence supports the finding, that the mortgaged property was not present at the place of sale as required by section 694 of the Code of Civil Procedure; also that Austin, the agent of the plaintiff, acted as the auctioneer and the plaintiff became the purchaser, and, as said in Henderson v. Fisher, supra, this "was analogous to the sheriff in conducting an execution sale; and hence the effect as to appellant of said sale would be the same as if the sheriff had bid at an execution sale."

[4] Under such circumstances there was no legal sale of the mortgaged property. It follows that each one of the defendants would be entitled to such credit as the property would have brought at a sale provided by law. From the evidence as a whole it is fair to presume that it would have been greatly in excess of the few dollars for which plaintiff purchased it.

Many other points are discussed in the briefs. We are of the opinion that what has already been said is controlling in this case, and it would be of no benefit to take up the remaining questions.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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106 Cal. App. 309

HILL v. HILL.

Civ. 4131.

District Court of Appeal, Third District, California.

June 9, 1930.

1. Divorce ⟹184(6).

Whether divorce should be granted for extreme cruelty is question of fact for trial court (Civ. Code, §§ 94, 130).

Civ. Code, § 94, defines extreme cruelty as wrongful infliction of grievous bodily injury, or grievous mental suffering, and section 130, to prevent collusion, forbids granting divorce on uncorroborated statement, admission, or testimony of parties.

2. Appeal and error ⟹1011(1).

Findings on conflicting evidence, amply supported, will not be disturbed.

3. Divorce ⟹130.

Evidence justified interlocutory decree of divorce on ground of extreme cruelty (Civ. Code, §§ 94, 130).

4. Divorce ⟹127(4).

In divorce action, if considerable number of important material facts are corroborated, or if other evidence strongly tends to confirm plaintiff's statements, sufficient corroboration exists under statute (Civ. Code, §§ 94, 130).

5. Divorce ⟹127(4).

In divorce action, wife's testimony *held* sufficiently corroborated under statute, where minor child and two other witnesses corroborated material statements (Civ. Code, §§ 94, 130).

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Divorce action by Anna E. Hill against Alexander Hill. From a judgment for plaintiff, defendant appeals.

Affirmed.

Henry G. Bodkin and Bingham Gray, both of Los Angeles, for appellant.

Warren L. Williams and Seymour S. Silverton, both of Los Angeles, for respondent.

LUTTRELL, Justice pro tem.

In this action the plaintiff was granted an interlocutory decree of divorce from the defendant on the ground of extreme cruelty. By the judgment or decree, plaintiff was awarded the custody of the two minor children of the parties, one, a boy 13½ years of age at the time of the decree, and the other, a girl 10½ years old. Provision was made in the decree for the support of the children by the defendant, and he was required to pay to plaintiff a stated sum as her attorney's fee in the action. The decree also disposed of the community property of the parties.

Defendant has appealed from the judgment on the ground that the evidence is insufficient to support the findings and the judgment and that the testimony of the plaintiff was not corroborated, as required by section 130 of the Civil Code of California. Respondent contends that the evidence adduced is amply sufficient to support the findings and judgment of the trial court and that respondent's testimony was sufficiently corroborated to satisfy the requirement of the above-mentioned section of the code.

An examination of the record of the evidence given at the trial demonstrates to our satisfaction that there is no merit to either of the contentions of the appellant. The trial court found, among other things, that on one occasion, as charged in respondent's complaint, the appellant struck respondent in the face, breaking her glasses and leaving black and blue marks on her face, and that he at said time twisted her wrists; that on another occasion he seized her and threw her over a rocking chair, thereby bruising her back. The court further found that appellant falsely accused respondent of flirting and associating with other men, and that he, in the presence of their children, called respondent a son of a bitch and a whore, and that the said acts and conduct of appellant caused respondent grievous mental anguish and physical suffering.

Respondent testified fully as to the above-mentioned acts of cruelty as well as to many others on the part of her husband. Her testimony was in all particulars mentioned in the findings corroborated by that of the son of respondent and appellant, who, according to his evidence, witnessed both of the physical encounters between the parties herein narrated and on one of such occasions found his mother weeping and prostrated. The son also testified to having heard the appellant apply said vile epithets to the respondent in the presence of himself and his sister.

Mrs. Christie Sullivan, a neighbor of the parties, testified that about the date of the last striking of respondent by appellant, as testified to by respondent, she observed respondent "with a mark on her face—a black eye."

Mrs. Margaret Allen, who worked in the same store with respondent, testified that about that same time she noticed that respondent had a "big black place" on her right cheek, and that her wrists were swollen.

Appellant, in presenting his defense in the action, denied the charges of cruelty. He did, however, admit that he had, in an indirect way, told his wife that she was a whore; his testimony in this regard being that respondent had spoken to him on the subject of her procuring a divorce, and that in reply he quoted to her a passage from the Bible to the effect that, if she should secure a divorce from him and then should commit adultery, she would be a whore.

Extreme cruelty is defined in section 94 of the Civil Code to be "the wrongful infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage."

In the case of Hansen v. Hansen, 86 Cal. App. 744, 261 P. 503, 504, decided by this court on November 15, 1927, in which case numerous California decisions are cited on the proposition, it is held that "no arbitrary rule of law can be laid down as to what particular facts must be alleged and proven in order to justify a finding that the complaining party has suffered grievous bodily injury, or has undergone grievous mental suffering. A cor-

rect decision must always depend upon the sound sense and judgment of the trial court. 'Whether in any given case there has been inflicted * * * "grievous mental suffering" or grievous bodily injury, is a * * * question of fact, to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party.' "

[1] Such being the undisputed law on the subject, and the evidence of appellant in the case at bar being in conflict with that of respondent and her witnesses on the issue of cruelty, it was for the trial court to pass upon the conflicting evidence and to determine whether or not the acts and conduct of appellant, as shown by the evidence, inflicted upon the respondent grievous mental suffering or grievous bodily injury, or both.

[2, 3] The trial court having decided these issues in favor of the respondent, and there being ample evidence in the record to support such conclusion, this court cannot, under well-settled principles of law, set aside such findings and judgment. In fact, from the evidence in this case, we cannot see how the trial court could have reached any other conclusion than it did on the issue of cruelty.

[4, 5] As hereinbefore stated, appellant contends that respondent's testimony is not sufficiently corroborated.

The principal object of the statute requiring corroboration in divorce cases is to prevent collusion. Smith v. Smith, 119 Cal. 183, 48 P. 730, 51 P. 183; Crum v. Crum, 57 Cal. App. 539, 207 P. 506; Andrews v. Andrews, 120 Cal. 184, 52 P. 298.

The fact that appellant vigorously contested respondent's suit in the court below and has presented this appeal dispels any idea of collusion between the parties in the procurement of a divorce. Moreover, corroboration of every act sworn to by the plaintiff is not required. It is sufficient corroboration if a considerable number of important and material facts are so testified to by the other witnesses, or if there is other evidence, circumstantial or direct, which strongly tends to strengthen and confirm the statements of the plaintiff. Andrews v. Andrews, supra; Percy v. Percy, 188 Cal. 765, 207 P. 369. As shown by the testimony of respondent's son, as well as by that of the other two witnesses called in her behalf, the requirement of the law, as to corroboration, was fully met in the instant case.

No sufficient reason appears why the judgment of the trial court should be disturbed, and the same is therefore affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

106 Cal. App. 352

STURGEON et al. v. CITY OF HAWTHORNE et al.

Civ. 4114.

District Court of Appeal, Third District, California.

June 11, 1930.

1. Appeal and error ⟹78(3).

Order sustaining demurrer to complaint is "interlocutory order" and not appealable (Code Civ. Proc. § 963).

[Ed. Note.—For other definitions of "Interlocutory Order," see Words and Phrases.]

2. Injunction ⟹135.

Granting of preliminary or temporary restraining order is not matter of right, but rests in trial court's sound discretion.

3. Municipal corporations ⟹1000(5).

Complaint, in suit to restrain city from issuing improvement bonds, *held* insufficient, in absence of allegation that plaintiffs made objections to city council as required by statutes.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Suit by Tallie T. Sturgeon and others against the City of Hawthorne and others. From an order sustaining a demurrer to the amended complaint and denying a restraining order, plaintiffs appeal.

Affirmed.

Fred W. Heatherly, of Los Angeles, for appellants.

Louis Greenbaum, of Los Angeles, and A. L. Stein, for respondents.

PULLEN, Justice pro tem.

Appellants herein as plaintiffs filed an amended complaint against the municipality and the members of its common council and the city clerk to restrain them from issuing certain bonds in payment for certain described improvements. Respondents interposed a demurrer to the amended complaint which by the court was sustained and also denied without prejudice appellants' application for an injunction pendente lite. Appellants having failed to amend, a judgment of dismissal was entered. Thereupon, appellants gave notice of appeal "from the order of the above-named superior court sustaining the demurrer of the defendants to the amended complaint and denying the restraining order prayed for in said amended complaint."

[1] The judgment must be affirmed. An order sustaining a demurrer is interlocutory

and is not subject to appeal. Section 963, Code Civ. Proc. We do not believe it requires the citation of many authorities, but the case of Cornic v. Stewart, 179 Cal. 242, 176 P. 164, shows the attitude of the courts thereon:

"In this case no respondent's brief has been filed, but a cursory examination of the record discloses that the only appeal before us is an attempted appeal from two orders of the trial court sustaining a demurrer to the plaintiff's first amended complaint and denying the plaintiff's application for leave to file a second amended complaint. Neither of these orders are appealable orders, and there is no appeal from the judgment. It follows that the appeals must be dismissed, and it is so ordered."

Also the court in the case of Meley v. Boulon, 104 Cal. 262, 37 P. 931, in discussing an attempted appeal from an order denying plaintiffs' motion for a new trial, said:

"The notice of appeal herein is addressed to the attorneys for respondents, and is in the following words: 'You will please take notice that the plaintiff substituted in the above-entitled action hereby appeals to the supreme court of the state of California from the order denying plaintiff's motion for a new trial, and from an order of said court denying plaintiff's motion to set aside the decision and judgment in the action, which said judgment was therein entered in the said superior court on the 16th day of December, 1891, in favor of the defendants in said action and against plaintiffs, and from the whole thereof.'

"The appeal from the orders named in this notice was dismissed by this court, February 6, 1893; and the appellant now claims that the notice above set out is sufficient as a notice of appeal from the judgment therein described, and he insists upon his right to be heard upon such appeal. This contention cannot be sustained. The notice of appeal is certainly very awkwardly constructed, but is not ambiguous, and it cannot possibly be construed as an appeal from the judgment therein mentioned. It says nothing about an appeal from the judgment, but gives notice only that the plaintiff 'appeals to the supreme court * * * from the order denying plaintiff's motion for a new trial, and from an order of said court denying plaintiff's motion to set aside the decision and judgment in the action;' and then follows a description of the judgment to which the said motion of plaintiff related; and the notice then concludes with the words 'and from the whole thereof.' These latter words refer to the orders previously mentioned, and indicate that the appeal is from the whole and not a part of said orders.

"While notices of appeal should be liberally construed, and no appeal should be dismissed because of any misdescription of the judgment or order to which it relates, unless it appears that the respondent has been misled by such misdescription, still this rule is not liberal enough to justify us in holding that the above notice of appeal is or was intended as an appeal from a judgment. In order to constitute such a notice, the paper relied on for that purpose should at least state that the appeal is taken from a judgment; and this, considering the fact that it is not difficult to find words to properly express such an intention, is not a harsh rule.

"It follows from these views that the cause is not properly on our calendar, the only appeal in the case having already been disposed of; and for this reason the submission thereof is set aside, and the cause stricken from the calendar."

[2, 3] With reference to the appeal from the order denying the restraining order, that order also must be affirmed for the granting, denying, dissolving, or refusing to dissolve a preliminary or temporary restraining order is not a matter of right, but rests in the sound discretion of the trial court and there is no showing here of any abuse of discretion. Lest appellants feel aggrieved that the mere form of a notice deprive them of a hearing, we have examined the amended complaint and find the demurrer thereto was properly sustained. It is nowhere alleged in the amended complaint that the appellants, the protestants to the proposed improvement, ever made any objection to the city council as provided by the various improvement acts under which the contemplated improvements were to be made.

For the foregoing reasons the judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

106 Cal. App. 372

PEOPLE v. FIDELITY & DEPOSIT CO. OF MARYLAND.

Civ. 220.

District Court of Appeal, Fourth District, California.

June 11, 1930.

1. Appeal and error ⟹1170(3).

Error in not requiring state suing on bail bonds to separately state cause of action on each bond *held* not prejudicial, precluding reversal (Const. art. 6, § 4½).

Entire transaction on which cause of action was based was fully set forth in complaint, and could easily have been answered by defendant. Two bonds in suit were taken together as part of one transaction for single purpose of securing release of accused from custody; second bond having been issued when first bond was determined insufficient.

2. Bail ⟹55.

Accused, when furnishing bail to obtain release from custody, must furnish bond substantially in statutory form (Pen. Code, §§ 1273, 1277, 1278).

3. Bail ⟹47.

Justice of peace admitting accused to bail before preliminary examination *held* authorized to accept continuing bond conditioned on accused answering charge in whatever court prosecuted at all times (Pen. Code, §§ 862, 1273, 1277, 1278).

Surety, in action to recover on bail bond, contended that justice of peace, on admitting accused to bail before preliminary examination, under Pen. Code §§ 862, 1273, 1277, and 1278 was without authority to accept bail that would apply after accused had been held to answer, and that therefore condition of bonds given before preliminary examination was fully performed by appearance thereat.

4. Bail ⟹62.

Intention of parties under bail bond is question of contract as determined from agreement.

5. Bail ⟹55.

Statutory form of bail bond applies to bonds securing appearance before magistrate before examination as well as those where accused is held to answer (Pen. Code, § 1278).

6. Bail ⟹75.

Accused's failure to appear when case was regularly called for trial *held* to constitute breach of bail bonds given before preliminary examination (Pen. Code, §§ 1273, 1277, 1278).

Bonds in question recited that surety "hereby undertakes that" accused "will appear in that or any other court in which his appearance may be lawfully required upon that charge and will at all times render himself amenable to its orders and process, and appear for judgment and surrender himself in execution thereof."

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the People against the Fidelity & Deposit Company of Maryland. Judgment for plaintiff, and defendant appeals.

Affirmed.

Curtis Hillyer, of San Francisco, for appellant.

Stephen Connell, Dist. Atty., of San Diego, for the People.

BARNARD, J.

One Slaymaker was arrested on November 23, 1925, and charged with a felony. Upon arraignment in the justice's court his bail was fixed at $1,000, being later raised to $2,000. The defendant, surety company, furnished two bonds in the sum of $1,000 each, the first on November 23, 1925, and the second on November 27, 1925, at which time the defendant was released. He appeared at the preliminary hearing, and was held to answer. Thereafter said defendant was arraigned in the Superior Court and pleaded "not guilty." When the case was regularly called for trial, the defendant did not appear. It is conceded that no bail was fixed, ordered, or accepted subsequent to the preliminary examination and the commitment of said defendant. After due proceedings, the bail was ordered forfeited, and the complaint in this action was filed setting up the above facts, and seeking to recover the amount specified in the two bonds. The defendant herein demurred to the complaint on the ground that it did not contain facts sufficient to constitute a cause of action, and also on the ground that two causes of action were attempted to be pleaded, but not separately stated. The demurrer being overruled and the defendant declining to answer, judgment was entered, from which judgment this appeal is taken.

[1] The first ground of reversal urged is that the court erred in overruling the demurrer, since the complaint sets forth both bonds sued upon in one cause of action, whereas it is insisted that there are two causes of action which should have been separately stated. We think the trial court should not have disregarded this rule of pleading, and should have required the plaintiff to amend the com-

plaint in this respect. On the other hand, while it would have been better pleading to have stated these causes of action separately, under section 4½ of article 6 of the Constitution, we may not reverse a judgment for any error as to any matter of pleading, unless, after an examination of the entire cause, including the evidence, we are of the opinion that the error complained of has resulted in a miscarriage of justice. No such result appears here, and nothing to show that the appellant was in any manner injured. The point raised is not only a highly technical one, but the whole transaction was fully set forth in the complaint, and could have easily been answered by the defendant. No reason appears why the matter alleged could not have been just as fully and more easily answered as here pleaded than if separated into two causes of action. This is especially true, since, as a matter of fact, these two bonds were used together as a part of one transaction, for the one purpose of together furnishing sufficient bail to secure the release of a defendant, who was released only when the second bond was filed, the two being treated in combination. While technically there may be a difference, practically it was as much one transaction as would have been the case had two thousand-dollar bills been deposited for the purpose. We are of the opinion that the error under consideration was not sufficient to require a reversal of the judgment.

[2, 3] The principal contention of appellant is that the complaint did not state a cause of action; it being maintained that a justice of the peace, upon admitting a defendant to bail before a preliminary examination is held, has no authority to accept bail that shall apply after such a defendant has been held to answer. And that, since the defendant, Slaymaker, appeared at the preliminary hearing, the agreement of the defendant herein as set forth in the bonds in question was fully performed; the failure of said defendant to appear for trial in the superior court not being covered by said bonds under our law. Appellant argues that the only authority for admitting a defendant to bail before conviction is given by sections 1273 and 1277 of the Penal Code; that by the first part of section 1273 authority is given to admit a defendant to bail for his appearance before a magistrate on the examination of the charge, which must be done before he is held to answer; and that, under the second part of this section, and under section 1277 of the same Code, authority is given to again admit him to bail for his further appearance, but that this may be done only after he has been held to answer. It is then argued that, since there is no authority for accepting bail prior to the preliminary examination which shall continue to apply after a defendant is held to answer, such bonds as those here involved, although in the form required by section 1278 of the Penal Code, are only contracts to pay if the one for whose release they are given fails to appear for preliminary examination, and that the other obligations, required by section 1278 and set forth in said bonds, are merely surplusage.

The authority for admitting a defendant to bail when the preliminary examination is not held immediately after the arrest is contained in section 862 of the Penal Code. Section 1268 of this Code defines "admission to bail," while section 1269 defines the "taking of bail." Section 1273 of this Code, so far as it affects this case, provides as follows:

"*Nature of Bail.* If the offense is bailable, the defendant may be admitted to bail before conviction:

"First—For his appearance before the magistrate, on the examination of the charge, before being held to answer.

"Second—To appear at the court to which the magistrate is required to return, the depositions and statement, upon the defendant being held to answer after examination."

Section 1277 is as follows:

"*What Magistrates May Admit to Bail.* When the defendant has been held to answer upon an examination for a public offense, the admission to bail may be by the magistrate by whom he is so held, or by any magistrate who has power to issue the writ of habeas corpus."

Section 1278 provides how bail is furnished, and gives the form which must be substantially followed.

Each of the bonds here in question contained the following: "Now, we, Fidelity and Deposit Company of Maryland, a Corporation, * * * hereby undertake that the above named Nathaniel E. Slaymaker will appear in that or any other court in which his appearance may be lawfully required upon that charge and will, at all times, render himself amenable to its orders and process, and appear for judgment and surrender himself in execution thereof; or if he fails to perform either of these conditions, that we will pay to the people of the State of California the sum of One Thousand Dollars." This substantially follows the requirements of section 1278 of the Penal Code.

Examining section 1273, which with section 1277 is the section most relied upon by appellant, we are unable to follow his contention that the phrase "before being held to answer" and the phrase "upon the defendant being held to answer after examination," give authority only for two separate bonds for two separate purposes. Giving the quoted phrases their greatest significance, they would only provide that a defendant may be admitted to bail for either purpose. But the fact that the defendant might be admitted to bail at either stage of the proceeding does not necessitate the holding that he must be admitted to bail separately at each of said stages. There is nothing in this section to indicate that a defendant may not be held to bail for both purposes covered by this portion of the section, and noth-

ing to indicate that any bail given pursuant to the section and in the form provided by section 1278 shall cease to be of effect when the preliminary examination is held; nor that bail requiring the appearance of the defendant in the superior court after being held to answer may not be given prior to his appearance before the magistrate on the examination of the charge. That it was the intention of the Legislature to provide for one continuing bond that should cover both of the purposes named in the quoted portion of the section is indicated by the terms of section 1278, which provides the form of the bond. The only reasonable interpretation of these sections is that, while a defendant is not required to obtain bail in the beginning or forever lose his right, when bail is furnished, it must be substantially in the form provided in section 1278. If these sections do not require a continuing bond, they certainly permit one. In this connection it may be observed that the language of section 1277, providing that, when a defendant has been held to answer, the admission to bail may be by either of the magistrates named, is significant in that it is so worded as not to require the admission to bail again if it has already been done. It may also be observed that, if it was intended by section 1273 to require the ordering and giving of separate bail bonds at successive stages of the proceedings, then section 1278, which provides the form for any and all bonds mentioned in section 1273, would not provide for one form only, covering appearance in any court, and compliance with all orders and processes of the court up to the time of judgment and execution, but, in that event, separate forms would have been provided covering the respective requirements of each stage. It would be useless to require that a bond conditioned on the appearance of the defendant at the preliminary examination should also contain those provisions set forth in section 1278 covering later proceedings. On the other hand, the form provided in section 1278 fully covers both a case where a defendant, not having been previously admitted to bail, is admitted to bail in accordance with section 1277, and one where a defendant is admitted to bail in the first place in accordance with section 1273.

We find nothing in these statutes denying to the magistrate authority to accept bail prior to the preliminary examination, the bond being conditioned upon the defendant appearing and answering the charge in whatever court it may be prosecuted, and upon his holding himself amenable to its orders and processes at all times, including his appearance for judgment, if convicted. On the other hand, these statutes seem to particularly authorize such a bond.

[4-6] Under such circumstances it becomes a question of contract as to what the parties have themselves agreed upon in the bonds in question. In San Luis Obispo County v. Ryal, 175 Cal. 34, 165 P. 1, 2, the court said: "It is a familiar rule of law that sureties cannot be held beyond the terms of their contract of suretyship. They have a right to declare in their bond the terms and conditions upon which they shall be bound and to stand on the precise terms of that contract."

In the case of Weinreich E. Co. v. A. J. Johnston Co., 28 Cal. App. 144, 151 P. 667, 670, the court said: "As to those (authorities) announcing the general rule that sureties are entitled to stand upon the precise terms of their contract, they must be considered in the light of the language used by Mr. Justice Lorigan in Sather Banking Co. v. Briggs Co., 138 Cal. 730, 72 P. 352, that: 'The old rule of strictissimi juris applies only to the extent that no implication shall be indulged in to impose a burden not clearly inferable from the language of the contract, but does not apply so as to hold that the contract shall not be reasonably interpreted as other contracts are.' In interpreting the terms of a contract of suretyship, the same rules are to be observed as in case of other contracts. (Civ. Code, § 2837.)"

In the case at bar the appellant agreed in writing to undertake that the defendant for whom bail was given would appear in the justice's court or "any other court in which his appearance may be lawfully required upon the charge, and will at all times render himself amenable to its orders and process, and appear for judgment and surrender himself in execution thereof; or if he fails to perform either of these conditions, that we will pay to the People of the State of California the sum of One Thousand Dollars."

It has heretofore been held that the form of bond provided for in section 1278 of the Penal Code applies to bonds to be given where the party is to appear before a magistrate before examination, as well as to those where he is held to answer after examination. People v. American Surety Co., 55 Cal. App. 756, 204 P. 419; City and County of San Francisco v. Randall, 54 Cal. 408. It has also been held that a bond conditioned in accordance with the provisions of section 1278 is sufficient to require the presence of the defendant in the Superior Court. In that case, one to recover upon such a bond when the defendant failed to appear in the Superior Court, the court said:

"The condition of the bond which is alleged to have been broken is that 'The above-named Juan Santos will appear and answer the charge above mentioned, in whatever court it may be prosecuted, and will at all times hold himself amenable to the orders and process of the court.' The complaint shows that the case was regularly set for trial for December 7, 1908, in the superior court of Shasta county, and on said day 'the said case was duly called to trial in said superior court, and the said Juan Santos having been theretofore duly advised of the time and place of said trial, then and there failed to appear for

trial,' etc. That the sureties undertook to produce Santos at the trial of the cause in the superior court when they promised that he would 'appear and answer the charge in whatever court it may be prosecuted' is too plain for argument." People v. Bellafont, 11 Cal. App. 492, 105 P. 426.

In the case of State v. Sorensen, 48 Utah, 663, 160 P. 1181, decided by the Supreme Court of Utah, it was argued that a bail bond was given for the defendant's appearance only in the justice's court, and hence that the failure of the defendant to appear in the district court for arraignment was not a default or breach within the terms of the bond. The Utah statute (Comp. Laws 1907, § 4988), almost in the exact language of section 1273 of our Penal Code, was as follows: "If the offense is bailable, the defendant may be admitted to bail: Before conviction—1. For his appearance before the magistrate on the examination of the charge, before being held to answer; 2. To appear at the court to which the magistrate shall be required to return the complaint, upon the defendant being held to answer after examination. * * *"

The court there held that the bond in question, conditioned that the defendant "will appear and answer the charge above mentioned before said justice, or in whatever court it may be prosecuted," covered the appearance of the defendant in the district court. Not only did the bonds here in question contain similar language, but under section 1278 of the Penal Code they were required to be so worded.

There is no ambiguity in the bonds under consideration, and their language is plain. Appellant agreed to pay a certain sum of money in the event the defendant, whose release was secured by said agreement, failed to comply with certain requirements definitely nominated in the bond. The requirements not having been complied with, the agreement of the appellant must be enforced.

The judgment is affirmed.

We concur: CARY, P. J.; MARKS, J.

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106 Cal. App. 368

BOZEGIAN v. BAKIRJIAN et al.

Civ. 4118.

District Court of Appeal, Third District, California.

June 11, 1930.

1. Pleading ⟹354(2).

Plaintiff's motion to strike out, if addressed to entire answer, *held* properly denied, where parts of answer constituted proper denials of plaintiff's allegations (Code Civ. Proc. § 453).

Code Civ. Proc. § 453, provides that sham and irrelevant answers, and irrelevant and redundant matter inserted in pleading, may be stricken out upon such terms as court may, in its discretion, impose.

2. Appeal and error ⟹919.

Absent contrary showing in record, presumption exists that order denying plaintiff's motion to strike entire or part of answer, if any, was properly denied.

Whether plaintiff's motion was addressed to entire answer or only to portion thereof did not appear from record. Record only showed that motion to strike answer to complaint from files came on for hearing and that that motion was denied.

3. Appeal and error ⟹994(3).

Trial court hearing conflicting testimony is judge of credibility of various witnesses appearing before it.

4. Appeal and error ⟹1011(1).

Where testimony is conflicting, finding of trial court based thereon will not be disturbed by appellate court.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by August Bozegian against Vahan Bakirjian and others. From the judgment rendered, plaintiff appeals.

Affirmed.

Y. B. Arsen, of Los Angeles, for appellant.

Benno M. Brink, of Los Angeles, for respondents.

PLUMMER, J.

So far as this appeal is concerned, it affects only the plaintiff and the defendant Egavian.

The appeal by the plaintiff is from a judgment entered in favor of the defendant Egavian, in an action prosecuted by the plaintiff to recover the sum of $25,350 damages alleged to have been suffered at the hands of the defendant Egavian.

The record discloses that, just prior to the alleged act which occasioned the injury to the plaintiff, the plaintiff and the defendant Bakirjian had been engaged in an altercation and fight in a room on the second floor of a building known as 543 South Los Angeles street, in the city of Los Angeles. The complaint in this action sets forth that shortly

after this occurrence, the plaintiff left the room mentioned, went down the stairway of the building to the sidewalk in front thereof; that shortly thereafter, the defendant Bakirjian came down the stairway to where the plaintiff was standing and assaulted him with a knife; that, at the time of the assault, the defendants Egavian and Serailian seized the plaintiff in such a manner as to hold both his arms, preventing him defending himself, and permitting the defendant Bakirjian to strike the plaintiff in the face, so injuring the plaintiff that the plaintiff lost the sight of one eye.

The answer of the defendant Egavian denies participation in the acts alleged by the plaintiff, sets forth a number of denials upon information and belief, and then directly denies that he (the defendant Egavian) was guilty of any of the acts alleged in the plaintiff's complaint. The answer also denies that the defendant Serailian participated in any of the acts. It would appear, however, that the defendant Serailian permitted default to be entered against him.

Upon this appeal two grounds of error are alleged: (1) That the court erred in denying the appellant's motion to strike out the answer of the defendant Egavian; and (2) that the findings of the trial court are not supported by the testimony. The appellant, in support of his contention that the court erred in denying his motion to strike out the answer of the defendant Egavian, characterizes the pleading of the defendant in the following words: "The answer is a monument of contradictions, conjunctural denials, denials loaded with negative pregnants, denials not within the scope or knowledge of defendant, denials which are incompetent, irrelevant, immaterial; denials not made with good faith; denials made wholly in disregard of the truth." A reading of the answer filed by the defendant Egavian leads to the conclusion that plaintiff's characterization thereof is not without some merit. Many denials contained in the answer appear to have been made without much consideration having been given to the verification which appears at the conclusion of the pleading. However applicable the characterization of the plaintiff, nothing is presented to this court upon which we can base a conclusion that the ruling of the trial court in denying the appellant's motion to strike out the answer of the defendant Egavian, constitutes any cause for reversal. Irrespective of many of the denials in the answer which appear to have no proper place therein, there are portions in the answer constituting proper denials of the plaintiff's allegations. Section 453 of the Code of Civil Procedure reads: "Sham and irrelevant answers, and irrelevant and redundant matter inserted in a pleading, may be stricken out, upon such terms as the court may, in its discretion, impose." Just what motion was interposed by the plaintiff in relation to the defendant's answer does not appear. The record in this case is entirely silent as to the contents of such motion. All that appears in the record is the following (omitting title of court and cause): "Motion to strike answer of complaint from files comes on for hearing. Arsena Yeretzian appearing as attorney for the plaintiff and B. M. Brink for defendants. Said motion is denied."

[1] If the motion of the plaintiff was to strike out the entire answer of the defendant, its denial by the court was proper. Had the motion been made to strike out certain portions thereof, doubtless the court would have granted the same.

[2] Nothing appearing to the contrary in the record, it must be presumed by this court that the order of the trial court denying whatever motion the plaintiff did make, if any, was properly denied.

As to the second ground upon which reversal is sought, we do not need to set forth the testimony at length. It is sufficient to state that the testimony of the defendant Egavian is to the effect that when he left the room where the fight between the plaintiff and Bakirjian had taken place, and in which he did not participate, he went home immediately; that he was not present when the events taking place on the sidewalk in front of the building transpired. On the other hand, the testimony of the plaintiff is directly to the effect that the defendant Egavian was one of the persons who held his arms while he was assaulted by the defendant Bakirjian. Two witnesses other than the plaintiff and defendant testified that the defendant Egavian was present at the time of the fight which took place on the sidewalk.

[3, 4] The trial court heard this conflicting testimony. It had before it the witnesses, and was, of course, the judge of the credibility of the different witnesses appearing in the cause. The trial court had a right to accept the version of the affair given by the defendant Egavian, if that version seemed to the court more credible. It may be here stated that the place where the encounter took place does not appear to be a very high-class resort, and testimony given of occurrences taking place in such resorts is not always the most reliable. But it was for the trial court to determine, if possible, the truth of the matter. We do not need to cite authorities to the effect that, where the testimony is conflicting, an appellate court will not hold that a finding based thereon is not properly sustained.

The appeal in this cause appears to be wholly without merit, and the judgment is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

106 Cal. App. 358

BAKER et al. v. BUTCHER et al.

Civ. 4116.

District Court of Appeal, Third District, California.

June 11, 1930.

1. Usury ⟹115.

Parol evidence is admissible to show whether transaction was usurious.

2. Usury ⟹117.

Existence of illegal agreement for payment of usurious interest must affirmatively appear from evidence adduced at trial.

3. Usury ⟹113.

Burden of showing illegal agreement for payment of usurious interest is on party who challenges transaction as void.

4. Bills and notes ⟹525.

Evidence, in action on note, supported finding that holder was purchaser of note without knowledge of agreement between makers and payee with respect to payment of usury.

5. Usury ⟹103.

Makers *held* precluded from relying on usury as defense in action on note by warranty before purchase by holder that makers had received consideration for full face value of note.

Before purchase of the notes was agreed upon, a written certificate was signed and delivered to the proposed purchaser by two makers, one of whom testified that he was acting as agent for makers in negotiating sale of note and trust deed, and the certificate stated that makers had received consideration for full face value of note, and that they claim no offsets or legal defenses of any nature against trust deed or note.

6. Usury ⟹6.

Usury law may not be converted into engine of injustice and deceit (Usury Law [St. 1919, p. lxxxiii]).

7. Bills and notes ⟹376.

Defense of usury is not available against innocent purchaser of note before its maturity for valuable consideration without knowledge of its usurious infirmity.

8. Usury ⟹76.

Usurious note is not made void by usury law, but law merely renders void provision with respect to usurious interest (Usury Law [St. 1919, p. lxxxiii] § 2; Civ. Code, §§ 3133, 3138).

9. Bills and notes ⟹517.

Where escrow instructions, warranty of title, and receipt of consideration showed title in payee of note, delivery was conclusively presumed under statute (Civ. Code, § 3097).

It was contended that, because payee did not have possession of note, there was no delivery, and title to the note did not pass. However, escrow instructions from payee to escrow holder and written warranty of title and receipt of full consideration on part of makers showed title in payee, and hence delivery was presumed under Civ. Code, § 3097, providing that, where instrument is in hands of holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed.

10. Usury ⟹26.

Owner of note may sell it for any price and on any terms so long as he is not party to, and has no knowledge of, previous usurious agreement (Usury Law [St. 1919, p. lxxxiii]).

11. Mortgages ⟹338.

Regardless of forfeiture of alleged usurious interest, makers of secured note could not restrain sale under provisions of trust deed for foreclosure, where principal debt was due.

Appeal from Superior Court, Los Angeles County; Robert D. Lambert, Judge.

Action by Lorin L. Baker and others against W. H. Butcher and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

A. G. Reily, of Los Angeles, for appellants.

Flint & MacKay, of Los Angeles (Wesley L. Nutten, Jr., of Los Angeles, of counsel), for respondents.

R. L. THOMPSON, J.

This is an appeal from a judgment against the plaintiffs in a suit for declaratory and injunctive relief against the foreclosure of a trust deed on the ground that the note secured thereby was executed in conflict with the usury law of California and void.

The plaintiffs were the owners of lots 1 and 2, block 4, of Ocean Pier West in Long Beach, Los Angeles county. The complaint alleges that on December 12, 1924, they borrowed $16,200 from the Los Angeles Investment Securities Corporation for which they executed a promissory note for $20,000 payable January 1, 1926, with interest at 8 per cent. per annum secured by a trust deed on said property; that the premium represented by the difference between the amount of said loan and the principal sum of the promissory note, together with interest thereon, constitutes

usury, and renders the note and trust deed void to the extent of all interest and bonus in excess of said sum of $16,200, under the provisions of the California "Usury Law" (Stats. 1919, p. lxxxiii, Deering's Gen. Laws, 1923, Act 3757, p. 1384); that the California Title Insurance Company, which is the trustee named in said trust deed, threatens to foreclose said trust deed and sell the property for default in the payment of the principal sum of said note and interest, and prays that the foreclosure of the trust deed be enjoined, and that it be determined that the note and trust deed are void with respect to the interest and principal sum in excess of $16,200.

The answer controverts the material allegations of the complaint, and affirmatively pleads estoppel in pais, and alleges that for a valuable consideration the plaintiffs, on December 12, 1924, executed and delivered in escrow, for the defendant W. H. Butcher, a promissory note for $20,000, due January 1, 1926, bearing interest at the rate of 8 per cent. per annum, secured by a duly executed trust deed on the Los Angeles county lots above described; that the Los Angeles Investment Securities Corporation, on January 23, 1925, purchased said note and mortgage from Butcher, the payee, for the sum of $17,600, which was paid; that the note and trust deed were duly assigned to said purchaser on the last-named date; that the Los Angeles Investment Securities Corporation was an innocent purchaser of said note and trust deed before maturity for a valuable consideration, without knowledge of the alleged usurious infirmity; and that the makers of the note were in default in the payment of both the principal and interest thereof, whereupon notice of foreclosure was duly given. Judgment of foreclosure and an order of sale were prayed for.

Upon trial the court found that the Los Angeles Investment Securities Corporation was the owner and holder of the note and trust deed as the purchaser thereof before maturity for a valuable consideration without knowledge of the alleged infirmity thereof; that the note constitutes a valid subsisting obligation of the makers duly secured by the trust deed upon the premises described; that the makers of the note were in default of payment of both principal and interest thereon, together with money advanced under the terms of the trust deed in the additional sum of $1,422.25; that the plaintiffs are estopped from maintaining the defense of usury; and that the owner of said note and trust deed is therefore entitled to foreclose the deed pursuant to the terms thereof, and to sell the property to satisfy its lien as prayed for.

The record shows that plaintiffs own the Long Beach lots in question. Prior to December 12, 1924, the lots were subject to a mortgage to secure a previous loan from other parties of the sum of $30,000. About December 1, 1924, the plaintiffs approached W. H. Butcher, whom they had not before known, and asked him to negotiate a loan for them of $20,000. It was arranged that the promissory note for that sum secured by a trust deed on their Long Beach lots should be executed in the name of Butcher and placed in escrow with the California Title Insurance Company. These instruments were drawn and dated December 12, 1924, and left with said Title Insurance Company with appropriate written instructions from the payee. They were, however, not then executed. Mr. Butcher then procured Dora C. Fennell, a real estate agent and loan broker of Los Angeles, to sell the note and trust deed. On January 14, 1925, she orally offered for sale to the Los Angeles Securities Company the instruments above mentioned, stating that they were placed in escrow with the Title Insurance Company. At the request of the proposed purchaser, the broker Fennell made a written statement of the alleged loan, together with the value, the incumbrance on the property, and the terms of the note and trust deed. She offered to sell these instruments at 10 per cent. discount from the face value thereof. Butcher, who was named in the note as payee, was in no way associated with the Los Angeles Investment Securities Corporation, was an entire stranger to it, and had no direct communication with this firm regarding the transaction. The Securities Corporation finally offered to purchase the note and trust deed from Butcher upon specified terms for $17,600. This amount was accepted by the plaintiffs, who, in company with Butcher, visited the escrow holder on January 21st, at its place of business at Los Angeles, for the purpose of consummating the sale. The Securities Corporation sent Mr. Owens, who was its escrow representative, to the Title Insurance Company's offices to close the purchase. This occurred on January 22, 1925. He did not inspect the documents, and claims not to have seen them until the transaction was closed and the deed was assigned and recorded. In consummating the purchase, Mr. Owens conferred only with A. D. Cross, the escrow clerk for the Title Insurance Company. It appears that some of the plaintiffs were present in the place of business of the Title Insurance Company, conferring with Butcher and Cross regarding the transaction, while Owens was also present, and plaintiffs claim to have generally discussed the matter with him, or in his presence. Owens, however, denies that he ever discussed the matter with any of the plaintiffs, or with Butcher. Some controversy at first arose over a provision in the trust deed which required the payment of $250 each quarter on the principal indebtedness. The plaintiffs refused to execute the trust deed in this form. Cross communicated this objection to Owens, who conferred with the Investment Securities Corporation regarding the matter. It was agreed that in lieu of

this provision Mr. Butcher, the payee and purported owner of the note, should advance $800, on account of future interest. A new trust deed including this provision was accordingly drawn by the Title Insurance Company. The Title Insurance Company was named therein as trustee. The note and trust deed was thereupon duly executed by Lorin L. Baker and wife, who signed the note and acknowledged the deed on January 21, 1925, and Charles D. Baker and wife did likewise on the following day. The purchase of the note and deed was then consummated on the 22d of January by the payment of $17,600 to Mr. Cross, the clerk of the escrow holder. The note was thereupon delivered to Mr. Owens for the purchaser, and the deed was recorded. Mr. Butcher testified that he received no money upon the sale of the instruments, but, upon the contrary, that it was all paid to the plaintiffs.

The appellants contend that the findings and judgment are not supported by the evidence. It is asserted that the Los Angeles Investment Securities Corporation was not a bona fide purchaser of the note and trust deed, but that it was the real party in interest for whom W. H. Butcher was a mere dummy; that the note was not originally executed to Butcher for a valuable consideration; and that the invalidity of the note to the extent of the alleged usurious interest and bonus on the sale thereof is a valid defense, even as against a bona fide purchaser before maturity for a valuable consideration without knowledge of the infirmity.

[1-4] We are of the opinion there is ample evidence to support the findings and judgment. It does not appear from the face of the note in question that it provides for usurious interest. It is true that parol evidence is admissible to show the actual nature of the transaction. 27 R. C. L. 212, § 13; Jones Syndicate v. Internal Revenue Commissioner (C. C. A.) 23 F.(2d) 833.

The existence of an illegal agreement for the payment of usurious interest must affirmatively appear from the evidence adduced at the trial. The burden of showing the illegal agreement for the payment of usurious interest is upon him who challenges the transaction as void. 27 R. C. L. 268, § 71; Friedman v. Wisconsin Acc. Corp., 192 Wis. 58, 210 N. W. 831, 53 A. L. R. 758; Brown v. Robinson, 224 N. Y. 301, 120 N. E. 694, 21 A. L. R. 777; Coast Finance Corp. v. Powers Furniture Co., 105 Or. 339, 209 P. 614, 24 A. L. R. 855.

In the present case, the evidence is sufficient upon which to uphold the findings to the effect that the Investment Securities Corporation was a bona fide purchaser of the note without knowledge of an agreement between the makers and payee thereof with respect to the payment of usury.

[5] Even though there was an illegal agreement between the makers of the note and Butcher for what amounts to usurious interest, the plaintiffs are estopped by their conduct and written warranty to the effect that the note was free from usury from now enforcing this defense against the purchaser thereof. Before the purchase of the instruments was agreed upon, at the request of the Investment Securities Corporation, a written certificate was signed and delivered to the proposed purchaser by two of the plaintiffs, one of whom testified that he was acting as an agent for the makers in negotiating the sale of the note and trust deed, as follows:

"California Title Insurance Co.,

"Los Angeles, Cal. Jan. 23, 1925

"The undersigned hereby certifies that they are two of the makers of a certain promissory note for $20,000.00 all due Jan. 1, 1926, after date, with interest at eight % net, payable quarterly, in favor of W. H. Butcher, which note is secured by the above mentioned trust deed, also that they are the owners of the above described premises. That they have received the consideration for the full face value of said note. That they claim no offsets or legal defenses of any nature against said trust deed, or note. That they have made no payments on principal or interest on said note.

"[Signed] Lorin L. Baker
"C. D. Baker."

The purchaser of this note was assured by this certificate of the makers that they had executed and delivered the $20,000 note in escrow payable to Butcher at 8 per cent. interest per annum, and that "they * * * received the consideration for the full face value of said note." In effect this amounted to an assurance on the part of the makers of the note that it was free from usury.

[6] This conduct and warranty constituted an estoppel in pais which will preclude the plaintiffs from now relying upon the doctrine of usury as a defense against the note. Holzbog v. Bakrow, 156 Ky. 161, 160 S. W. 792, 50 L. R. A. (N. S.) page 1023, note, page 1031. To permit the plaintiffs to now deny the validity of this note or assert that they did not receive the full face value of the note from the payee would sanction a fraud and convert the wholesome purpose of the usury law into an engine of injustice and deceit. This may not be done. Haines v. Commercial Mtg. Co., 200 Cal. 609, 621, 254 P. 956, 255 P. 805, 53 A. L. R. 725; Van Noy v. Goldberg (Cal. App.) 277 P. 538.

[7] Moreover, according to the weight of modern authorities, the defense of usury is not available against an innocent purchaser of a promissory note before its maturity for a valuable consideration without knowledge of its usurious infirmity. Community Lumber

Co. v. Chute (Cal. App.) 284 P. 466. In 39 Cyc. 1078b it is said:

"The rule is well settled that a bona fide purchaser of a negotiable note or bill before maturity, for a valuable consideration, without notice of usury, takes the same free from the defense of usury when the statute merely provides that usurious interest shall be forfeited in whole or in part."

[8] Under the Usury Act of California it is clear that the entire instrument does not become void because of an agreement to charge usurious interest. Haines v. Commercial Mtg. Co., 200 Cal. 609, 622, 254 P. 956, 255 P. 805, 53 A. L. R. 725; Rice v. Dunlap, 205 Cal. 138, 270 P. 199. Section 2 of the California Usury Act provides that any contract "in conflict with the provisions of this section shall be null and void *as to any agreement* or stipulation therein contained *to pay interest* and no action at law to recover interest in any sum shall be maintained and the debt can not be declared due until the full period of time it was contracted for has elapsed." So, also, in 1 Joyce on Defenses to Commercial Paper, p. 633, § 468, it is said:

"Whether paper based on a usurious contract between the original parties was or was not subject to the defense of usury as against a bona fide holder before maturity, without notice, and for value, was a question upon which the decisions were far from being in harmony prior to the adoption of the Negotiable Instruments Law. The general rule, however, seems to be that such a defense was not available against such holder in the absence of a statutory provision making such paper absolutely void." 29 Am. & Eng. Enc. of Law, p. 521; Hamilton v. Fowler (C. C. A.) 99 F. 18; Bradshaw v. Van Valkenburg, 97 Tenn. 316, 37 S. W. 88; L. R. A. 1918C, note at page 776.

The paper or note is not made void by the Usury Law of California. It merely renders void the provision with respect to usurious interest. Upon the contrary, as a part of the Negotiable Instruments Act of California which was adopted in 1917 (Stats. 1917, p. 1531), section 3138 of the Civil Code provides:

"A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

A holder in due course is defined by section 3133, as one who takes the instrument under the following conditions:

"(1) That it is complete and regular upon its face;

"(2) That he became the holder of it before it was overdue * * *;

"(3) That he took it in good faith and for value;

"(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

In order to constitute notice of such a defect as would render the instrument void, the purchaser must have had "actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Section 3137, Civ. Code.

It will be observed that in those jurisdictions where it has been held that the defense of usury may be enforced against commercial paper in the hands of an innocent purchaser, in due course, for value, without notice of the infirmity, the usury statutes upon which such authorities are founded render the entire instrument void when it is associated with an agreement imposing usurious interest. The case of Sabine v. Paine, 223 N. Y. 401, 119 N. E. 849, 5 A. L. R. 1444, is an example of the effect of such a statute. It was there held that the defense of usury would lie against an innocent holder of a note, in spite of the existence of a Negotiable Instruments Act similar to that which exists in California. That decision, however, may be accounted for by the clear distinction between the California Usury Law and the New York Usury Law. In the state of New York the Usury Law (General Business Law [Consol. Laws, c. 20], §§ 370, 371, 373) provides:

"All bonds, bills, notes * * * whereupon or whereby there shall be reserved or taken * * * any greater sum, or greater value, for the loan or forbearance of any money * * * than is above prescribed, shall be void. Whenever it shall satisfactorily appear * * * that any bond, * * * contract, security or any evidence of debt, has been taken or received in violation of the foregoing provisions, the court shall declare the same to be void, * * * and order the same to be surrendered and canceled."

Some confusion of authorities has evidently occurred in failing to distinguish between the different provisions of the usury laws in various jurisdictions.

[9] It is contended that, because Butcher, the payee of the note, did not have possession of the instrument, the transaction lacked the element of delivery, and therefore title did not pass to the Investment Securities Corporation. The escrow instructions from Butcher and the written warranty of title and receipt of full consideration on the part of the makers adequately show title in the payee. Moreover, section 3097 of the Civil Code provides that, "where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him *is conclusively presumed.*" There is, therefore, sufficient evidence of the delivery of the note.

[10] Manifestly the owner of a promissory note or other personal property may sell it for any price and upon any terms he chooses so long as he is not a party to, and has no knowledge of, a previous usurious agreement with respect to it. Under such circumstances the sale is not affected by the usury law. Verbeck v. Clymer, 202 Cal. 559, 563, 261 P. 1017; 39 Cyc. 926b, 931; 27 R. C. L. 215, 216; Lamb v. Herndon, 97 Cal. App. 193, 275 P. 503; Commercial Credit Co. v. Tarwater, 215 Ala. 123, 110 So. 39, 48 A. L. R. 1437, note; Hudson v. Repton State Bank, 16 Ala. App. 101, 75 So. 695; People's B. & T. Co. v. Fenwick Sanitarium, 130 La. 723, 58 So. 523, 43 L. R. A. (N. S.) 211, note, Ann. Cas. 1913C, 1322; 1 Joyce on Defenses to Com. Paper, p. 633, § 467. In the last-mentioned authority it is said: "Where notes sued on were bought by the holder, the maker cannot be heard to say that the difference between the price of the notes and the face value is usury and that consequently the holder should not be allowed to recover such sums."

[11] Regardless of the question of the forfeiture of the alleged usurious interest and bonus, the plaintiffs were not entitled to injunctive relief to restrain the sale under the provisions of the trust deed. The principal sum was also due at the maturity of the note on January 1, 1926. The trust deed provided for foreclosure and sale of the property to satisfy the lien, upon default of either principal or interest, upon notice thereof. This notice was duly served March 17, 1926. The suit was not premature, not having been commenced until July 15, 1926.

For the foregoing reasons the judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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106 Cal. App. 234

MERRITT v. MERRITT.

Civ. 4137.

District Court of Appeal, Third District, California.

June 5, 1930.

Rehearing Denied July 5, 1930.

1. Divorce ⟹308.

In divorce proceeding, allowance of $350 monthly for maintenance and education of minor child *held* warranted under circumstances of parties.

Prior to the divorce the parties had been living in a luxurious manner, spending as much as $4,000 or $5,000 monthly.

2. Divorce ⟹309.

In divorce proceeding, allowance for maintenance of minor child is always subject to modification.

3. Divorce ⟹307.

In divorce proceeding, evidence *held* sufficient to support finding that father had sufficient income to pay $350 monthly allowance for child's maintenance.

There was evidence that the father was earning a monthly salary of $1,250, that he had turned all of his property over to a family holding company, and that he was spending about $3,000 or $4,000 a month.

4. Divorce ⟹297.

Fact that order in divorce proceeding for maintenance of child was in conflict with prior property settlement between parties *held* not to invalidate order.

5. Divorce ⟹307.

In divorce proceeding, discretion of court to make allowance for maintenance of minor child is limited to conditions and financial ability existing at time of order.

6. Divorce ⟹297.

Parties to divorce proceeding may not, by prior agreement, abridge right of minor child to adequate support.

7. Divorce ⟹307.

In divorce proceeding, amount of allowance for maintenance of minor child *held* within reasonable discretion of court.

8. Divorce ⟹308.

In divorce proceeding, declaring of lien on father's property to secure payment of allowance for maintenance of minor child *held* within court's authority.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action for divorce by Lou Merritt against Hulett C. Merritt, Jr. From an order modifying an interlocutory decree of divorce, defendant appeals.

Affirmed.

Russell & Heid, of Tulare, for appellant.

Young & Young, of Los Angeles, for respondent.

R. L. THOMPSON, J.

This is an appeal from an order modifying an interlocutory decree of divorce by increasing the allowance for the maintenance of a minor child. It is asserted the increased allowance is not warranted by the circum-

stances of the parties or the income of the father.

The parties to this action were married June 23, 1920. One daughter, named Andriana, who was four years of age at the time of the trial, was born as the issue of the marriage. A suit for divorce, on the ground of adultery, was filed December 1, 1926. On November 30, 1926, the property rights of the parties were settled by the execution of a written agreement. By the terms of this contract the respondent was allowed $750 per month as alimony, and the additional sum of $250 a month for the maintenance and support of the minor child. December 5, 1927, an interlocutory decree of divorce was rendered in favor of the respondent, awarding her the custody of the minor child, together with the monthly payments above mentioned, pursuant to the contract settling the property rights. Subsequently, upon proceedings duly had, the court modified this interlocutory decree by allowing the respondent an additional $100 per month for the education and maintenance of the child. From this order an appeal was perfected.

It is claimed the evidence will not support an allowance of $350 a month for the maintenance of the child for the reason that the circumstances and income of the appellant will not warrant the allowance of that sum.

[1] Under the circumstances in which the parties to this action were accustomed to live, extravagant though it may have been, we may assume this allowance was not excessive. Prior to the divorce they had been living in an opulent manner. The picture of their residence with its colonnades and spacious buildings set in a garden of stately trees and an abundance of shrubs and flowers is superb. The evidence shows they maintained a private golf course, two automobiles with a chauffeur, and five servants. On occasions, for months at a time, they lived in first-class hotels like the Biltmore at Los Angeles, Del Monte Lodge or Mark Hopkins at San Francisco. They traveled abroad. She enjoyed the services of a professional nurse and a maid. The respondent testified: "We were living at the rate of about four or five thousand dollars a month," and she added, "my mode of life is not nearly as good as it was while we were married, or anyways near it." "The way I am living now, it forces me to keep baby in an entirely different plane to that (which) her father occupies. * * * We cannot go to the same class of hotel he goes to. If we travel, we cannot travel as he travels. We cannot dress as he dresses; we can't do anything in the same way that he does." The appellant is the manager of the 6,500-acre Tagus Ranch, Inc., for which service he receives a salary of $1,250 a month. He is also the vice president of the Pacific States Corporation, which the respondent testified was a family holding corporation, which "owns the watch he wears. He (appellant) turned in all his property to the holding company. He and his father have—the father has everything, because that is his own company." Accounting for the necessity of an increased allowance for the maintenance of the child, the respondent said she rented a house at $200 a month, but desired better accommodations for the child; that she employed a private nurse for the daughter, which costs her $150 a month; clothing $25 to $50 a month, drugs $10 a month; tuition in a private school $30 a month, and numerous other incidental expenses; that the child was nervous and "under the doctor's care all the time"; that there was "dental work to be done which will cost around between $500 and $600, some corrective work which we have known had to be done when she arrived at an age where it could be."

[2] This evidence is ample upon which to allow an aggregate sum of $350, under the circumstances. Moreover, an allowance for the maintenance of a child is always subject to modification. This sum may be diminished at any time upon a proper showing.

[3] In spite of the affidavit of the appellant to the effect that his entire income consisted of the salary of $1,250 a month above mentioned, we are of the opinion the evidence will support the finding that he is financially able to pay the sum allowed. The appellant was not present in court at the hearing, and an opportunity to cross-examine him regarding his resources and income was not afforded. The respondent testified, in addition to the extravagant manner in which he lives, that "He is spending about $3,000 or $4,000 a month. * * * Q. Do you know that? A. Yes I do." In view of the evidence that "He turned in all his property to the holding company," in support of the order appealed from, we may assume he had an additional income from that source which enabled him to spend $3,000 or $4,000 a month.

[4-8] The fact that the order is in conflict with the provisions of the property settlement contract which was executed by the parties with respect to the maintenance of the child does not impair the validity of the order. While it is true that the discretion of the court to make an allowance for the maintenance of a minor child is limited to the conditions and financial ability existing at the time of the order (9 Cal. Jur. 802, § 143; Schammel v. Schammel, 105 Cal. 258, 38 P. 729), the parents may not abridge the rights of the minor or deprive her of an adequate support by any prior agreement. 9 Cal. Jur. 803, § 144; Lewis v. Lewis, 174 Cal. 336, 163 P. 42; Parkhurst v. Parkhurst, 118 Cal. 18, 59 P. 9. The amount is within the reasonable discretion of the court. Bancroft v. Bancroft, 178 Cal. 352, 173

P. 582. Nor did the court exceed its authority in declaring a lien upon appellant's property to secure the payment of the allowance. McKannay v. McKannay, 68 Cal. App. 701, 230 P. 214.

The order is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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106 Cal. App. 300

DICKEY v. KUHN et ux.★

Civ. 7248.

District Court of Appeal, First District, Division 1, California.

June 9, 1930.

Rehearing Denied July 9, 1930.

1. Judgment ⟹725(6).

Decision affirming judgment denying cancellation of purchase-money notes eliminated issues of fraud and right to cancellation in subsequent action on note.

2. Sales ⟹153.

Restaurant purchasers' abandonment of premises was repudiation of contract obviating necessity of vendor's tendering performance (Civ. Code, § 1440).

Civ. Code, § 1440, provides that if party to obligation notifies other party before latter is in default that he will not perform and does not retract such notice before time for performance by him, other party may enforce obligation without previously performing or offering to perform any conditions on his part.

3. Contracts ⟹322(1).

Statute eliminating necessity of offer to perform contract by party notified by other party that latter will not perform does not dispense with proof of ability to perform (Civ. Code, § 1440).

4. Contracts ⟹278(1).

Tender of performance does not extinguish contractual obligation, and one suing on dependent covenant must show continuous readiness to perform after tender (Civ. Code, § 1495).

Civ. Code, § 1495, provides that offer of performance is of no effect, if person making it is not able and willing to perform according to offer.

5. Contracts ⟹278(1).

Statutes eliminating necessity of actual production of money by party whose written offer to perform contract is not accepted do not dispense with statutory requirements of good faith and ability to perform (Civ. Code, §§ 1493, 1495, 1496; Code Civ. Proc. § 2074).

Civ. Code, § 1493, requires that offer of performance be made in good faith and in manner most likely to benefit creditor; section 1495 requires that person making offer be able and willing to perform according to offer; and section 1496 and Code Civ. Proc. § 2074, provide that where written offer to perform is not accepted, actual production of money is unnecessary.

6. Contracts ⟹278(1).

That party to whom offer of performance is made by other party to contract is unprepared to perform does not justify offerer's inability to perform (Civ. Code, § 1495).

7. Contracts ⟹278(1).

That party to contract may make tender of performance dependent on performance of concurrent condition does not affect statutory requirements of good faith and ability to perform (Civ. Code, §§ 1493, 1495, 1498).

Civ. Code, § 1498, provides that tender may be made dependent on due performance of a concurrent condition.

8. Judgment ⟹585(3).

Judgment denying cancellation of notes for price of restaurant before purchaser abandoned premises *held* not res judicata of seller's ability to transfer clear title in action on note.

9. Sales ⟹357(1).

Averment of amended and supplemental answers, in action on purchase-money notes, that plaintiff was unable to transfer or assign lease of or interest in restaurant sold, casts burden on plaintiff to prove ability to perform contract (Civ. Code, § 1495).

10. Evidence ⟹92.

Negative averments, necessary to pleading and not part of pleader's case, must be established by opposite party.

11. Sales ⟹347(1).

Seller unable to transfer clear title to restaurant fixtures and lease could not recover full value thereof from buyer repudiating contract (Civ. Code, § 1495).

12. Sales ⟹347(1).

Seller without title to property at date of sale cannot recover agreed price.

13. Sales ⟹357(1).

Seller suing for price after buyer repudiated contract must show his title to property

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★Rehearing denied.

or impossibility of obtaining title because of repudiation, where issue of title is raised.

14. Husband and wife ⟹239.

Wife, not party to husband's agreement to reimburse one from whom spouses contracted to purchase restaurant for advanced rentals, *held* not liable for money advanced.

Appeal from Superior Court, Alameda County; Homer R. Spence, Judge.

Action by John Dickey against A. Kuhn and wife. Judgment for plaintiff, and defendants appeal.

Reversed.

Clark, Nichols & Eltse, of Berkeley, for appellants.

Clarence De Lancey and Ramsey Probasco, both of Oakland, for respondent.

WARD, Justice pro tem.

John Dickey contracted to sell to A. Kuhn a restaurant for the agreed purchase price of $5,000. Dickey received $500 in cash and three promissory notes, executed and delivered by Kuhn and his wife to Dickey; the first for $500, the second for $500, and the third for $3,500. The last note was dated July 31, 1922, and payable January 31, 1923. Kuhn took possession of the restaurant and paid the first $500 note. Prior to the due date of the second note Kuhn and his wife commenced a suit to cancel the notes, etc., upon the grounds of fraud and misrepresentation and failure of consideration. The defendant Dickey in that action filed a cross-complaint and pleaded the second promissory note of $500, which had become due. Judgment in the first action was given in favor of Dickey and the Kuhns appealed. The judgment was affirmed. Kuhn v. Dickey, 66 Cal. App. 227, 225 P. 867. This action subsequently was brought to cover the amount of the last note for $3,500 and to recover certain moneys alleged to have been advanced by the plaintiff Dickey at the instance of the defendants. The case was tried by a jury which rendered a verdict in favor of the defendants. Upon appeal the action of the jury was reversed. Dickey v. Kuhn, 85 Cal. App. 8, 259 P. 93, 95. Defendants in an amended answer and supplemental answer set forth that plaintiff Dickey had not been able to transfer or assign said lease or any interest therein and that he had not complied with his agreement to execute a bill of sale.

The present case was tried by the court, and the court found that by reason of the abandonment by the defendants the plaintiff was at no time or at all in default; that the only equipment which was not owned outright and to which plaintiff did not have a complete title was a cash register; that the only part of the equipment that was replevined or recovered by vendors thereof was the cash register; that Dickey had been ready, able, and willing to transfer, deliver, assign, and sell said fixtures and equipment to defendants free and clear of indebtedness and with a perfectly clear title; that the condition upon which plaintiff was to deliver a perfectly clear title was when defendants made payment upon the promissory note, which payment had never been made; "that all matters in relation to the abandonment of said contract, to the formal tender of title and to the formal assignment of the lease from plaintiff to defendants, has been fully adjudicated in the case of Kuhn v. Dickey, 66 Cal. App. 227, 225 P. 867. Whereupon the court rendered judgment for the sum of $3,735, covering the principal of the note and for money advanced. Interest was awarded in the sum of $1,473.96 and the further sum of $1,200 attorney's fees.

[1-3] Between these parties the decision in the first case eliminated all issues of fraud and any right of the Kuhns to the cancellation of the notes. Kuhn v. Dickey, 66 Cal. App. 227, 225 P. 867. In the second appeal on motion for a hearing before the Supreme Court it was held, "having, however, abandoned the premises prior to the due date of said note, and having never offered to pay the same upon the above conditions, he was no longer entitled to defend against its payment upon that ground." This holding by the Supreme Court was simply stating in effect that the abandonment by appellants was a notice to respondent that appellants would not perform upon their part, and therefore that respondent was entitled to enforce the obligation and was excused from offering to perform or actually performing any of the conditions upon the respondent's part in favor of the appellants. Appellants' abandonment of the premises was a repudiation of the contract. It was therefore unnecessary that respondent should go through the form of making a tender which would have been an idle and fruitless act. Section 1440 of the Civil Code provides as follows: "If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party." But while this section eliminates the necessity of performance or the offer of performance, it does not dispense with the ability to perform on the part of the party who seeks to enforce the obliga-

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tion. If the language of the Supreme Court in Dickey v. Kuhn, supra, may be construed as absolving respondent from proof of ability to perform, that language has reference only to the period up to or upon the due date of the note. In the last appeal the Supreme Court did not pass upon the question whether or not, when one abandons, may the other party successfully maintain an action for the collection of a promissory note, a part of the contract transaction, when it appears upon the trial that the party excused from tender is not and was not able to perform. The question of continuous ability to perform was not touched upon. The fact that respondent was seeking to obtain $3,500, when he (the respondent) could not deliver the instruments in exchange for the cash, was not stressed in the last appeal.

[4-7] Section 1495, Civil Code, provides: "An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer." "By this provision the party making the offer must not only be willing but able to perform according to the terms of his offer." McCarthy v. Grider, 72 Cal. App. 402, 237 P. 751, 755. "A tender, though sufficient to enable a party to maintain an action upon a dependent covenant, condition or agreement, is not equivalent, in every respect, to performance. It does not satisfy or extinguish the obligation. And even when suit is brought upon the dependent covenant, the plaintiff must show continuous readiness to perform after the tender." Redington v. Chase, 34 Cal. 670. And so we reason that the elimination of the necessity of an offer of performance does not dispense with the proof of ability to perform when that is made an issue in the case. In Holladay v. Holladay, 13 Or. 523, 11 P. 260, 12 P. 821, it was held, "This statute dispenses with the necessity of actually producing the money with the offer but this does not dispense with the necessity of the party having the money in fact." In Ladd v. Mason, 10 Or. 314, it was said, "Surely the justice and good sense of the legislature should not be impugned by such a construction of this provision as would place its framers in the position of having intended to provide a mode whereby a party might make a valid tender if his offer should not be accepted, without the readiness or ability to make it good, in the event of its acceptance." "It is true that, by section 2074 of the Code of Civil Procedure and section 1496 of the Civil Code, where an offer to perform is made in writing, but is not accepted, the actual production of the money is not necessary; but these sections do not dispense with the requirements of sections 1493 and 1495." McCarthy v. Grider, supra. "An offer of performance must be made in good faith, and in such manner as is most likely, under the circumstances, to benefit the creditor." Section 1493, Civ. Code. "An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer." Section 1495, Civ. Code. "To what has been said above it may be added that the fact that the party to whom the offer is made is also unprepared to perform, does not furnish any justification for the inability of the offerer to perform. * * *" McCarthy v. Grider, supra. "The rule stated in section 1498 of the Civil Code, that one making a tender may make it depend upon the due performance of a concurrent condition, does not affect the case, for nevertheless the party must act in good faith and be able and willing to perform, else, under sections 1493 and 1495, and the authorities above cited, his written offer will be of no avail. Nor does the fact that the other party was also unprepared to perform furnish any justification for his own inability, nor change what would otherwise be an ineffectual and shadow form into a substantial, bona fide, and effective tender." Doak v. Bruson, 152 Cal. 22, 91 P. 1001, 1003. See, also, Allen v. Chatfield, 172 Cal. 68, 156 P. 47; Kuhns v. Chicago, etc., 65 Iowa, 528, 22 N. W. 661.

[8-10] That counsel for respondent viewed the question of the readiness, willingness, and ability to perform as a vital question in this case is shown by the fact that such a finding was presented and adopted by the court. The court found "that at all times prior to the first day of February, 1923, and for some time thereafter the said John Dickey had been ready, able and willing to transfer, deliver and assign and sell said fixtures and equipments to defendants Kuhn, free and clear of indebtedness and with a perfectly clear title." See finding XI, Trans., p. 78. If this finding was based upon the claim that the same subject-matter had been adjudicated in Kuhn v. Dickey, supra, the finding was erroneous. The first trial had been held and submitted prior to the date of abandonment and at the time of the submission of the case both Dickey and Kuhn had approximately three months in which to perform or to offer to perform the contract. The first case did not involve respondent's obligation on final payment. The Supreme Court in Dickey v. Kuhn, supra, held that they could not give their "approval * * * of the appellate tribunal wherein it seems to have been held that the judgment in the former action was res adjudicata. * * *" There is no evidence in the record to support the finding that the appellants were ready, able, or willing to perform. This issue was raised by appellant's amendment to answer and supplemental answer as a negative averment which made it incumbent upon the respondent to prove that he had ability to perform. Negative averments which are necessary to a pleading and which are not part of the pleader's case must

be established by the opposite party. Melone v. Ruffino, 129 Cal. 514, at page 519, 62 P. 93, 79 Am. St. Rep. 127; Dirks v. Cal. Safe Dep. Co., 136 Cal. 84, 87, 68 P. 487; Holmes v. Warren, 145 Cal. 457, 460, 78 P. 954; Petaluma Pav. Co. v. Singley, 136 Cal. 616, 618, 69 P. 426; 22 Cor. Jur. 71. Respondent offered no evidence on this issue that appears in the record, but evidence offered by appellants indicate, to say the least, that there is considerable doubt that respondent had title to all of the fixtures on the real property that he agreed to sell or that he owned a certain bake oven or cash register (which had been replevined), or that he could obtain an assignment of the lease from the owner of the property. These matters may be all explained to the satisfaction of the court in another trial, but as the record now stands, respondent would have been unable to pass a "perfectly clear title."

[11-13] This is a case in which appellants repudiated the contract by abandonment and the respondent, unable to perform, failed and neglected to put himself in a position of ability to perform within a reasonable time or at all. We must conclude that the respondent repudiated the contract by his inability and unwillingness to perform. Appellants would not and respondent could not proceed further with the contract. Under such circumstances we cannot approve a judgment that respondent should have the full value of the fixtures and lease when he was unable under the sale contract to give "clear of indebtedness and with a perfectly clear title" the property specified in the contract. The contract provided "sale of above-named fixtures and lease to be clear of indebtedness and perfectly clear title." One who agrees to sell may not be allowed the agreed price when he does not have title to the property at the date of sale. If one party repudiated and the other party brings suit to recover the purchase price and the issue of title is raised, the vendor must show title or that it was impossible to obtain title as the result of the repudiation.

[14] It is not necessary to discuss other contentions raised by appellants except to say that the evidence presented on the second cause of action hardly justifies a judgment against Mrs. Kuhn for money advanced for rental of the premises. The contract of sale was between A. Kuhn and John Dickey. True, the notes were signed by Lillian Kuhn, but the evidence only connects A. Kuhn with the agreement to reimburse Dickey for advanced rentals, an agreement separate and apart from the matters set forth in the first cause of action.

Judgment reversed.

We concur: TYLER, P. J.; CASHIN, J.

106 Cal. App. 416

GRIMES v. RICHFIELD OIL CO. OF CALIFORNIA et al.

Civ. 134.

District Court of Appeal, Fourth District, California.

June 12, 1930.

Rehearing Denied July 11, 1930.

1. Automobiles ⟹245(34).

Where defendant was merely accompanying driver of truck which collided with automobile, and had no control over truck, no case was made for jury.

2. Pleading ⟹406(1).

Insufficiency of complaint *held* waived by failure to demur or object to evidence thereunder on ground of incompetency or immateriality.

3. Trial ⟹159.

Action cannot be dismissed on motion for nonsuit merely because of defective pleading.

4. Automobiles ⟹245(17).

Evidence *held* sufficient to take to jury defendants' negligence in parking unlighted truck having projecting load with which automobile collided (St. 1923, pp. 546, 551, 552, 561, §§ 99, 106, 110(a), 136).

California Vehicle Act, § 99 (St. 1923, p. 546), requires vehicles to be equipped at appropriate times with lighted lamps and headlights; section 106 (St. 1923, p. 551) requires trailers to be equipped with red light at rear; and section 110 (a), St. 1923, p. 552, declares that, in addition to the ordinary rear light, a red light must be displayed at the end of any load which projects four feet or more beyond the end of the vehicle. Section 136 (St. 1923, p. 561) relates to parking vehicles on the paved or improved portion of a highway. Plaintiff's evidence tended to show that, while driving his automobile at a lawful speed, with proper headlights and brakes, he collided with machinery projecting beyond the end of defendant's truck and trailer parked on the highway, in violation of essential provisions of sections previously referred to.

5. Automobiles ⟹244(45).

Evidence *held* insufficient to establish contributory negligence of motorist who struck machinery projecting at rear of trailer of defendant's unlighted truck (St. 1923, pp. 546, 551, 552, 561, §§ 99, 106, 110(a), 136).

6. Negligence ⟹67.

Since one has right to presume others will obey law, it is not negligence to assume

absence of danger which could arise only by another's illegal act.

7. Negligence ⟹135.

Law bars recovery only when plaintiff's contributory negligence is sole inference which reasonable men could draw from unconflicting evidence.

8. Negligence ⟹136(9).

If reasonable minds might draw different conclusion, negligence is question of fact for jury, even where facts are undisputed.

9. New trial ⟹114.

After trial judge's death, motion for new trial on court's minutes *held* properly granted by another judge, notwithstanding blackboard drawing, alleged to represent facts not otherwise disclosed (Code Civ. Proc. § 660).

It was argued that, under Code Civ. Proc. § 660, motion for new trial on minutes of court authorizes reference to such proceedings at trial as are within judge's recollection. But examination of testimony showed that facts were adequately described without aid of diagram, which was merely incidental.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by F. C. Grimes against the Richfield Oil Company of California, Dunnic Ott, and another. A nonsuit was granted on motion of defendants named. From an order granting a motion for a new trial, defendants appeal.

Affirmed as to defendant first named, and reversed as to defendant last named.

F. E. Borton and James Petrini, both of Bakersfield, for appellants.

Siemon & Garber and Rowen Irwin, all of Bakersfield, for respondent.

AMES, Justice pro tem.

This is an action for personal injury. The negligence upon which the action is predicated, as disclosed by the allegations in the complaint and the evidence in support thereof, consists of defendant's failure to maintain lights upon the rear end of a combination of vehicles, consisting of a truck and trailer, which, it is claimed, was standing on the paved or improved portion of a public highway before sunrise, during the early morning hours of the day of the accident.

The testimony of the respondent may be summarized as follows: That on the 15th day of March, 1928, he was driving and operating an 8-cylinder, V-type motor Peerless touring car on the state highway between Bakersfield and Los Angeles; his headlights had recently been adjusted and conformed to all provisions of the California Vehicle Act; that he could discern any substantial object on the highway ahead of him at a distance of 200 feet; his brakes had recently been adjusted, and were in good working order; shortly before the accident occurred he had been driving his car at a lawful rate of speed, and at no time in excess of 40 miles per hour. At the hour of about 5:15 a. m., and while it was still dark, he collided with the overhang of a load of oil well machinery, which extended beyond the rear end of the trailer. The truck and trailer were standing on the paved portion of the highway, close to the center line. There was no red light, nor any light visible to him from the rear of the truck or trailer. When he first saw the truck and trailer, he was between 50 feet and 100 feet from the rear end thereof, and too close to stop with safety. He testified that these vehicles were not moving when he first saw them. As soon as the appellant's vehicles were seen by him, he applied his brakes vigorously; that he thought he saw some object on the highway to the left of the truck and trailer, but whether or not the objects which he thought he observed were persons standing on the highway, or were merely shadows, he was unable to say, but, under the stress of immediate danger, he attempted to pass to the right of the trailer, but in attempting to do so collided with its projecting load, and, to quote his own testimony, he described this contact as follows: "I struck some projected load that wiped the cowl and instrument board off the car and continued against my chest and pressed me against the back of the seat and crushed the front seat out and turned me bottom side up in the tonneau, tearing my legs open on the cushion in the tonneau, in the rear seat and crushing them and turned the back of the tonneau and then what seemed to be the upper corner of the truck ripped the fender off and torn through the side and damaged that and my car swerved by reason of the impact and locked with the rear of the truck which came to a full stop."

He further testified that between the time when he first observed the truck upon the highway and his impact with the trailer about two seconds had elapsed, during which time he was able to distinguish the projecting portion of the load upon the trailer, and during that period observed that the truck was standing still. He testified as to the character of his injuries as follows: "Nose and cheek bone broken, upper jaw broken and section torn out with teeth broken, antrum, I think they call it, part of the bone stock beneath the upper jaw-bone; a gash through the upper lip, and whatever it was

passed through there and tore out the jawbone; roof of my mouth was crushed clear to the palate, the left shoulder was badly fractured, the left arm fractured in numerous places, just about two or two and a half inches."

On cross-examination he attributed his failure to see the truck to a change of gradient in the highway, and in his further description of the accident used the following language: "I am quite, very sure what carried away the back of the seat carried away the cowl and struck me against the chest and the back and tore out the part of the tonneau and seat, was part of the projecting load."

After testifying that the only opportunity he had to observe the load on the truck was the period of two seconds which elapsed between the time when he first saw the trailer and his impact with its overhanging load, in answer to the following question: "You noticed the overhanging load on the trailer in that brief space of time? he testified as follows: "Yes, after I started to turn with a big bar right in front of me."

It was stipulated by counsel at the trial that the paved portion of the highway at the point of the accident was 22 feet wide, and that there was room enough on the right-hand side of the pavement to have stopped and parked the truck and trailer off the pavement.

He further testified that he reached the conclusion that the appellant's vehicles were standing still, rather than moving, not only by reason of his observation of the trailer upon the highway, but for the further reason that he did not hear "the barking of the motor," which he contends he would have heard had the motor been in operation, drawing its heavy burden upon an upward grade.

On cross-examination appellants attempted to impeach the testimony of respondent on the issue that the truck was standing still by reading into the record a portion of a deposition of respondent, in which he testified with respect to the appellant's vehicles: "I don't think they were traveling; if they were it was very, very slowly, but I got the impression that they were standing; they might have been creeping along, but I remember not having observed the exhaust or barking report of the motor." The respondent called the driver of the truck as an adverse witness under the provisions of section 2055 of the Code of Civil Procedure, who testified that at the time of the accident the truck was traveling at the rate of 2½ to 3 miles per hour. It is not disputed that the accident happened before sunrise and while it was still dark.

At the conclusion of plaintiff's case defendants Ott and Richfield Oil Company of California moved for a nonsuit as to defendant Ott upon the ground "that there is no evidence at all showing, or tending to show, that Ott is in any manner concerned in the accident at all," and as to defendant Richfield Oil Company of California upon the following grounds: "(1) That there is no evidence to establish the charge in the complaint that the defendant negligently, carelessly and without regard to the welfare or safety of others then and there stopped and parked his truck and trailer in the paved, improved portion of the said highway without any rear or tail-light. (2) That there is no evidence to sustain the remaining charge of negligence as follows: 'and negligently and carelessly and without regard to the welfare or safety of other persons then and there permitted said truck and trailer to stand on said public highway loaded with material that extended a distance of more than four feet beyond the rear and/or end of said vehicle without displaying at the extreme end of said load a red light or any light whatsoever' and further (3) on the ground of contributory negligence on the part of the plaintiff appearing conclusively as a matter of law."

A nonsuit was granted as to both said defendants. Later, upon motion, a new trial was granted, as against both said defendants.

[1] We may, at this point, dispose of the contention of defendant Ott. It appears from the testimony of defendant Cline, the driver of the truck at the time of the accident, that he was accompanied by a "Mr. Ottie," who is described in the record as his "partner." Assuming that the "Mr. Ottie" referred to is defendant Ott, it does not appear that he had any control over the operation of the truck, but was merely accompanying Cline on the truck at the time of the accident. There was no error in granting the nonsuit as to defendant Ott, and the balance of this opinion will be directed to the propriety of the order in granting the motion for a new trial as to defendant Richfield Oil Company of California, which will hereafter be referred to in the singular number as the appellant.

[2, 3] The appellant contends that, the acts of negligence having been alleged in the complaint in specific terms, the respondent is confined to the specific allegations contained in his complaint, in the absence of a general allegation of negligence.

Paragraph 3 of the complaint, which alleges the negligent acts of appellant, is as follows: "That the said defendants negligently, carelessly and without regard to the welfare or safety of other persons, then and there stopped and parked said truck and trailer on the paved, improved and main traveled portion of said highway without any rear or tail-light, and negligently and carelessly, and without regard to the welfare or safety of other persons, then and there permitted said truck and trailer to stand on said public highway, loaded with materials that extended a distance of more than four feet beyond the

rear of the bed and/or body of said vehicle without displaying at the extreme end of said load a red light or any light whatsoever."

Appellant argues that the words in the foregoing paragraph "without any rear or tail-light" is not an allegation of anything, but is a modifying phrase, tending to aggravate the alleged negligence of stopping and parking the truck and trailer on the highway, and that it is not an allegation that appellant was driving and operating its truck and trailer at nighttime without a tail-light. In its answer appellant denied generally all of the allegations in paragraph 3 of the complaint.

The question here involved is purely a question of pleading, going to the sufficiency of the complaint, and, no demurrer, either general or special, having been filed, and evidence of the failure of the appellant to maintain the lights required by law having been introduced without objection to its competency or materiality, we think the insufficiency of the complaint was waived. The question was raised for the first time on appellant's motion for a nonsuit, but it has been held that an action cannot be dismissed on motion for a nonsuit by reason of a defective pleading.

In Scott v. Sciaroni, 66 Cal. App. 577, 226 P. 827, 829, it is said: "Respondent contends that the judgment of nonsuit was properly entered on the ground of insufficiency of the complaint in various particulars. There are two answers to this contention: First, the grounds now urged were not stated in the motion for a nonsuit; and, second, insufficiency of the complaint is not a statutory ground for granting a nonsuit."

To the same effect are Keefe v. Keefe, 19 Cal. App. 310, 125 P. 929, and Pacific Paving Co. v. Vizelich, 141 Cal. 4, 74 P. 352.

[4] The acts of the appellant which, it is claimed, constitute negligence, are prohibited by sections 99, 106, subdivision (a) of section 110, and a portion of section 136 of the California Vehicle Act. Since these provisions should be borne in mind throughout the ensuing discussion we quote them in full.

"99. *Vehicles Must Be Equipped With Lights.* Every vehicle when upon any public highway within this state during the period from a half hour after sunset to a half hour before sunrise and at any other time when there is not sufficient light to render clearly discernible a person, vehicle or other substantial object on the highway at a distance of two hundred feet ahead, shall be equipped with lighted lamps and lighted headlights as herein respectively provided for different classes of vehicles and subject to such exceptions as are set forth in this act."

"106. *Rear Lights.* Every motor vehicle and every trailer or semi-trailer, which is being drawn at the end of a train of vehicles, at the times and under the conditions specified in section ninety-nine, shall carry at the rear a lighted lamp exhibiting a red light plainly visible under normal atmospheric conditions for a distance of five hundred feet toward the rear and so constructed and placed that the number plate carried on the rear of such motor vehicle or trailer shall be illuminated by a white light in such manner that the number plate thereon can be plainly distinguished under normal atmospheric conditions at a distance of not less than fifty feet toward the rear."

"110. *Light or Flag at End of Load.* (a) Whenever any vehicle shall be loaded with any material in such a manner that any portion of such load extends toward the rear four feet or more beyond the rear of the bed or body of such vehicle, there shall be displayed at the extreme end of the load at the times and under the conditions specified in section ninety-nine, in addition to the ordinary rear light hereinbefore required to be displayed on such vehicle, a red light plainly visible under normal atmospheric conditions at least two hundred feet from the rear, and at all other times while such vehicle is upon the highway a red flag or cloth not less than sixteen inches in width shall be displayed at the extreme rear of said load as a warning signal to persons operating vehicles approaching from the rear."

"136. *Stopping on Highway.* No person shall park or leave standing any vehicle whether attended or unattended upon the paved or improved or main traveled portion of any public highway, outside of a business or residence district when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway; provided, in no event shall any person park or leave standing any vehicle whether attended or unattended upon any public highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for the free passage of other vehicles thereon."

Appellant next contends that the testimony of the respondent, which we have hereinbefore summarized, does not tend to prove that the truck and trailer were parked or standing on the highway at the time of the accident in violation of section 136 of the California Vehicle Act above quoted, but there is evidence of certain physical conditions which existed shortly after the accident, which, in connection with the testimony of the plaintiff, should, we believe, have been weighed by the jury in determining that issue. Witness Clarence Batone visited the scene of the accident between 6 and 7 o'clock, and within about one hour after the collision occurred. He found the Peerless car in contact with the truck on the right-hand side of the latter, ap-

parently in the same position as it was immediately after the collision, and, after testifying as to his observations of skid-marks on the pavement, he testified as follows:

"Q. You said there was some brake marks or skid-marks where the brakes had been set? A. Brake marks for the trailer and car.

"Q. What marks were there for the trailer? A. Whenever I was there still the trailer was moved over right, just the car moved over right.

"Q. You mean like that (indicating)? A. Something like that, on solid tire.

"Q. Was there more than one of those marks? A. Two of them. One each side of the trailer.

"Q. Which wheels of the trailer? A. The right and the left.

"Q. Rear wheels? A. Yes, sir. Here is a little bit it skid."

Ben Hunter, a traffic officer, arrived at the scene of the accident between 8:30 and 8:45 a. m. Respondent's car had been moved, but the truck and trailer were still standing on the highway. The following is a portion of his testimony:

"Q. Did you observe any marks in the pavement in the vicinity of the trailer? A. Yes, sir.

"Q. What sort of marks were they and where were they located with reference to the trailer wheels? A. The only one I noticed was to the rear and left of the trailer.

"Q. The rear left wheel of the trailer? A. Yes, sir.

"Q. What sort of mark was that? A. Side skid mark."

And, after illustrating the position of the wheels of the trailer with respect to the skid marks about which he had testified upon a blackboard, proceeded as follows:

"Q. That is a mark that apparently had been made by the left rear wheel of the trailer? A. That is what I presumed it had been made by.

"Q. What kind of a skid mark was it, was it a mark of rubber on the pavement or a mark of iron on the pavement? A. It looked to me like it was a mark of rubber.

"Q. Where was the trailer, where was it standing when you saw it, with reference to that skid mark? A. At the end of the skid.

"Q. Could you tell from the appearance whether the truck had moved since it had skidded? A. Did not look like it, standing at the end of the skid mark like this. Looked like it had been marked this way and stopped right here. That was the way I found it."

Witness Walter Combs visited the scene of the accident about 7:15 a. m. and testified as follows:

"Q. Did you notice any skid marks at the time? A. Yes, sir.

"Q. Tell just what you saw with reference to skid marks. A. The two rear wheels of the trailer had been caused to slide to the right, looking from the back end, and just slightly forward. It did not slide squarely across the highway, just a slight forward movement, looked to be rubber marks on the highway, too.

"Q. Where were the wheels of the truck with reference to the skid-marks? A. The wheels of the trailer, you mean.

"Q. The trailer, I should say? A. The trailer wheels were setting right on the end of the skid-marks, setting right where they had stopped, when it was sliding side-wise.

"Q. The skid-marks were to the right? A. Yes, sir, to the right standing behind the trailer looking south.

"Q. And the wheels, two rear wheels of the trailer stood right on the end of these skid-marks? A. Yes, sir, right on them."

This witness further testified as follows:

"Q. When you observed the trailer was it standing at right angles to the center of the road? A. The rear end was slightly to the right. The rear end of the trailer was diagonally across the highway, probably three or four or five inches, the rear end was closer to the outside than the front.

"Q. To that extent the trailer was standing diagonally across the road? A. Just slightly, not to a great extent."

Witness H. L. Spears testified that he arrived at the scene of the accident at about 9:30 a. m.; that "the truck was setting straight on the highway and the trailer had been pushed as at an angle over towards the right side of the road"; that in referring to the rear wheel of the trailer he also testified that there was a skid mark "where the wheel had stopped on the trailer"; that the skidding of the trailer was on the rear wheels; that the wheels were "setting right on top of the skid marks, evidently it had skidded."

We believe that the testimony of respondent is amply corroborated by witnesses Batone, Hunter, Combs, and Spear, and that the jury could infer from the fact that the rear wheels of the trailer were standing on the right end of the skid marks which they had apparently made on the pavement, and that the trailer was standing at a different angle from that at which the truck was standing, with no evidence of these vehicles having been moved since the collision had occurred, that they were both standing still at the time of the collision.

We will now proceed to a consideration of the testimony of respondent's witnesses which tends to prove that the oil well equip-

ment, with which the trailer was loaded, extended a distance of 4 feet or more beyond the rear end of that vehicle. This element of the case is material, in view of the provisions of section 110 of the California Vehicle Act above quoted, requiring a red light, in addition to the ordinary tail-light, to be displayed when the load on a vehicle extends 4 feet or more toward the rear, beyond the rear end of the body of the vehicle. Witness Hunter testified that he did not remember whether or not the valves projected; that there was one valve that might have projected slightly that was just where respondent's car would have hit. Witness Combs testified that the trailer was loaded with heavy machinery that looked like mud pumps and one or two pipes which he described as "about six-inch pipe," and, in testifying as to a conversation had with the driver of the truck, his evidence was as follows:

"Q. What did they say, if anything, about the load on the trailer? * * * And particularly with reference to the position of the pump having been changed on the trailer, what did he say about that pump having been shifted? A. He said it hit it hard enough to move the load, or pump, I don't know which word he used. He called my attention to, pointed to the machine setting near the corner of the trailer."

It should be borne in mind that at the time of the accident respondent was driving a large eight-cylinder touring car; that his injuries were particularly severe in and around his mouth; that both the front and rear seats in his automobile were damaged as a result of coming in contact with some object; that, according to his testimony, he struck "a projected load that wiped the cowl and instrument board off the car" and continued against his chest; that from the admission of the driver of the truck it can readily be inferred that some portion of the overhanging load was shoved forward and to the right, and, while it is true that there is no direct evidence that the overhang of the load at the rear end of the trailer was 4 feet or more in length, we think that there is ample evidence from which the jury could have drawn that inference.

But, assuming that the evidence above adverted to was insufficient to prove the absence of the red light on the rear end of the trailer, there is in the record the positive testimony of respondent that no light was visible. Independently of failure of appellant to maintain a light at the end of its projecting load as required by section 110(a) of the Vehicle Act, there was evidence tending to show that no light whatever was visible, which of itself would constitute a violation of section 99.

[5] We are next urged to say, as a matter of law, that respondent's negligence contributed to his injury. It is true that respondent testified that he did not know why he was unable to see the vehicles of appellant, but attributed his failure to do so to a change of gradient in the highway. Other witnesses called by plaintiff were unable to substantiate this contention, and respondent, upon subsequent visits to the locality of the accident, was unable to identify the place on the highway where the accident occurred. However, if we disregard this testimony of respondent, we still think that his evidence fails to establish as a matter of law that his own negligence contributed to the accident.

In the case of Haynes v. Doxie, 52 Cal. App. 133, 198 P. 39, 40, the plaintiff was driving his car at a moderate and lawful rate of speed over a paved highway, which, at and before approaching the scene of the accident, was slightly down grade. A downpour of rain reduced visibility, and, owing to the wet pavement, his car had a tendency to skid. He was driving on his right-hand side of the highway, and defendant's truck was standing near the center thereof without a light exposed on its rear end, and plaintiff did not see the truck until within 25 or 30 feet of it. Under these circumstances a higher degree of care would be required of plaintiff than was necessary for the respondent in the instant case. Appellant contended for the rule that it was negligence for the driver of an automobile to drive on the highway on a dark night at such a rate of speed that he could not avoid objects after they came within the area illuminated by his lights. In that case, as in this one, the court was asked to say that plaintiff, as a matter of law, contributed to the accident by his own negligence, and in declining to do so the court says:

"The fact that respondent was not able to see, and did not see, the unlighted truck until he was within 25 or 30 feet of the same does not fully establish the facts necessary to give appellant the benefit of the rule above stated. Notwithstanding the facts stated, it may also be true that if the truck had been lighted, as required by law, plaintiff would have been able to see it, and would have seen it, while at a distance great enough to enable him to stop his automobile, and avoid the collision. The condition of the road, as to its openness and the distance to any point of intersection or any railroad crossing, was known to both parties, and the plaintiff was entitled to proceed at a rate reasonable under those conditions."

In the case of Schurman v. Los Angeles Creamery Co., 81 Cal. App. 758, 254 P. 681, 682, the plaintiff collided with an unlighted wagon, which was approaching him from an

opposite direction, a portion of which was encroaching on the half of the highway where he was traveling. In refusing to hold that plaintiff was guilty of contributory negligence, the court says:

"Appellant asks the court to determine, as a matter of law, that a person traveling the highway at night must see every object on his half of the highway in face of the fact that automobile engineers and manufacturers are expending vast sums of money in extensive research to develop lights that will measure up to appellant's requirements, and have so far been but partly successful. In order that this court could determine, as a matter of law, that respondent was guilty of contributory negligence, much more is required than would be sufficient in the trial court to sustain a finding of fact to the same effect. It must be clearly shown from the undisputed facts, judged in the light of common knowledge and experience, that a party has not exercised such care as men of common prudence usually exercise in positions of like exposure. * * * The evidence against the plaintiff should be so clear as to leave no room for doubt, and the facts such that the inference is irresistible, to justify this court in determining, as a matter of law, plaintiff guilty of contributory negligence against the finding."

The facts in the case of Mostov v. Unkefer, 24 Ohio App. 420, 157 N. E. 714, 716, are similar to the instant case. The accident out of which the action arose occurred in Michigan, but the trial was had in Ohio. Plaintiff was accompanied by her husband, who was driving the automobile in which they were riding at night, and collided with the rear end of defendant's truck, which was left standing on the highway without a red light or any light exposed at the rear end of the truck, in violation of a statute in Michigan, similar to ours, requiring a red light at the rear end of a truck upon the highway. There was evidence to the effect that the driver of the car could see by his own lights a substantial object 200 feet ahead, and actually saw the truck at a distance of 75 or 100 feet therefrom. Defendant invoked the doctrine that the negligence of the husband should be imputed to the wife, and contended that the court erred in refusing to direct a verdict for defendant, on the ground of contributory negligence of the driver. In holding that the question of contributory negligence was a question of fact for the jury, the Court of Appeal of Ohio says: "In the instant case the driver of the coupe had a right to assume that the law would be obeyed and that an unlighted truck would not be left parked on the paved portion of a much traveled highway, and was therefore confronted with a sudden and unexpected emergency."

[6] And it is the rule in California that every person has a right to presume that every other person will perform his duty and obey the law, and, in the absence of reasonable ground to think otherwise, it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person, provided, of course, that such person himself use reasonable care to observe the conduct of the other person so far as such conduct may affect his own safety at the time. Harris v. Johnson, 174 Cal. 55, 161 P. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560; Swartz v. Feddershon, 92 Cal. App. 285, 268 P. 430; Barton v. Studebaker Corp. of America, 46 Cal. App. 707, 189 P. 1025; McPherson v. Walling, 58 Cal. App. 563, 209 P. 209.

The appellant, in the instant case, concedes that the respondent was driving at a lawful rate of speed, that his brakes were in good working condition, and that his lights complied, in every respect, with the provisions of the California Vehicle Act, and that he was driving his automobile at a lawful rate of speed.

[7, 8] The rule is well established in this state that, when the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from those facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, then, and then only, does the law step in and forbid plaintiff a recovery. Even where the facts are undisputed, if reasonable minds might draw a different conclusion upon the question of negligence, the question is one of fact for the jury. Moss v. H. R. Boynton Co., 44 Cal. App. 474, 186 P. 631; White v. Davis (Cal. App.) 284 P. 1086, and cases there cited. We conclude that the evidence failed to show contributory negligence as a matter of law.

[9] But one more point remains to be disposed of.

The case was tried by Hon. Rollin Laird, late judge of the Superior Court of Kern county. Subsequent to the entry of judgment, and prior to the making of the motion for a new trial, Judge Laird died, and the motion for a new trial was made and argued before Hon. Erwin W. Owen, a judge of the Superior Court of Kern county.

At the hearing of said motion for a new trial, appellant filed a written objection to the hearing of the same by Judge Owen upon the following grounds: "That the judge hearing said motion is not the same judge who presided at the trial of this case, and heard the evidence, and has no personal knowledge nor recollection of the elements of evidence offered and received in said

cause. That a diagram was made upon a blackboard during the trial of said cause; that as appears from the transcript of testimony herein, and from the affidavit of F. E. Borton filed herewith, said diagram in and of itself, contained evidence material to the question of contributory negligence on the part of plaintiff, and that said diagram is not before this court nor capable of being considered by this court on this motion."

The objection is supported by an affidavit of F. E. Borton, counsel for the appellant, in which he recites: "That in the trial of this cause before the late Hon. Rollin Laird, and a jury sitting in Department One of the Superior Court of the county of Kern, state of California, a blackboard was employed by various witnesses for the plaintiff and designs and diagrams were placed thereupon with chalk. That said diagram was illustrative and explanatory of the testimony of the witnesses and in addition thereto was employed in certain particulars by such witnesses as a visual representation of the facts which in such instances were not stated otherwise and do not otherwise appear than as upon said diagram."

Appellant concedes that a judge, other than the judge who presided at the trial, has the power to hear and determine a motion for a new trial, but he argues, when a motion for a new trial is made upon the minutes of the court, which was done in this case, reference may be had, among other things, "to such proceedings occurring at the trial as are within the recollection of the judge" (Code Civ. Proc. § 660), and contends that the authority of a judge, other than the one who tried the case, should not be enlarged or extended.

Were we inclined to view this contention with approval, the facts in the case do not justify our doing so. Our attention is particularly called to the testimony of witnesses Batone and Hunter, who, in the course of giving their testimony, amplified certain portions thereof upon a blackboard, upon which a drawing representing the respective positions of the vehicles on the highway had been made. But an examination of the testimony of these witnesses discloses the physical conditions upon the highway, and the facts to which they testified can be readily visualized from their oral testimony, without the aid of the drawing, which was merely incidental thereto.

The order appealed from is affirmed as to defendant Richfield Oil Company of California and reversed as to defendant Ott.

We concur: MARKS, Acting P. J.; BARNARD, J.

209 Cal. 596

BROWN v. CANADIAN INDUSTRIAL ALCOHOL CO., Limited, et al.

S. F. 13276.

Supreme Court of California.

June 18, 1930.

Rehearing Denied July 17, 1930.

1. Appeal and error ⟹1011(1).

Determination of weight of conflicting evidence is for trial court.

2. Gifts ⟹47(3).

Where confidential relationship existed, grantee had burden to show gift was freely and voluntarily made with full knowledge of facts and complete understanding of effect (Civ. Code, §§ 2219, 2228, 2235).

3. Trusts ⟹283(1).

The least fraud is sufficient to set aside transaction between trustee and his cestui, particularly where relationship is also that of parent and child.

However, all gifts between cestui and his trustee are not void. Where trustee has sustained satisfactorily his burden to disprove fraud or undue influence, such gifts are as valid as any other gift freely and voluntarily made.

4. Gifts ⟹38.

Where fiduciary relationship exists between donor and donee, absence of independent advice does not alone authorize court to avoid gift.

Absence of such advice, however, is circumstance to be considered in determining whether gift should be avoided because of alleged undue influence or fraud.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward Judge.

Suit by Ida M. Brown against the Canadian Industrial Alcohol Company, Ltd., and another, to quiet title to certain corporate stock. From the judgment, plaintiff and named defendant appeal.

Affirmed.

Joseph E. Bien, Werner Olds, and Brobeck, Phleger & Harrison, all of San Francisco for appellants.

Sullivan & Sullivan and Theodore J. Roche, Theodore L. Breslauer and Frederick Olds, all of San Francisco, for respondents

RICHARDS, J.

This action was instituted by Ida M. Brown to quiet title to 10,000 shares of the capital stock of the Canadian Industrial Alcohol Company, Limited, a foreign corporation, of the approximate value of $400,000. The corporation claims no interest in the stock, the real controversy being between Ida M. Brown and R. Harold Brown, her son. The corporation was joined in order that it might be bound by the final judgment rendered herein, and in order that an injunction pendente lite might issue against it to prevent the transfer of the stock or the payment of dividends thereon. The complaint of appellant, Ida M. Brown, is based on the theory that an alleged gift of the stock was secured by defendant R. Harold Brown through the use of fraud, force, and undue influence. R. Harold Brown denies the allegations of the complaint and contends that he received the stock as a free and voluntary gift from his mother, 5000 shares for himself and 5000 shares as trustee for his sister. On the issue thus joined, namely, whether there had been a free and voluntary gift of the stock, the case proceeded to trial before the court without a jury, the request of R. Harold Brown for a jury trial having been refused, on the theory that it was an equity case. The trial occupied a period of five weeks, during the course of which a mass of evidence, oral and documentary, was introduced, resulting in a transcript of some 2,250 pages. Judgment was rendered in favor of defendant R. Harold Brown, and plaintiff has appealed. The corporation has also appealed, but solely for the purpose of placing itself within the jurisdiction of this court, in order that it may be protected against the rival claimants by the decision rendered herein.

[1] Plaintiff's sole contention on this appeal is that the evidence is insufficient to sustain the findings. It would serve no useful purpose to review the evidence. Sufficient it is to say that we have carefully scrutinized the long transcript, and carefully read the two long and involved briefs of appellant, and we find, although the evidence is in conflict, there is more than ample evidence to support the findings of the trial court. It is true that in many respects Mrs. Brown's testimony was considerably at variance with that of Harold Brown and his corroborating witnesses, but that was a matter for the trial court to consider, and not this court on appeal. As was said by this court in the case of Hotaling v. Hotaling, 187 Cal. 695, 697, 203 P. 745, 747: "The trial judge was called upon to delicately adjust the balance so as to determine upon which side, in this great mass of conflicting evidence and inference, the preponderance might lie, while upon this appeal our only duty is to ascertain if there was any substantial showing in

behalf of the court's finding to give rational support to the conclusion reached."

[2, 3] It may be conceded that, under the circumstances of this case, a confidential relationship existed between Mrs. Brown and Harold, and it is therefore the law that the burden of proof rested on Harold to show that the gift was freely and voluntarily made, and with a full knowledge of all the facts, and with a complete understanding of the effect of the transfer. Civil Code, §§ 2219, 2228, 2235; Odell v. Moss, 130 Cal. 352, 62 P. 555; Estate of Cover, 188 Cal. 133, 204 P. 583; Bradley v. Bradley, 37 Cal. App. 263, 173 P. 1011; Payne v. Payne, 12 Cal. App. 252, 107 P. 148; Cox v. Schnerr, 172 Cal. 371, 156 P. 509; Espinosa v. Stuart, 52 Cal. App. 447, 199 P. 66; Ross v. Conway, 92 Cal. 632, 28 P. 785. Transactions between a trustee and his cestui, and particularly where the relationship is also that of parent and child, are scrutinized with extreme care. The least fraud is sufficient to set such a transaction aside. Soberanes v. Soberanes, 97 Cal. 140, 31 P. 910; Nobles v. Hutton, 7 Cal. App. 20, 93 P. 289, and cases cited supra. But all gifts between a cestui and his trustee are not void. The burden rests on the trustee to disprove fraud or undue influence; but once the trustee has complied satisfactorily with this requirement, such gifts are as valid as any other gift freely and voluntarily made. In this case, on ample evidence, the trial court found that the gift was freely and voluntarily made, and specifically disproved fraud or undue influence. This court has frequently upheld gifts between parent and child where the trial court, on sufficient evidence, has found against the donor's contention of fraud and undue influence. De Arellanes v. Arellanes, 151 Cal. 443, 90 P. 1059; Wilbur v. Wilbur, 197 Cal. 1, 239 P. 332; Crow v. Crow, 168 Cal. 607, 143 P. 689; Soberanes v. Soberanes, supra; Zihn v. Zihn, 153 Cal. 405, 95 P. 868; Schurman v. Look, 63 Cal. App. 347, 218 P. 624.

[4] Appellant makes much of the fact that she had no independent advice in reference to the transaction. In some early cases of this court, where the factual situation was particularly aggravating, expressions may be found, when considered separately and without reference to the text, which imply that independent advice is essential to the validity of such a gift. Ross v. Conway, supra; Dolliver v. Dolliver, 94 Cal. 647, 30 P. 4; Yordi v. Yordi, 6 Cal. App. 20, 91 P. 348; Nobles v. Hutton, supra. But those cases were never intended to hold that independent advice was indispensable. We are in accord with the rule that, where a fiduciary relationship exists between the donor and donee, the absence of independent advice is a circumstance to be considered in determining whether the gift should be avoided because of alleged undue influence or fraud, but its nonexistence alone does not authorize the court to avoid the gift. All utterances to the contrary have been squarely repudiated by this court. A fairly recent case so holding is Smith v. Lombard, 201 Cal. 518, 258 P. 55. See, also, Wilbur v. Wilbur, supra; Soberanes v. Soberanes, supra. Moreover, the evidence in this case shows that Harold several times urged his mother to seek independent advice, but that she refused to secure it.

The appellant herein has insisted that we should scrutinize her briefs and arguments with extreme care. We have done so, only to reach the conclusion that her contentions are without substantial merit, and that the evidence is more than ample to sustain the findings of the trial court.

The judgment and order appealed from are affirmed, and it is further ordered that no costs be assessed against appellant Canadian Industrial Alcohol Company, Limited.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.

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209 Cal. 562

COOPER v. SMITH.

Sac. 4306.

Supreme Court of California.

June 17, 1930.

1. Automobiles ⟹245(6).

Negligence of motorist, striking one crossing highway, in approaching without warning or slackening of speed, *held* for jury.

2. Automobiles ⟹245(72).

Contributory negligence of one struck by automobile while walking across highway *held* for jury.

3. Automobiles ⟹245(91).

In action for injuries sustained when struck by automobile while walking across highway, evidence warranted submission of case to jury under last clear chance doctrine.

4. Trial ⟹194(16).

In personal injury action, instruction regarding compensatory damages *held* not erroneous as direction to find for plaintiff.

The instruction was in substance that, in regard to compensatory damages, jury could take into consideration and find for plaintiff for his injuries and pain and suf-

fering as well as other things stated therein, but other instructions were to effect that fact that court instructed jury on measure of damages was not to be taken as intimation that court believed plaintiff was entitled to recover damages, and that instructions on damages were to be considered only if jury believed plaintiff was entitled to recover.

5. Trial ⟹210(1).

Refusing instruction that, when witness states he looked and did not see, his testimony that he looked must be disregarded, *held* not error.

6. Appeal and error ⟹1002.

Jury's implied findings on conflicting evidence were conclusive on appeal.

In Bank.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Claud Cooper against Farrie B. Smith for damages for personal injuries sustained by plaintiff when struck by defendant's automobile. From a judgment for plaintiff, defendant appeals.

Affirmed.

George A. Corbett, of San Francisco, and George F. Jones, of Oroville, for appellant.

Ware & Ware, of Chico, for respondent.

FINCH, Justice pro tem.

This is an action to recover damages for personal injuries sustained by the plaintiff when struck by the defendant's automobile. Judgment was entered in favor of the plaintiff, and the defendant has appealed.

The accident occurred April 27, 1927, on the highway running in a northerly direction from Chico. At the time of the accident H. J. Stover's automobile was parked on the east side of the highway, facing north, the left wheels about 3 feet east of the east edge of the pavement, which was 15 feet in width. The plaintiff's truck, facing south, was parked on the opposite side of the highway; the left wheels thereof being about 3 feet west of the west edge of the pavement. The plaintiff was standing by the side of Stover's automobile, about 2 feet from the pavement. About 60 feet south of the plaintiff's position there is "a slight turn in the road" to the east, but the plaintiff had an unobstructed view of the highway for about 600 yards in a southerly direction. The plaintiff testified:

"I made a survey down the highway 150 or 200 feet to see if I had time to cross, * * * and seeing that there was no other car in sight I immediately started across the highway, * * * took a step or so, glanced to the north to see that no more cars were coming, probably took one more step, making probably three or four steps, again glanced to the south and seen the machine was on top of me. * * * At that time I was walking leisurely, probably three or four steps, probably a step to the second, not over about four seconds, when I glanced up and seen this car on me. * * * It was coming from the south, * * * about 40 or 45 feet away from me. * * * The car was in about the middle of the east half of the highway and I was within a foot or 18 inches of the middle of the highway. * * * I dodged back one step to try to get out of the way of it, and as I did that, why the car bumper hit my leg, broke it here, and I hit the fender and the headlight and the cowl and pretty near every other place that is on that (left) side of the car. * * * It swayed to the left towards the center of the highway, and I dodged back a step to the east to get out of its way." He further testified that the defendant gave no warning of her approach, that she was driving at about 40 miles an hour, and that her automobile finally came to a stop about 160 or 165 feet from the point where it struck him.

Stover gave testimony substantially to the same effect as that of the plaintiff. He and other witnesses testified that the defendant said "it was her fault, that she should have blown her horn; * * * that she had been driving between 35 and 40 miles an hour."

The defendant testified that she was driving "in the center of the highway" between 33 and 35 miles an hour; that, when she was about 300 feet from the Stover automobile she saw the plaintiff "standing on the dirt portion," facing north; and that she continued to observe him as she approached. She further testified:

"He turned and looked across the highway and I thought he heard me coming, * * * and I kept looking and wondering if he was going to look my way, and when I was in * * * probably fifteen feet of the rear end of Mr. Stover's car, he turned about face and stepped out in front of my car, at that time facing north, and when he did, his steps were about three or four, but the first step I know was taken rather rapid, swift. * * * I took my foot off the accelerator and let out my clutch and used my foot brake, reached for the emergency and with my left hand steered my car to the west. * * * I judge my automobile went about between twenty and twenty-five feet. * * * Just before I came to the rear part of Mr. Stover's car, probably ten feet before I was to the rear, * * * I was going thirty-five."

[1-3] The foregoing evidence is clearly and substantially conflicting on the issues of the

defendant's negligence and the plaintiff's contributory negligence and the question of the defendant's last clear chance to avoid the accident, notwithstanding the plaintiff's negligence, if any. At the time of the accident, the speed limit was 35 miles an hour. St. 1923, p. 553, § 113. A speed in excess of 35 miles an hour constituted negligence. It was a question for the jury to determine whether it was negligence, under the circumstances shown, for the defendant to approach the place of the accident without any warning or slackening of speed. If, as the plaintiff testified, the highway was clear for 150 or 200 feet when he started across the pavement, it is a reasonable inference that he was not negligent in attempting to cross. If, on the other hand, as testified by the defendant, the plaintiff, without looking to the south, started to walk rapidly across the pavement when the defendant's automobile was only a few feet away, he was clearly guilty of negligence. If, after observing that the highway was clear for 150 to 200 feet to the south, the plaintiff leisurely and negligently walked over the east half of the pavement without again looking, "oblivious to or unconscious of his position of danger," and the defendant, as she testified, "kept looking" at him and "wondering if he was going to look" her way, and thereby became aware of the fact that he was unconscious of the danger, then the doctrine of the last clear chance is applicable. Berguin v. Pacific Elec. Ry. Co., 203 Cal. 116, 123, 263 P. 220.

[4] After instructing the jury as to the measure of damages, if the jury found for the plaintiff, the court said:

"In regard to these compensatory damages I wish to say to you that you have a right to take into consideration and find for the plaintiff for his injuries and pain, and suffering, as well as the other things that I have stated herein."

The appellant contends that this instruction is a direction to find for the plaintiff. Fairly construed, however, and considered in connection with other instructions on the subject, the instruction correctly tells the jurors, if they find for the plaintiff, to award him compensation "for his injuries and pain and suffering," etc. Other instructions stated:

"The fact that I have instructed you or may instruct you upon the measure of damages in this case is not to be taken by you as an intimation that I believe or do not believe that plaintiff is entitled to recover damages in this action. * * * Instructions on damages are to be considered only where under the evidence and instructions from the court you believe that the plaintiff is entitled to recover but they should not be considered by you where the liability of the defendant has not been established."

[5] Complaint is made of the court's refusal to instruct the jury that, "when to look is to see and a party or witness states that he looked and did not see, his testimony in this respect to-wit, that he looked, must be disregarded." The proposed instruction is a mere commonplace, within the knowledge of all the jurors, and is argumentative, rather than a statement of law. The court fully, and in terms favorable to the defendant, instructed the jury as to the plaintiff's duty to look before and while crossing the pavement.

[6] The other grounds urged for a reversal of the judgment have been carefully considered, and it does not appear that any of them have merit. The record shows a substantial conflict in the evidence on every material issue, and therefore the implied findings of the jury are conclusive on appeal.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; TYLER, Justice pro tem.; PRESTON, J.; SEAWELL, J.; CURTIS, J.

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209 Cal. 567

BUTTRICK v. SEINES et al.

L. A. 9847.

Supreme Court of California.

June 17, 1930.

1. Licenses ⟹39.

Transfer of one seventy-second interest in royalty deed by sole owner of lease was not violation of statute (Corporate Securities Act [St. 1917, p. 673, as amended]).

2. Appeal and error ⟹1011(1).

Where evidence of fraud was conflicting, trial court was within province in resolving conflict in favor of defendant.

In Bank.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action for damages for fraud brought by Gussie C. Buttrick against E. Byron Seines and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Superseding opinion in 284 P. 224.

Duke Stone, of Los Angeles, for appellant.

Hahn & Hahn, of Pasadena, Richard A. Dunnigan, of Los Angeles, in propria persona, W. W. Praul, of Los Angeles, for respondents.

SHENK, J.

This is an action for damages for alleged fraud in the sale to the plaintiff of an interest in the product of certain oil and gas wells. Findings and judgment were for the defendants, and the plaintiff has appealed.

The principal ground of the appeal is that the evidence is insufficient to support the findings. Considered from a viewpoint favorable to the findings, the evidence shows that in August, 1921, the defendant Hamilton leased from approximately twenty-four different owners certain lands at Huntington Beach in Orange county for the purpose of developing thereon oil and gas wells. He paid for the lease the sum of $15,000. A few months later he purchased an assignment of a lease at Signal Hill with a down payment of $10,000, and agreed to prosecute oil and gas operations thereunder. At a time when he was the sole owner of these leases, and on December 12, 1921, he sold by deed to the plaintiff a one seventy-second interest in and to all oil, petroleum, gas, and other hydrocarbon substances extracted from the land under said leases. No well was drilled on the Signal Hill property for the reason that other operations in the immediate vicinity proved that expenditure of money on that lease would not be warranted. This lease was therefore abandoned in August, 1922. Drilling operations were prosecuted on the Huntington Beach property, the well being designated as Huntington Beach well No. 1. At a depth of 2,650 feet water was encountered to such an extent that it was impossible to shut it off. This, together with difficulties arising with the lessors, caused a cessation and discontinuance of these operations. When Hamilton was satisfied that the foregoing two oil leases were failures he obtained a third oil and gas lease on land at Huntington Beach. Without any obligation on his part so to do he deeded to the plaintiff an interest in this third lease. The defendants Seines and Wimpenny were interested with Hamilton in this lease. After an expenditure of over $75,000 on this lease it proved to be a failure. Hamilton, with one McKeon, obtained a fourth lease at Santa Fé Springs in connection with which Hamilton expended over $40,000 of his own money. Unable to provide further funds for drilling purposes, he transferred all of his interest in and to the fourth lease to McKeon and the Hamilton Oil Syndicate, with the understanding that those who held royalty deeds in wells Nos. 3 and 4, including the plaintiff, would be protected, retaining no beneficial interest himself. Oil was produced from well No. 4, and the plaintiff received dividend checks monthly from December 15, 1922, to April 15, 1923, inclusive, totaling $686.50, when the well failed. Further expenditures in deepening the well to 5,000 feet met with no success. A fifth well was drilled, but was abandoned as valueless for oil. After losing $75,000 in his oil ventures the defendant Hamilton turned his attentions elsewhere. The plaintiff then brought this action alleging fraudulent misrepresentations on the part of the defendants and a violation of the Corporate Securities Act in the transfer of the royalty interests to her without a permit from the commissioner of corporations.

[1, 2] Assuming that the original royalty deed was a "security," there was no violation of the Corporate Securities Act (St. 1917, p. 673, as amended) when the defendant Hamilton, as sole owner of the two original leases, thus transferred to the plaintiff the one seventy-second interest therein. People v. Pace, 73 Cal. App. 548, 238 P. 1089. The plaintiff paid nothing for the subsequent royalty deeds.

The evidence as to the alleged fraud was conflicting. The trial court within its province resolved the conflict in favor of the defendants.

No other points require specific mention.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; RICHARDS, J.

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209 Cal. 625

KEELING COLLECTION AGENCY v. McKEEVER, Commissioner.

S. F. No. 13826.

Supreme Court of California.

June 20, 1930.

1. Appeal and error ⚷460(2).

Statute requiring bond against waste, where judgment directs sale of land as condition precedent to stay of execution, applies only to appellant in possession or in subordination to whom possession is held (Code Civ. Proc. § 945).

2. Appeal and error ⚷907(2).

Every presumption favors trial court's order, where evidence is not before reviewing court.

3. Appeal and error ⚷460(2).

Appeal from decree directing sale of premises in satisfaction of mechanic's lien claim *held* to stay execution (Code Civ. Proc. §§ 385, 945, 949).

Code Civ. Proc. § 949, which is the applicable statute, provides that perfecting of appeal stays execution, unless court in its discretion requires bond.

In Bank.

Application by the Keeling Collection Agency for a writ of mandate, prayed to be directed to George P. McKeever, Commissioner, appointed by the Superior Court in and for the City and County of San Francisco, to sell real property pursuant to a decree foreclosing mechanics' liens.

Writ denied.

Louis E. Goodman and Louis H. Brownstone, both of San Francisco, for plaintiff.

A. Don Duncan and John A. Sinclair, both of San Francisco, for defendant.

SEAWELL, J.

Petition for writ of mandate to compel George P. McKeever, as commissioner, to sell certain real property as directed by a decree of the superior court of the city and county of San Francisco providing for the foreclosure of certain mechanics' liens.

In an action brought by petitioner in the court below as the assignee of mechanics' lien claims, the court decreed that said liens for the sum of $38,269.24 were superior to the lien of a deed of trust upon said property for the sum of $150,000, and directed the sale of the premises in satisfaction of said mechanics' lien claims, appointing defendant, McKeever, commissioner to conduct the sale. The defendant West American Finance Company, named as beneficiary in said deed of trust, and the trustees thereunder appealed to this court, and the appeal is now pending. Upon motion of appellants the court below entered an order staying the sale without bond pending the determination of the appeal. Petitioner contends that the case is not one where the perfecting of an appeal stays execution (section 949, Code Civ. Proc.), and that the said order was void for the reason that the court had no power to stay the sale without requiring a bond against waste under the provisions of section 945, Code of Civil Procedure, and seeks by mandamus to compel the commissioner to proceed with the sale.

[1-3] It has uniformly been held that section 945, Code of Civil Procedure, requiring a bond against waste where the judgment directs the sale of real property as a condition precedent to a stay of execution, applies only to an appellant in possession or in subordination to whom possession is held. Zappettini v. Buckles, 167 Cal. 27, 138 P. 696; Bank of Woodland v. Stephens, 137 Cal. 458, 70 P. 293; Owen v. Pomona Land & Water Co., 124 Cal. 331, 57 P. 71; McMillan v. Hayward, 84 Cal. 85, 24 P. 151; Root, Neilson & Co. v. Bryant, 54 Cal. 182. It cannot be said that the appellant West American Finance Company, the beneficiary under said deed of trust, or the trustees under said deed of trust, who join in the appeal, are now or were ever in actual possession of the property. The facts appearing from the allegations of the petition for writ of mandate and answer thereto are as follows: The action to foreclose the mechanics' liens was commenced on December 17, 1928, tried on June 13 and 17, 1929, and judgment rendered on August 20, 1929. On December 31, 1928, within a few days after the commencement of said action, the property was sold under said deed of trust by the trustees named therein, and at the sale the Pacific States Savings & Loan Society became the purchaser for the amount of the lien, to wit, $150,000. On April 11, 1929, it is alleged in the answer to the petition herein, said company sold the property to Joseph Greenbach and Helen Greenbach, his wife, and defendant has no information and belief as to whether or not there have been further sales. Petitioner avers in an affidavit introduced upon the proceedings to fix the amount of a stay bond, and accompanying its petition herein, that California Pacific Title & Trust Company was the immediate grantee of Pacific States Savings & Loan Society, but this fact is not important.

Upon the sale under the trust deed, the title of the trustees passed to the purchaser, and it is conceded that the successors in interest of such purchaser are now in actual possession of the property. The possession of such parties cannot be held to be the possession of appellants within the meaning of section 945, Code of Civil Procedure. Following the sale the appellant West American Finance Company, the beneficiary under the deed of trust, was without any interest in, or right to possession of, the property, and certainly without right to exercise control over those in possession or to prevent the commission of waste.

If it had appeared upon the hearing of the motion to stay the sale without bond that the real party in interest upon the appeal was not the appellant West American Finance Company, whose lien had been satisfied by the trustees' sale, but was the grantee of the purchaser at such sale, in actual possession of the property, the law would require a bond against waste. The said purchaser could not avoid the requirement of a bond through the device of continuing the appeal in the name of the nominal appellants (section 385, Code Civ. Proc.) rather than securing a substitution of parties. But the proceedings which took place upon said motion are not before us, and it must be presumed that the judge below had before him evidence that appellant West American Finance Company and the trustees under the deed of trust had an interest in prosecuting the appeal despite the satisfaction of the lien by the trustees' sale. Agreements against contingent losses may have existed between said West American Finance Company and the Pacific States Savings & Loan Society, the purchaser at the trustees' sale. The evidence not being before us, every

presumption must be indulged in support of the order.

Since there is no statute requiring a bond in such cases as that before us, section 949, Code of Civil Procedure, applies. In cases within said section the perfecting of an appeal stays execution unless the court, in its discretion, requires a bond. No showing is here made that the court abused its discretion in refusing a bond.

In support of the contention that the appeal does not stay the execution of the judgment, petitioner cites such cases as Halsted v. First Savings Bank, 173 Cal. 605, 160 P. 1075; Cullinan v. Mercantile Trust Co., 193 Cal. 563, 226 P. 4, and Stetson v. Sheehan, 52 Cal. App. 353, 200 P. 387. None of said cases involved a judgment directing the sale of real property. We do not deem them authority for the proposition that although no bond is required under section 945, supra, in the instant case, nevertheless, the execution of the judgment is not stayed by the appeal. We regard the following cases, in which the perfecting of an appeal was held to stay execution, as stating the principle of law to be here applied: Baar v. Smith, 201 Cal. 87, 255 P. 827; Estate of Kennedy, 129 Cal. 384, 62 P. 64; Ruggles v. Superior Court, 103 Cal. 125, 37 P. 211; Coburn v. Hynes, 161 Cal. 685, 120 P. 26; McCallion v. Hibernia, etc., Soc., 98 Cal. 442, 33 P. 329; Pennie v. Superior Court, 89 Cal. 31, 26 P. 617; In re Schedel, 69 Cal. 241, 10 P. 334; Root, Neilson & Co. v. Bryant, 54 Cal. 182.

In addition to the law points above discussed, and which we think are conclusive of the issue presented, we are of the further view that the case is not one which strongly calls for the granting of the extraordinary relief herein sought.

Writ denied.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

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209 Cal. 656

PACIFIC EMPLOYERS' INS. CO. et al. v. DIVISION OF INDUSTRIAL ACCIDENTS & SAFETY et al.

L. A. 11886.

Supreme Court of California.

June 26, 1930.

1. Master and servant ⟹373.

Injury to employee struck by golf club which fellow employee was swinging was not accident "arising out of employment" so as to be compensable.

Claimant was employed in tailoring establishment. In idle moment fellow employee was practicing swinging of golf clubs. There was no intent to strike claimant, and claimant was unaware of the fellow employee's use of the golf clubs.

[Ed. Note.—For other definitions of "Arising out of Employment," see Words and Phrases.]

2. Master and servant ⟹372.

Accidents "arising out of employment" are those traceable to nature of work or risks to which employer's business exposes employee.

In Bank.

Proceeding before the Division of Industrial Accidents and Safety for compensation for injuries by Joseph Fiore, claimant, opposed by the Pacific Employers' Insurance Company, insurer, and others. Compensation was awarded, and the insurance company and others bring certiorari.

Award annulled.

F. Britton McConnell, of Los Angeles, for petitioners.

Edward O. Allen, of San Francisco, for respondents.

LANGDON, J.

This matter comes to us upon a writ to review an award of the Industrial Accident Commission, granting compensation to the employee, Fiore.

[1] The employee was a sewing machine operator in a tailoring establishment. In the same room the "cutter" was located at a counter to which the machine operator went for materials for his work. A salesman for the employer had left his bag of golf sticks in the store. In an idle moment the "cutter" was practicing swinging one of these golf clubs at a place close to the table where he did the cutting. As Fiore approached the cutting table for materials, the swinging club struck him in the face, inflicting the injury for which the Industrial Accident Commission awarded compensation.

The facts of the case are not disputed. The respondent seeks to differentiate this case from the cases of Coronado etc. Co. v. Pillsbury, 172 Cal. 682, 158 P. 212, 213, L. R. A. 1916F, 1164; Fishering v. Pillsbury, 172 Cal. 690, 158 P. 215; and Great Western Co. v. I. A. C., 187 Cal. 295, 201 P. 931, because in the instant case neither of the employees was "skylarking" or indulging in

"horseplay." There was no intent on the part of the cutter to touch or injure Fiore and Fiore was unaware, apparently, of the cutter's exercise with the golf clubs.

However, the sole question presented is whether said injury arose out of the operator's employment so as to be compensable. While the cases above cited may be distinguished from the instant case in some particulars, they are not distinguishable upon principle.

[2] The principle of those cases is announced in the following language appearing in the opinion in Coronado Beach Co. v. Pillsbury, supra: "The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employee's work or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasonably incident to the employment. * * * It 'arises out of' the occupation when there is a causal connection between the conditions under which the servant works and the resulting injury. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

In the case last cited the court considered an earlier case in which a foreman had been assaulted, without provocation, by one of his workmen, saying: "It was held that the employment of the foreman 'did not expose him to risk of such assault to any greater extent than the risk of any bystander not so employed of being assaulted in the same manner.' This conclusion from the facts found was logical and proper. In the matter at bar the employment of Flint exposed him to no greater danger from being tickled by a fellow servant than would a guest in the hotel of his employer have been so exposed. The two cases are quite similar."

We think this case is also similar in principle. Fiore was exposed to no greater danger of being struck by this golf club, because of his employment, than would have been any customer or acquaintance of the employer who might have visited the place of business. Logically, this case cannot be differentiated from the cases cited, and this is apparently well understood by the respondent commission, for its argument is, in effect, an attempt to secure a modification or reversal of the rule of these cases, which clearly would be required for an affirmance of this award. The commission made a similar effort in the case of Great Western Co. v. I. A. C., 187 Cal. 295, 201 P. 931, but this court refused to overrule the two previous cases of Coronado Beach Co. v. Pillsbury and Fishering v. Pillsbury, supra, but reaffirmed these cases upon reason and authority.

The award is annulled.

We concur: WASTE, C. J.; PRESTON, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

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209 Cal. 634

DOWNS v. DOWNS.

L. A. 11925.

Supreme Court of California.

June 24, 1930.

Appeal and error ⟹627(1).

Without record containing trial court's clerk's transcript, appellant cannot have consideration of merits of cause.

Appellant's notice to the clerk of the trial court, requesting that a transcript on appeal be prepared and made up, was filed too late. Her subsequent application for relief from the default was denied by the court, but she took no steps to perfect an appeal from the denial of the relief. Even if appellant was still entitled to prosecute an appeal on the judgment roll alone, this was of no benefit to her without the record containing the clerk's transcript.

In Bank.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by Bertha L. Downs against Willis F. Downs. From the judgment, plaintiff appeals.

Affirmed.

Catherine A. McKenna and J. Irving McKenna, both of Los Angeles, for appellant.

Frank R. Carrell, of Los Angeles, for respondent.

WASTE, C. J.

Plaintiff appeals from a judgment against her in an action for divorce. Respondent has moved to dismiss the appeal, and for an affirmance of the judgment. The motion to dismiss the appeal was denied when the motion came on for hearing.

The notice to the clerk of the trial court requesting that a transcript on appeal be prepared and made up, as provided by the alternative method, was not filed in time, and appellant's subsequent application to the court below for relief from the default was denied. Notice of appeal from the order denying the relief appears to have been given, but no steps have been taken to perfect such appeal.

Assuming that appellant may still be entitled to prosecute an appeal on the judgment roll alone, she admits, what seems to be an obvious fact, that without a record containing the clerk's transcript she cannot have a consideration of the merits of the cause.

The motion for an affirmance of the judgment is therefore granted.

The judgment is affirmed.

We concur: SHENK, J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.

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209 Cal. 605

TIERNEY & LAWFORD, Inc., v. WILSHIRE CAFÉ CO., Inc., et al.

L. A. 10326.

Supreme Court of California.

June 18, 1930.

Rehearing Denied July 17, 1930.

1. Evidence ⟹73.

Five persons, owning all issued capital stock of corporation, will be inferred to have constituted board of directors (Civ. Code, § 305, as amended by St. 1929, p. 1264, § 10).

Such inference arose as in view of fact that by-laws provided for board of five directors, and directors were required at such time to own stock in corporation until adoption of 1929 amendment (St. 1929, p. 1264, § 10) to Civ. Code, § 305.

2. Corporations ⟹248.

Liability of corporation on original indebtedness and derivative liability of stockholders continues without understanding that note was to be accepted in payment.

3. Corporations ⟹237.

Corporation, as respected stockholder's liability, became liable on agreement by stockholder after acceptance of work either on theory of estoppel or implied ratification.

SEAWELL, J.; PRESTON, J.; CURTIS, J.

In Bank.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action by Tierney & Lawford, Inc., against the Wilshire Café Company, Inc., Maurice Macagno, Frank Balzano, Carlo Bravo, and others, subsequently dismissed as to all defendants, except those named. Judgment for plaintiff against the last three named defendants, and such defendants appeal.

Affirmed.

Howell W. Richardson, T. E. Parke, Victor H. Koenig, Ernest M. Torchia, and Benjamin W. Shipman, all of Los Angeles, for appellants.

George L. Keefer, of Los Angeles, for respondent.

SEAWELL, J.

Defendants Maurice Macagno, Frank Balzano, and Carlo Bravo appeal from a judgment rendered in favor of plaintiff, Tierney & Lawford, Inc., a corporation, in an action to recover from each of said defendants, upon his statutory stockholder's liability, a proportion of an alleged indebtedness of $4,637.51 due to said plaintiff from Wilshire Café Company, a corporation. The Wilshire Café Company was named in the title of the complaint as a party defendant, but no relief was prayed for nor judgment rendered against it. The action was dismissed before trial as to the other defendants against whom no judgment was rendered. Upon this appeal defendants contend that no indebtedness was incurred by said Wilshire Café Company in favor of plaintiff at a time when they were stockholders.

The evidence introduced on behalf of plaintiff shows that between August 21, 1923, and November 25, 1923, plaintiff corporation did certain painting and decorating upon certain restaurant premises in the city of Los Angeles subsequently operated under the name Richelieu Café, and that it also supplied furnishings for the use of said business, consisting of carpeting, draperies, tapestries, dining room tables and chairs, and other appropriate furnishings. This work was done under an agreement made on August 21, 1923, between plaintiff corporation and defendant Maurice Macagno, purporting to act on behalf of said Wilshire Café Company, a corporation, and contracting in its name. A price of $26,500, to be paid in stated installments, was agreed upon. The terms of the agreement were embodied in an instrument entitled "Specifications and Estimate for Painting and Decorating Richelieu Café," which concluded as follows: "Accepted—Giulio Nuccio, President." The specifications for furnishings follow the signature of Nuccio and close with the words: "Accepted: Wilshire Café Co., Inc., by Maurice Macagno." Carpet furnishings not provided for in the original agreement of the value of $950 were furnished at the request of Macagno, and additional work of the value of $384 was done at his request.

[1] It was not shown that Macagno or Nuccio were authorized as officers by the by-laws of the corporation to make the contract in question, or that authority had been conferred upon them by resolution of the board of directors of said company. At the time

of the making of the agreement, and until some time after November, 1923, defendant Macagno was the owner of 84 shares of the capital stock of said company, defendant Balzano was the owner of 79 shares, defendant Bravo of 69 shares, and Nuccio and one Hodel the owners of 14 shares each. Since the by-laws provided for a board of five directors, and directors were required to own stock in the corporation until the adoption of the 1929 amendment (St. 1929, p. 1264, § 10) to section 305, Civil Code, it is to be inferred that said five persons, the owners of all issued capital stock, constituted the board of directors.

The work was completed and accepted on or about November 25, 1923. A receipt for the furnishings, dated November 27, 1923, is signed "Wilshire Cafe Co., by G. Nuccio." About that time the café was opened and operated by the persons who were the sole stockholders of the Wilshire Café Company with the furnishings supplied by plaintiff corporation. In January or February, 1925, the café was closed because of financial difficulties. The installment due upon the execution of the agreement and the September and October installments were paid in accordance with the terms of the contract. Between December 11 and March 29, 1924, other payments were made, making a total paid of $23,196.49. It does not appear through direct testimony by whom or in what manner payments were made, but we think it may be inferred from the evidence as a whole that payments prior to December, 1923, were made by defendant Macagno, or, if not by him, by one of the other four stockholders and directors of the Wilshire Café Company.

Some time following the acceptance of the work performed by plaintiff and the opening of the café, the defendants herein and Nuccio and Hodel ceased to be stockholders. About April 30, 1924, after defendants had transferred their stock, said Wilshire Café Company, by Morris Weiner, then its president, and F. M. Andreani, secretary, pursuant to resolution of the board of directors, executed a promissory note in favor of plaintiff for the principal sum of $4,637.50, which was the balance remaining unpaid on plaintiff's bill. Said Weiner also signed the note in his individual capacity and secured the obligation by a pledge of 150 shares of the stock of the café company then owned by him.

[2] It was the contention of defendants in their answer that any liability on their part as stockholders was extinguished for the reason that said note was accepted in full satisfaction and payment and by way of novation for any indebtedness of the Wilshire Café Company to plaintiff. The court below found against this contention, and its finding, which is supported by the evidence, is not attacked on this appeal. Where there is no understanding that a note shall be accepted in payment and satisfaction of the indebtedness, the liability of the corporation upon the original indebtedness and the derivative liability of those who were stockholders at the time of the creation of the original indebtedness continues. Winona Wagon Co. v. Bull, 108 Cal. 1, 40 P. 1077; Ellison v. Henion, 183 Cal. 171, 190 P. 793, 11 A. L. R. 444; London & S. F. Bank v. Parrott, 125 Cal. 472, 58 P. 164, 73 Am. St. Rep. 64; Clark v. Berlin Realty Co., 33 Cal. App. 50, 164 P. 333.

[3] But defendants contend that Macagno was not shown to have had authority to contract on behalf of the corporation in 1923, and that the corporation incurred no liability until said note was executed, at which time they owned no stock. As noted above, the work was performed and furnishings supplied under an agreement with persons who were stockholders and appear by inference to have been directors of the Wilshire Café Co. That the indebtedness incurred by Nuccio and Macagno in order that the café might function was without the knowledge and consent of the appealing stockholders is inconceivable in the light of the facts of the case. The contract was made in the name of the corporation. Said corporation thereafter operated the café as furnished by plaintiff. It voluntarily accepted and freely used the benefits of the contract under such circumstances as to require the conclusion that all stockholders had knowledge of the agreement under which they were furnished. The defendants offered no evidence to rebut the facts appearing and inferences to be drawn from plaintiff's testimony. Under such circumstances the corporation became liable on the agreement made by Macagno at least as early as the acceptance of the work and furnishings in November, 1923, either on the theory of estoppel or implied ratification through acceptance of the benefits, if indeed the facts and circumstances testified to, in the absence of rebutting testimony, do not present a situation where actual authority to make the contract may be inferred.

The evidence establishes plaintiff's right to recover the reasonable value of the additional carpeting and additional work performed by it. The finding as to stock ownership is not open to the objection made by defendants, but in legal effect is a finding that said defendants owned the stated number of shares continuously from August 21, 1923, to December 1, 1923.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; PRESTON, J.; CURTIS, J.

209 Cal. 629

WALKER v. KIMBALL FRUIT CO., Inc. (two cases).

S. F. 12967; Sac. 4431.

Supreme Court of California.

June 24, 1930.

Rehearing Denied July 24, 1930.

1. Appeal and error ⟹930(4).

Since jury's verdicts were against defendant, appellate court must assume jury found in favor of plaintiffs on issue involved.

2. Appeal and error ⟹1001(1).

If there is any substantial evidence supporting jury's implied finding, it must be sustained by appellate court.

3. Appeal and error ⟹930(1).

Appellate court must resolve all conflicts in evidence in favor of upholding jury's verdicts.

4. Appeal and error ⟹930(1).

Jury, having returned verdicts for sellers suing on price guaranty, must have rejected testimony of buyer's agent that no guaranties were contained in contracts in direct conflict with sellers' testimony.

Buyer's soliciting agent testified that minimum price guaranties were written in duplicate contracts, mailed by him to buyer's state agent, and state agent testified that no such guaranties were contained therein when he received them about a day after their mailing. Testimony of both witnesses could not be true, in view of fact there was no evidence whatever that contracts were or could have been changed between time buyer's soliciting agent deposited them in the mail and the time when buyer's state agent received them in sealed envelopes through the mail.

5. Evidence ⟹60, 83(1).

Court could not presume that some one, while contracts for purchase of apples were in mail, surreptitiously and fraudulently changed contracts (Code Civ. Proc. § 1963, subds. 15, 33).

Code Civ. Proc. § 1963, subds. 15 and 33, provide that presumptions are that official duty has been regularly performed and that law has been obeyed.

6. Principal and agent ⟹170(3).

Buyer's state agent's receipt and retention of contracts mailed by soliciting agent *held* ratification of latter's price guaranties.

By verdicts in favor of sellers, jury impliedly found that buyer's state agent received contracts for purchase of apples with price guaranty clauses, and that on their receipt read them, and that he must have discovered that they were more than contracts of consignment, and that they contained agreement of guaranty. Having ascertained this fact, and afterwards having accepted the fruit of the sellers and shipped and sold it under said contracts, buyer, whom state agent represented, ratified contracts as drawn by soliciting agent, and was thereafter estopped to deny their validity.

7. Appeal and error ⟹1001(1).

Jury's fact findings, supported by substantial evidence, will not be disturbed by appellate court.

In Bank.

Appeals from Superior Court, Sonoma County; R. L. Thompson, Judge.

Actions by H. Walker and by D. G. Walker against the Kimball Fruit Company, Inc. Judgments for plaintiffs, and defendant appeals.

Affirmed.

Superseding opinion of the District Court of Appeals in 283 P. 895.

Heller, Ehrman, White & McAuliffe and Webster V. Clark, all of San Francisco, and Geary & Geary and C. J. Tauzer, all of Santa Rosa, for appellant.

E. M. Norton, of Healdsburg, Robert Duncan, Karl Brooks, of San Francisco (John L. McNab, of San Francisco, and Barrett & McConnell, of Santa Rosa, of counsel), for respondents.

CURTIS, J.

In these actions tried before a jury verdicts were rendered in favor of the plaintiffs, upon which judgments were entered against defendant. Motions for new trials were made and denied, and the defendant has appealed.

The principal question presented on these appeals is as to the sufficiency of the evidence to support the judgments. The controversy involves two written contracts entered into by the defendant, one with the plaintiff H. Walker, and the other with the plaintiff D. G. Walker. The plaintiffs are father and son, and they are the owners of adjoining apple orchards situated in the county of Sonoma. By the contract with H. Walker the latter agreed to deliver one-half of his 1926 crop of apples grown on his orchard to the defendant to be marketed by the defendant for the account of the said H. Walker. By the contract with the plaintiff D. G. Walker, he agreed to deliver all of his 1926 crop of apples grown on his orchard to the defendant to be marketed by the defendant for the account of the said D. G. Walker.

In each of these contracts, or at least in the copies of the contracts given to the plaintiffs, there was a clause or provision guaranteeing a minimum price which the apples would bring to the plaintiffs. These contracts were secured from the plaintiffs by Kemp Ross, the agent and representative of the defendant in Sonoma county, and were signed by him as such agent and representative. It is now, and has been, the contention of the defendant throughout this litigation that Ross had no authority to include in said contracts, or in either of them, any covenant or agreement on behalf of the defendant guaranteeing that the plaintiffs would receive any definite amount for the apples delivered by them to the defendant; that the defendant was a purely consignment company, and confined its operations exclusively to doing a commission business. While the plaintiffs claim that the evidence shows that Ross had both actual and ostensible authority to enter into said contracts of guaranty, they further contend, even in the absence of any original authority in Ross to make such contracts, that the defendant ratified said contracts, and with full knowledge that they contained a clause guaranteeing a minimum price for the fruit accepted plaintiff's fruit, and sold the same without ever making any objection to said contracts or notifying the plaintiffs that they would not be bound by their terms. If this contention of the plaintiffs can be maintained, then the question of Ross' authority to execute said contracts becomes a matter of no consequence.

[1-3] We will therefore consider first the contention of the plaintiffs that the defendant ratified said contracts. As the verdicts of the jury were against the defendant, we must assume that they found in favor of plaintiffs upon the issue of ratification. That being so, if there is any substantial evidence in support of this implied finding of the jury, it must be sustained by this court, and in considering the evidence for this purpose we must resolve all conflicts therein in favor of upholding the verdicts of the jury.

The defendant is a corporation organized under the laws of the state of New York, but during the year 1926 had and maintained an office and place of business in the city of San Francisco. From this office it carried on an extensive business in shipping fruit from various localities in the state of California, and during said year Alexander Young was the general manager and agent of the defendant for the state of California, and as such had charge of the office of the company and directed its affairs in the state of California. During the summer of 1926 Kemp Ross was the agent of the defendant company in soliciting business and procuring contracts for the shipment of fruit from the various growers in that part of Sonoma county in which the orchards of the plaintiffs were located. Ross testified that, when he visited the orchard of H. Walker in May, 1926, with Mr. Kimball, the president of the Kimball Fruit Company, Inc., who was visiting California in the interest of his company, Mr. Kimball was much impressed with the quality of Mr. Walker's fruit, and said to Ross, "You get this crop regardless." He further testified that in a later conversation with Mr. Young, the managing agent of the defendant, Mr. Young had told him that the company had ordered too much shook, and that he was afraid that they would not get apples enough to use up the shook. Mr. Young, so Ross testified, urged him to get more apples and "to get the apples regardless." After these conversations Ross, in behalf of the company, entered into with the plaintiffs the two contracts sued on. Ross testified that he prepared the contracts in triplicate, gave one copy to each of the plaintiffs, and immediately sent by mail the two originals to the office of the defendant in San Francisco, and kept copies for his own files. The contracts were dated in the early part of July. Mr. Young, the managing agent of the defendant, testified that he received the contracts by mail shortly after they were executed, opened the envelope containing the contracts, examined them to see whether or not they were acceptable to him, and then filed them away with many other contracts. After this time, and before any dispute arose between the parties hereto as to the validity of the contracts under which the plaintiffs claim, the fruit from the orchards of the plaintiffs was delivered to the defendant, and by the defendant shipped and sold. Mr. Young further testified that the contracts sent to him by Ross and which he received through the mail did not contain the clause guaranteeing a minimum price for the fruit, or any provision of guarantee whatever, and that the first he knew that the plaintiffs made any such claim was some time in September, 1927, when he received letters from the plaintiffs with reference to the matter. The contracts produced by him showed that they had at some time been changed, and the words "shipper to furnish W. W. boxes for picking in" were written in the contracts held by him at the place where in the copies of the contracts given to the plaintiffs the guarantee clause had been written. Mr. Young was clear and positive in all of his statements. On the other hand, Ross positively stated that the contracts mailed to Young were in the exact language as the copies of the contracts which he delivered to the plaintiffs, and that no change had been made in the contracts sent to Young prior to their being mailed to Young by Ross.

[4-7] This whole matter was thoroughly gone into at the trial by both parties, and

all the evidence was before the jury, and we must presume that the jury gave it due consideration in arriving at the verdicts. Having returned verdicts in favor of the plaintiffs, they must have rejected the testimony of Young and accepted that of Ross, for the statements of these two witnesses are diametrically opposed to each other. They both cannot be true, in view of the fact that there is no evidence whatever that the contracts were, or could have been, changed between the time Ross deposited them in the mail and the time when Young received them in sealed envelopes through the mail. The only basis on which the evidence of these two witnesses can be reconciled is to presume that some one, while these contracts were in the possession of the duly constituted mail authorities, surreptitiously and fraudulently made the purported changes in their phraseology. We are not permitted to indulge in such a presumption. On the other hand, the presumptions are "that official duty has been regularly performed" and "that the law has been obeyed." Subds. 15 and 33, § 1963, Code Civ. Proc. If, therefore, Young received those contracts with the guarantee clause written in each and on their receipt read them, as he testified that he did, he must have discovered that they were more than contracts of consignment and that they contained the covenant or agreement of guarantee. Having ascertained this fact, and afterwards having accepted the fruit of the plaintiffs, and shipped and sold it under said contracts, the company whom he represented must be held to have ratified the contracts as drawn by Ross, and was thereafter estopped to deny their validity. This principle needs no citation of authority, but, if any were needed, we would refer to Gribble v. Columbus Brewing Co., 100 Cal. 67, 71, 34 P. 527, and Gladium Co., Inc., v. Thatcher, 95 Cal. App. 85, 91, 272 P. 340. The jury having upon substantial evidence found in favor of the plaintiffs, this court is without power to set aside their verdicts.

Two separate appeals, due to the difference in the amounts of the verdicts, were taken in these actions, one in the action of H. Walker to this court and the other to the District Court of Appeal. Thereafter the appeal in the action of H. Walker was transferred to the District Court of Appeal, where the two appeals were, upon stipulation, consolidated and submitted together. The same course was pursued here after the transfer of said actions to this court.

For the reasons hereinbefore stated, the judgment in each action is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

209 Cal. 616

DOUGLAS et al. v. SCHINDLER.

Sac. 4300.

Supreme Court of California.

June 19, 1930.

Rehearing Denied July 17, 1930.

1. Landlord and tenant ⟹98.

Subsequent agreement between lessors and assignee of lease referring to original lease for certain terms and conditions made subject-matter of lease contract operated to rescind original lease.

Agreement executed by lessors provided that, whereas the original lessee had, with consent of lessors, assigned lease contract to another by virtue of an assignment contract, whereby, in consideration of said presents and of the covenants and promises therein contained, and for the further consideration of $10, it was contracted and agreed by and between parties thereto that original lease contract and all provisions thereof be, and the same were thereby, made subject-matter of lease contract between parties affecting and relating to lands thereinabove set forth.

2. Landlord and tenant ⟹98.

Failure of subsequent lease between lessor and assignee to specifically release lessee was immaterial.

3. Landlord and tenant ⟹98.

Two valid and enforceable leases cannot be outstanding on same property for same term.

4. Landlord and tenant ⟹109(7).

Surrender of premises by operation of law took place when lessors entered into new lease with assignee of original lease.

In Bank.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by Harry J. Douglas and another, as executors of the last will of Austie L. Douglas, deceased, and another, against A. D. Schindler. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Charles A. Shurtleff and Robert B. Gaylord, both of San Francisco, for appellants.

T. T. C. Gregory and Wallace Sheehan, both of San Francisco, for respondent.

PER CURIAM.

This appeal presents but one point for our consideration, namely: Did a certain agree-

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ment, to be hereafter set forth, amount to a novation, thereby releasing respondent Schindler from liability under a certain lease agreement, or was it a mere recording agreement, in no way changing the legal status of the parties at the time of its execution? The point arises from the following uncontradicted facts:

On August 10, 1922, Austie L. Douglas and H. J. Douglas, as lessors, entered into a lease agreement with A. D. Schindler as lessee, for the leasing of some 2,400 acres of land in Kings county, Cal., for a period of five years, starting August 31, 1922, and terminating August 31, 1927. The total rental for this period was to be $24,025, payable in semiannual installments of $2,402.50 each, in February and August of each year. In addition to the above rentals, the lessee agreed to pay all taxes and water assessments levied against the property during the lease period. It was probably contemplated by the parties that Schindler would form a corporation to farm the property, in which event the lease was to be assigned to this corporation. At any rate, the lease provided that the lessee could assign to any third person or corporation, "who shall be substituted in place of the lessee," providing the assignee assumes all the obligations under the lease. The lease contained no clause requiring the lessor's consent to any such assignment by the lessee. Schindler was likewise given a two-year option to purchase the property on certain specified terms. On September 7, 1922, Schindler assigned the lease to the Corcoran Farming Company, of which company he was president, reserving to himself the option to purchase mentioned, supra. The farming company assumed all obligations under the lease, and immediately went into possession of the property, with the knowledge and consent of the lessors. Respondent contends that, because the original lease provided the assignee was to be "substituted" for Schindler, in the event of an assignment, there was an anticipatory agreement to effect a novation by the assignment and this, when executed, effected respondent's release. The argument, although ingenious, is unsound. We find nothing in the original lease and in the assignment of September 7, 1922, to distinguish it from the ordinary assignment of a lease, under which the original lessee remains liable to the lessor by virtue of the privity of contract established by the lease.

So matters remained until October 17 or 18, 1922. On that date Schindler sent to appellants a letter in which was inclosed an agreement prepared by himself. This appeal hinges upon the proper interpretation of that letter and inclosure. Appellants refer to this enclosure as a mere "recording agreement," while respondent refers to it as a "new lease" between appellants and the farming company. The letter first mentions that a farming company check is inclosed in payment of certain water assessments, and then continues: "As you will recall, I mentioned to you sometime ago the necessity of placing of record a notice of the lease of your property and you indicated that you would prefer not to have its terms made public. I have therefore had prepared a skeleton agreement giving notice of such contract, but referring for the terms thereof to another agreement which is not of record. If you and Mrs. Douglas will execute this and return to me one copy I will do what further is necessary. As a matter of course, your signature should have notarial acknowledgment in order to make the agreement suitable for recordation." The letter closed with an inquiry about certain subtenancies. The "other agreement" referred to in the above letter clearly refers to the Schindler lease. The inclosed agreement, in the form of a formal contract, provided in part: "This contract, entered into in duplicate, this 17th day of October, 1922, by and between Austie L. Douglas and H. L. Douglas, her husband, first parties, and Corcoran Farming Company, a California Corporation, second party: Witnesseth: Whereas, first parties have heretofore, on the 10th day of August, 1922, entered into a lease contract and option to purchase with A. D. Schindler wherein it was provided for, among other things, that first parties grant to said A. D. Schindler a lease for the period of five (5) years and an option to purchase for a period of two years covering certain lands situated in the Kings County, California [here follows a legal description of the leased property]. Whereas, said A. D. Schindler, by and with the consent of the first parties has assigned said lease contract to second party by virtue of an assignment contract, dated September 7, 1922, and, Whereas, said last mentioned assignment contract was made by said A. D. Schindler, by and with the consent and approval of first parties. Now, therefore, for and in consideration of these presents and of the covenants and promises herein contained, and for the further consideration of ten ($10.00) dollars to first parties in the hand paid by second party, receipt whereof is hereby acknowledged, it is contracted and agreed by and between the parties hereto that said lease contract between first parties and A. D. Schindler, dated August 10, 1922, and all the provisions thereof be and the same are hereby made subject matter of a lease contract between first parties and second party affecting and relating to the lands hereinabove set forth, provided, however, it is understood and agreed that in so far as any option has been given to said A. D. Schindler by said lease contract that the same has not been transferred to second party, and that any such option still runs under said lease contract to and is owned by said A. D. Schindler."

This agreement was properly executed by the appellants, and then recorded at the request of the farming company. The farming

company remained in possession of the land and performed all necessary conditions for over four years. In January, 1927, the farming company attempted to repudiate the lease, and attempted to surrender possession of the property to appellants, who refused to accept. Appellants then brought an action against Schindler as original lessee and the farming company as assignee for the last installment of rent and for certain delinquent taxes and assessments, totaling $8,101.25. The case was tried before the court without a jury, resulting in a verdict against the farming company, but in favor of Schindler, on the theory that the agreement of October 17, 1922, amounted to a release of Schindler, and a new lease between appellants and the farming company. We concur in this interpretation of the agreement. The farming company has not appealed.

[1-4] The letter of October 17, 1922, may well be considered as ambiguous in its description of the inclosed agreement, but the agreement itself is clear, certain, and unambiguous. The opening paragraph states that it is a contract between appellants and the farming company. Then reference is made to the Schindler lease for certain terms and conditions, and then it is stated that those terms and conditions *"are hereby made subject matter of a lease contract"* between appellants and the farming company. Appellant H. J. Douglas admits having read the agreement before signing it. As a man of at least ordinary intelligence, that agreement could mean but one thing to him—the one thing that it expresses clearly and unequivocally—that is, that appellants were entering into a "lease contract" with the farming company. Under the circumstances of this case this could have but one meaning—that the Schindler lease was rescinded and a new lease was entered into with the farming company. The privity of estate between Schindler and the appellants was severed by the assignment of September 7, 1922. Privity of contract was destroyed between those parties by the rescission and new lease of October 17th. Appellant makes much of the fact that the October 17th agreement does not specifically state that Schindler is to be released by this new agreement. Under the circumstances that is immaterial. Bangle v. Southwell, 70 Cal. App. 561, 232 P. 58. It is elementary that two valid and enforceable leases cannot be outstanding on the same property for the same term. A surrender of the premises by operation of law took place when appellants entered into a new lease with the farming company with Schindler's consent, thus releasing Schindler of all liability. Welcome v. Hess, 90 Cal. 507, 27 P. 369, 25 Am. St. Rep. 145; 35 Cor. Jur. 994.

The judgment appealed from is affirmed.

209 Cal. 635

WALTER v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 13786.

Supreme Court of California.

June 24, 1930.

1. Master and servant ⟹405(4).

Commission's finding employee's death was not caused by injury arising out of or in course of employment *held* not contrary to evidence.

2. Master and servant ⟹416.

Commission's finding *held* to eliminate injury during employment as contributing cause of death either by direct causation or acceleration of diseased condition (Workmen's Compensation Law).

The finding was that "employee's death was not proximately caused by an injury arising out of and occurring in course of employment, or while performing service incidental to his employment." Claimant contended she was entitled to express finding on issue whether injury to employee's spine was an accelerating cause of affliction from which he died.

In Bank.

Proceeding under the Workmen's Compensation Law by Mrs. J. M. Walter, claimant, for the death of her husband, opposed by the Eibe & Huffman Warehouse Company, employer, and the State Compensation Insurance Fund, insurance carrier. The Industrial Accident Commission denied a death benefit, and claimant applies for certiorari.

Affirmed.

John A. McGilvray, of Sacramento, and George C. Faulkner, of San Francisco, for petitioner.

Edward O. Allen, of San Francisco, for respondents.

RICHARDS, J.

The applicant for a writ of review herein is seeking an annulment of the award of the Industrial Accident Commission denying to her a death benefit by reason of the death of her husband, occurring on February 19, 1929, and which, according to the contention of the petitioner for such award, was proximately caused or accelerated by an injury which her deceased husband sustained on July 10, 1928, while in the employ of the Eibe & Huffman Warehouse Company, which employer was at the time insured against liability with the state compensation insurance fund. The injury which the decedent on said latter date sustained was occasioned by the fact that,

while working in the warehouse of his employer, he was caught in the fall of a pile of sacks and thereby sustained a fracture of the second lumbar vertebra. He was taken to a hospital and treated for his injuries for some time, under the direct care and supervision of Drs. Fibush and Prothero, who each testified fully before the commission concerning his condition when he arrived at the hospital and his treatment thereafter by them of the aforesaid injury to his spine. During the considerable period of his confinement in bed in the hospital and in his home he appeared to have developed a diseased condition of the bladder and kidneys, resulting in the formation or development of a cancerous condition, which caused the death of the patient on February 19, 1929.

The question at issue before the commission was as to whether the subsequently developed affliction of the decedent which caused his death had been either caused or accelerated by the injuries which he had suffered to his spine. Touching this phase of the case a very considerable volume of evidence was presented before the Commission, consisting not only of the observations and opinions of the physicians who attended him during the period between the date of his aforesaid injuries and the time of his death, but also the testimony of physicians who had attended him during a period of several years prior to the date of his injuries, and who testified to the fact that during such prior period the decedent had been treated by them for stricture, requiring occasional operations for the dilation of the urethra, which were required in order to relieve obstruction of his urinary function, which, unless relieved, would tend to cause kidney infection. The testimony of the physicians who attended the decedent after his injuries and who testified in detail with respect to the development of the decedent's urinary trouble and bladder and kidney infection, and that of Dr. Hale in particular, whose patient the decedent had been for several years prior to his injury, were sharply in conflict, although the petitioner herein strenuously and quite plausibly insists that the death of the decedent, which admittedly had for its immediate cause the cancerous affection of his urinary organs, was accelerated by the injury which he suffered to his spine.

[1] The findings of fact and award of the commission, wherein the widow of the decedent was denied a death benefit, while finding that the injury to the decedent's spine which arose out of and occurred in the course of his employment, for which injury temporary total disability up to the time of his death was allowed, proceeded to find that "the employee's death was not proximately caused by an injury arising out of or occurring in the course of his employment, or while performing any service incidental to his employment." Petitioner assails this finding upon two grounds, the first of which is that said finding is contrary to the evidence in the case, the irresistible trend of which, according to the petitioner's contention, is to show that decedent's injuries produced a paralyzed condition of his physical system which, aided by his long period of enforced inaction, either proximately caused or reasonably induced the affliction which immediately resulted in his death; and the second of which is that the petitioner was entitled to an express finding upon the issue before the commission as to whether the injury to the decedent's spine had been an accelerating cause of the affliction from which he died. As to the first of these contentions, we cannot ignore the fact that the physicians above named, who attended upon the decedent after the occurrence of his injuries and during the development of the bladder and kidney disorders which resulted in his death, have given positive testimony to the effect that the decedent's aforesaid injury was not a contributing cause of the diseased condition which immediately resulted in his decease, and that this court has no power, in the presence of such testimony, to set aside or annul the findings of the commission and its decision based thereon.

[2] With respect to the second and more serious of the petitioner's contentions, we are constrained to hold that the findings of fact of the commission are sufficient in form to comply with the requirement of the Workmen's Compensation Law (St. 1917, p. 831, as amended) with respect to the findings of the ultimate facts in cases before the commission, and that the finding that "the employee's death was not proximately caused by an injury arising out of and occurring in the course of his employment, or while performing any service incidental to his employment," eliminates the employee's injury received on July 10, 1928, while in the employ of the Eibe & Huffman Warehouse Company, as a contributing cause of the death of said employee, either by way of direct causation or of acceleration of the diseased condition which constituted the immediate cause of his death.

Having reached this conclusion from the record before us, it follows that the findings and decision of the commission must be, and they are hereby, affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

209 Cal. 540

PEOPLE v. MARSHALL.
Cr. 3318.

Supreme Court of California.
June 11, 1930.

1. Criminal law ⟹1180—Ruling of appellate court on point distinctly made on previous appeal is, in all subsequent proceedings in same case, "law of case."

Ruling of appellate court on a point distinctly made on previous appeal is, in all subsequent proceedings in the same case, law of the case, from consequences of which court cannot depart nor parties relieve themselves.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Law of the Case.]

2. Criminal law ⟹624—Waiver of right to trial within statutory period applies to hearing on insanity plea after conviction on plea of not guilty (Pen. Code, §§ 681a, 686, 1026, 1050, 1382).

In prosecution for grand theft, defendant filed pleas of not guilty and not guilty by reason of insanity, and when arraigned waived right to trial within statutory period. From conviction on first plea, defendant appealed, and, after remittitur for trial on second plea, contended that he was entitled to dismissal under authority of Pen. Code, §§ 681a, 686, 1050, and 1382, because trial on plea of insanity was not held within statutory period. *Held*, that waiver of right to trial within statutory period applied to hearings on separate pleas, since under section 1026 such separate hearings constitute but one trial.

3. Criminal law ⟹624—Another 60-day period, within which accused was required to be tried on insanity plea, was begun by order of appellate court remanding case (Pen. Code, § 1382).

In prosecution for grand theft, where defendant appealed after conviction on plea of not guilty, another period of 60 days, in which accused was required to be tried on insanity issue, under Pen. Code, § 1382, started in operation by order of appellate court remanding case for trial on such plea.

4. Criminal law ⟹624—Statute requiring trial within 60 days had no application to hearing on insanity plea following filing of remittitur on appeal from conviction (Pen. Code, § 1382).

Pen. Code, § 1382, requiring trial in 60 days after filing information, has no application to hearing on plea of not guilty by reason of insanity, provided for in section 1026, following the filing of remittitur, since such hearing was delayed by appeal from conviction on plea of not guilty.

5. Criminal law ⟹576(3)—Accused held not deprived of right to speedy trial by delay pending appeal from conviction, nor by failure to bring trial on insanity plea within 30 days after filing remittitur.

Where accused was convicted on January 14, 1929, on plea of not guilty to charge of grand theft, accused *held* not deprived of his constitutional and statutory right to speedy trial by delay pending appeal nor by failure to bring accused to trial on plea of not guilty by reason of insanity within 30 days after filing remittitur on July 1, 1929.

6. Judges ⟹47(2)—Judge sitting at hearing on plea of not guilty had authority, under assignment, to sit at insanity hearing after appeal from conviction (Pen. Code, § 1026).

Judge assigned to sit from January 2 to January 31, 1929, and thereafter to act until all matters heard by him should be disposed of, having heard trial on plea of not guilty to charge of grand theft, had authority to complete trial and hear trial on plea of not guilty by reason of insanity, since, under provisions of Pen. Code, § 1026, separate hearings on such issues constituted but one trial.

7. Criminal law ⟹1189—Reversing case for trial on special plea held to contemplate merely trial on insanity issue on which hearing had not been had.

Where, in prosecution for grand theft, defendant filed pleas of not guilty and not guilty by reason of insanity, and appealed from conviction on plea of not guilty, reversal for trial on special plea *held* to contemplate trial on plea of not guilty by reason of insanity and not retrial of all issues.

8. Criminal law ⟹1189—Reversal of conviction for trial on insanity issue held within power of appellate court (Pen. Code, § 1260).

Under Pen. Code, § 1260, which provides court may reverse, affirm, or modify judgment or order appealed from, appellate court, on appeal from conviction on plea of not guilty, could reverse case for trial on plea of not guilty by reason of insanity.

9. Criminal law ⟹1189—Reversing conviction for trial on insanity issue held not "reversal without ordering new trial," so as to discharge defendant (Pen. Code, § 1262).

Judgment reversing conviction on plea of not guilty to charge of grand theft, and remanding case for trial on issue of insanity, *held* not reversal without ordering new trial, within meaning of Pen. Code, § 1262, so as to discharge defendant.

10. Criminal law ⟹1186(4)—Sustaining objection to question on cross-examination of witness who testified as to defendant's sanity as to nature and manifestations of insanity held not prejudicial (Const. art. 6, § 4½; Code Civ. Proc. § 1870, subd. 10).

In prosecution for grand theft, where nonexpert witness had qualified as required by Code Civ. Proc. § 1870, subd. 10, so as to be able to testify as to defendant's sanity, sustaining objection to question on cross-examination as to whether witness knew how insane person would act, what insanity was, difference between idiocy and insanity, and different manifestations of insanity, *held* not prejudicial so as to require reversal under Const. art. 6, § 4½.

11. Criminal law ⚷354—Where defense in prosecution for grand theft was insanity, defendant had right to prove insanity of his sister.

In prosecution for grand theft, where defense was not guilty by reason of insanity, defendant had right to prove insanity of his sister.

12. Criminal law ⚷452(2)—Before witness may be interrogated as to mental condition of relatives of defendant relying on insanity, witness must be qualified to testify in that regard.

Before witness in criminal prosecution, where defense is not guilty by reason of insanity, may be interrogated as to mental condition of members of defendant's family, witness must be qualified to testify to such matters.

13. Criminal law ⚷354—Exclusion of letters written by accused's sister for purpose of showing sister's insanity held not error, where witness, addressee of letters, had never met sister.

In prosecution for grand theft, where defense was not guilty by reason of insanity, exclusion of letters written by accused's sister, offered for purpose of showing sister's insanity, *held* not error, where witness to whom letters had been written had not seen sister, and there being nothing to show whether letters showed the real state of mind of their author.

14. Criminal law ⚷1186(4)—On appeal, accused must show that error in exclusion of evidence was prejudicial to him to obtain reversal (Const. art. 6, § 4½).

Under Const. art. 6, § 4½, which provides that no judgment should be set aside on ground of improper rejection of evidence, it is incumbent on accused to show on appeal that any error in exclusion of evidence was prejudicial to him.

15. Criminal law ⚷829(1)—Refusing defendant's requested instructions in prosecution for grand theft held not error, where those given were full and complete.

Where instructions given in prosecution for grand theft were full and complete, refusing instructions asked for by defendant *held* not error.

PRESTON, J., dissenting.

In Bank.

Appeal from Superior Court, San Diego County; Eugene Daney, Jr., Judge.

J. W. Marshall was convicted of grand theft, and he appeals.

Affirmed.

For opinion of District Court of Appeal adopted herewith, see 283 P. 119.

Edward J. Kelly, of San Diego, for appellant.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Stephen Connell, Dist. Atty., and J. H. McKinney, Deputy Dist. Atty., both of San Diego, for the People.

PER CURIAM.

A hearing in this court after judgment in the District Court of Appeal, Fourth District, was granted in order that we might consider the effect of that judgment in the light of our recent decisions construing section 1026 of the Penal Code as amended in 1927 and the effect of the former appeal in this same case (People v. Marshall, 278 P. 258) upon the rights of the defendant on this, the subsequent, appeal. It cannot be doubted that the original judgment of conviction pronounced against the defendant on January 26, 1929, was premature and erroneous. This error was corrected by the reversal. Upon the going down of the remittitur, the cause was then pending before the trial court in the state that it would have been, had the original judgment not been rendered. No good cause has been shown for a re-examination of the points urged and passed upon on the former appeal or for a retrial of the case on the separable plea of "not guilty." There but remained the determination of the issue raised by the plea of "not guilty by reason of insanity," as properly directed by the reviewing court on the former appeal. This court refused to exercise the power to make a similar order on petition for rehearing in People v. Pokrajac, 206 Cal. 259, 274 P. 63, concluding, as we did, that, under the circumstances appearing in that case, a retrial as to both issues should be had. After an examination of the record herein, we are satisfied with the reasoning and conclusions of the District Court of Appeal, and hereby adopt the opinion of the court of the Fourth District written by Mr. Justice Barnard as the opinion of this court. The opinion passes upon, and we think correctly, all of the points raised on the present appeal, and is as follows:

This is an appeal from a judgment and sentence upon conviction of the crime of grand theft, and from an order denying a motion for a new trial.

The defendant entered a plea of not guilty and also one of not guilty by reason of insanity. The case went to trial on the plea of not guilty only, on January 11, 1929. After a verdict of guilty, the defendant was sentenced to the state prison at Folsom. Upon appeal, the judgment was reversed and the case remanded for trial upon the issue of insanity. People v. Marshall (Cal. App.) 278 P. 258. The remittitur was filed in the superior court on July 1, 1929. On August 1, 1929, the case went to trial on the issue raised by the plea of not guilty by reason of insanity. The jury having found that the defendant was sane at the time of the commission of the act charged in the information, judgment and sentence were pronounced, and the defendant appealed.

[1] The appellant first urges that we again review the assignments of error which were

presented and argued on the former appeal. The claim is made that it was not necessary for the court to express an opinion on these points, other than the one upon which the reversal depended, and that all references to such other points in the opinion handed down are dicta only. The former appeal was based both upon errors of law alleged to have occurred at the trial on the plea of "not guilty," and on the contention that defendant had not been duly convicted, in that the trial court had no authority to pronounce sentence upon the defendant, without first having a jury pass upon the issue raised by his separate plea. Both of these contentions were urged by appellant, and both were passed upon by the appellate court. Without question, if errors of law had been found, the order of reversal would have directed a retrial on the plea of not guilty, as well as a trial upon the issue of insanity. The references in the opinion of the court to those matters, other than the failure of the trial court to submit the issue of the sanity of the defendant to a jury, were not dicta as claimed, but were necessary to the decision of questions properly before the court. It was held that there was no error prior to the time of judgment and sentence, but that the pronouncement of sentence was premature, the verdict not being complete until it should be determined whether or not the defendant was sane at the time the offense was committed.

In the case of People v. Hamilton, 103 Cal. at page 496, 37 P. 627, 630, the court said:

"It is not doubted but that a ruling by the appellate court upon a point distinctly made upon a previous appeal is, in all subsequent proceedings in the same case, a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves"—citing cases.

No further evidence was put in after the remittitur came down on any of the matters involved in the first hearing, and as to those matters the decision heretofore rendered by the District Court of Appeal, having become final, is the law of the case. Mitchell v. Davis, 23 Cal. 381; People v. Walker, 76 Cal. App. 192, 244 P. 94.

The next point raised is that the defendant was deprived of his right to a speedy trial. It is insisted that, having been convicted on his plea of not guilty on January 14, 1929, he was entitled to an immediate trial on his plea of not guilty by reason of insanity. Section 1026 of the Penal Code reads in part as follows:

"If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury, in the discretion of the court."

[2-5] No mention of the plea of "not guilty by reason of insanity" was made at the time judgment was pronounced. When the defendant was asked if he had any cause to show why judgment should not be pronounced, he said that he had, but the record shows no objection made, other than his motion for a new trial. In due course, he himself instituted an appeal. The remittitur was filed July 1, 1929, thus restoring jurisdiction to the superior court. The trial on the issue of not guilty by reason of insanity began on August 1, 1929. It is urged that, by authority of sections 681a, 686, 1050, and 1382 of the Penal Code, the defendant was entitled to a dismissal of the case. The record shows, without contradiction, that, when the defendant was arraigned, he waived his right to trial within the statutory period provided by law. We are of the opinion that the entire proceeding provided for under section 1026 constitutes but one trial, and therefore this waiver applied to each of the respective hearings upon the separate pleas. Not only is this true, but, by the appeal following the first hearing, the superior court was divested of jurisdiction to proceed in the matter until that appeal was decided, and thereupon another period of 60 days was started in operation by the order of the appellate court. In re Scott, 81 Cal. App. 577, 254 P. 596. One reason why the provisions of section 1382 of the Penal Code do not apply is because the case was actually tried on the insanity issue within 60 days from the filing of the remittitur. Section 1050 of the Penal Code is directory only, and contains no provision for the dismissal of a case when its terms are not complied with. Ray v. Superior Court (Cal. Sup.) 281 P. 391. Section 1382 of the Penal Code has no application to a new trial following the filing of a remittitur. In re Alpine, 203 Cal. 731, 265 P. 947, 58 A. L. R. 1500. We think the same thing is true of a hearing following the filing of a remittitur, in a case where the second hearing provided for in section 1026 of the Penal Code has been delayed, pending the determination of an appeal from the first hearing thereunder. The appellate court remanded this case to the trial court for the sole purpose of a trial upon the one remaining plea. Neither by the delay pending the appeal nor by the failure to bring him to trial on this plea within 30 days after the filing of the remittitur was the defendant deprived of his constitutional or statutory rights. People v. Walker, supra.

[6] It is next argued that the judge who presided at the hearing on the issue of insanity had no jurisdiction to act in the matter, because his assignment to the superior court had expired. The first hearing had been held before Eugene Daney, Jr., a duly elected, qualified, and acting justice of the peace, then sitting as a judge of the superior court of the county of San Diego under an assignment thereto by the judicial council of the state of California. His assignment was

in the usual form, the pertinent part thereof reading as follows:

"* * * Good cause appearing therefor, you are hereby assigned to sit as Judge of the Superior Court in and for the County of San Diego, beginning January 2 to and including January 31, 1929, and thereafter to act as such until all matters heard or partially heard or submitted to you therein shall have been completed and disposed of by you, and also for the purpose of hearing and determining any motion after judgment in a case decided by you. * * *"

After the remittitur was filed, Judge Daney was called in by the presiding judge of said superior court to complete the hearing of this case. The hearing on the issue of insanity began on August 1, 1929, and no other assignment from the judicial council appears in the record. A trial on the issues presented by a plea of "not guilty" and a plea of "not guilty by reason of insanity," under the provisions of section 1026 of the Penal Code, constitutes but one trial. People v. Marshall (Cal. App.) 278 P. 258; People v. Leong Fook (Cal. Sup.) 273 P. 779. Having partially heard the matter in question, under the authority specifically given in the assignment as above set forth, the judge presiding had jurisdiction to complete the trial.

[7, 8] The next point urged is that the appellate court had no power to reverse this case without either ordering a retrial of all the issues or a dismissal of the case, and that there should have been a trial de novo. The order made on the previous appeal is as follows: "The judgment is reversed and the case remanded for trial upon the issue presented by the special plea." Appellant argues that, since no pleas are denominated special pleas by statute, all being equally general and equally special, the appellate court intended to order a trial de novo on all pleas. We think it is clear that the order of that court was to have the case completed on the one issue only (the question of insanity), and not to have all of the issues retried. It is further argued that, if a new trial from the beginning was not ordered, the defendant must be discharged. Section 1260 of the Penal Code provides:

"The court may reverse, affirm, or modify the judgment or order appealed from, and may set aside, affirm or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial."

[9] Under the power here given to modify a judgment or order, the court may reverse in part and affirm in part, and may send the case back for a new trial on certain counts and not on other counts. People v. Dillon, 68 Cal. App. 457, 229 P. 974. It has been held that the court may set aside a judgment and sentence where erroneously pronounced without upsetting the verdict. People v. Hill, 36 Cal. App. 574, 172 P. 1114; People v. Votaw, 38 Cal. App. 714, 177 P. 485; In re Lee, 177 Cal. 690, 171 P. 958. The court here did not disturb the verdict in the first of two necessary steps which constitutes but one trial. On the contrary, the court held there were no errors of law in the proceedings up to and including that verdict. It was held that, since the verdict was not yet complete, the trial court had no power to pronounce judgment and sentence and the case was sent back to be completed. It was then the duty of the trial court to proceed as should have been done in the first instance, to a hearing on the remaining issue. The appellate court had the power to remand the case to the trial court for proper action. In re Lee, supra. The judgment was not "reversed without ordering a new trial" within the meaning of section 1262 of the Penal Code.

[10] The next two points raised relate to the sustaining by the trial court of objections to certain questions asked on cross-examination of two witnesses, who had testified that the defendant had appeared to them to be sane. Neither of these were expert witnesses, but both had testified as intimate acquaintances of the defendant. Each witness had given his opinion on the subject, and the reasons upon which his opinion was based. Section 1870, Code Civ. Proc. subd. 10. The questions to which objections were sustained were as to whether the witnesses knew how an insane person would act; what insanity is; the difference between idiocy and insanity; the different manifestations of insanity; and whether or not the witness knew the various types of insanity. All of these were questions which would have been more properly addressed to an expert witness than to one testifying only from the standpoint of an acquaintance. In any event, the witnesses not only stated the reason for their opinions, but the record shows a full and complete cross-examination allowed as to the facts on which they based their opinions, and as to their previous experience with insane people, including any reading on the subject. We have read the entire transcript of the testimony of these two witnesses and the same shows that the exclusion of the evidence sought to be brought out by these questions was without prejudice to the rights of the defendant. Const., art. 6, § 4½.

[11, 12] It is next insisted that the court erred in excluding evidence of the insanity of the defendant's sister. It must be conceded that the defendant had the right to prove such insanity by competent evidence. People v. Harris, 169 Cal. 53, 145 P. 520, 523. The wife of defendant was asked whether there was insanity in defendant's family. The court sustained an objection to this question on the ground that it was not the best evidence. The defendant then attempted to prove such insanity of the sister by introducing letters said to have been written to the wife of defendant by the sister, and which

letters are claimed to show unmistakable signs of insanity. The court sustained objections to the introduction of these letters, on the ground that they were incompetent, irrelevant, and immaterial, hearsay, no proof of their genuineness, and no opportunity to cross-examine the writer as to whether they were written voluntarily or under instructions. Other than these letters, no evidence of the insanity of the sister was offered. The objection to the first question on the ground that it was not the best evidence was not good. However, before a witness may be interrogated as to the mental condition of other members of the family, he must first be qualified to testify in that regard. In People v. Harris, supra, the court said:

"* * * Undoubtedly, where insanity is a defense, the mental condition of any of the relatives of the defendant is material, and on that subject, as on all inquiries relating to insanity, a reasonable latitude should be allowed. But this does not mean that the rules as to the admissibility of evidence should be relaxed. The rule is that before the opinion of witnesses as to sanity of a person or a particular phase of it can be given—and the inquiries here were simply calling for the opinion of the witnesses on that subject—it must be preliminarily shown that the witness is qualified to express it, and clearly this was not shown here. * * *"

[13, 14] No foundation was here laid as to the qualification of the witness to express an opinion on the subject. The witness admitted she had never met the sister, and had never seen her write. She testified that she believed the letters were written and signed by the sister, as she had received a number of letters from her. Apparently all of these letters were written after the commission of the offense charged in the information. Aside from the objectionable features of such evidence standing alone, without further proof tending to show the insanity of the writer, and with nothing to show whether the letters showed the real state of mind of their author, or were purposely written to create an impression in that regard, the qualification of this particular witness to testify as to the genuineness of the letters was very weak to say the least. Under the circumstances, the ruling of the court on the admission of the letters was correct. In addition to this, it is incumbent upon the appellant to show upon appeal that any error, if such there was, was prejudicial to him. Article 6, section 4½, of the Constitution, provides that no judgment shall be set aside on the ground of improper rejection of evidence, unless after the examination of the evidence the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. Our attention has not been called in any of the briefs to the letters claimed to have been written by the sister and offered in evidence, and, after searching through the more than six hundred pages of the transcript, we are unable to find them. We do not know whether there was anything in them tending to bear out appellant's contention or not.

[15] Complaint is also made of the refusal of the court to give a number of specific instructions asked for by defendant. While we do not consider it necessary to set these forth in detail, we have examined them all. Nearly all of them were instructions that the jury should take into consideration particular facts. The record shows that the court did instruct the jury that every fact showing the mental condition of the defendant at the time and all things bearing on the subject of his capacity to distinguish right from wrong, at that time, must be considered by them. The instructions given were full and complete, and in our opinion nothing would have been added to them by the inclusion of those asked for, and refused.

No error appearing in the record, the judgment and order appealed from are affirmed.

PRESTON, J.

I dissent. It appears that the judgment on the first trial of this cause ([Cal. App.] 278 P. 258) was reversed because of the failure of the trial court to finish the trial by disposing of the question raised by defendant's plea of not guilty by reason of insanity. While it must be admitted that in the order of reversal the District Court of Appeal attempted to preserve the verdict of guilty theretofore rendered on the issue of defendant's first plea, yet in my opinion said court could not properly enter any order except a general order of reversal. This follows from the fact that the disposition of the issues made by the several pleas of the defendant constituted but a single indivisible trial.

This is in effect held over and over again in the case of People v. Leong Fook, 206 Cal. 64, 273 P. 779. There the court held that it was not necessary that the jury be resworn after the trial of one issue and before entering upon the trial of another; also that, after the trial of one issue, no examination of jurors should be had as to their qualifications to further act as such before entering upon the trial of the further issue. Moreover the court there approved the following quotation from the case of People v. Connor, 142 N. Y. 130, 36 N. E. 807, 808: "There was but one indictment and one charge, and the defendant's pleas constituted his answer and defense to the accusation. He was entitled to but one trial, and could demand but one jury. The order in which the issues should be disposed of was a matter in the discretion of the court, which had power to direct them to be tried separately or together, and, whatever course was adopted, the trial must be one continuous proceeding, and the rights of the defendant with respect to the examination of the jury were the same as if the plea of not guilty alone appeared upon the record. He had no more right to stop the trial while

in progress, in order to ascertain the effect which the evidence given had upon the minds of the jury, than he would have had if there was only a plea of the general issue."

In fact, the undeniable conclusion from the reasoning employed in the Fook case excludes the existence of two or more juries acting in department upon the trial of the pleas entered in a criminal case. This simply cannot be done in a jury case where the jury is impaneled according to the rules of common law. Moreover, the identical question here before us was passed upon by this court in the case of People v. Pokrajac, 206 Cal. 259, 274 P. 63. There the defendant, as here, entered the two pleas. At the conclusion of the trial on the first plea, the court immediately fixed the time for pronouncing judgment, and then turned to the jury and said: "And you, gentlemen of the jury, I wish on behalf of the People of the State of California, to commend you for your courageous and faithful work in this case in rendering a verdict which, undoubtedly, is the correct one." It will be noted that this remark of the court in no wise affected or tainted the verdict on the plea of "not guilty," but this court held that it did prejudice the whole issue, and gave and made its general order of reversal. Thereafter the Attorney General petitioned this court to have the judgment modified to read as follows: "The judgment and the order denying defendant's motion for a new trial upon his plea of not guilty by reason of insanity are hereby reversed and a new trial upon such plea is hereby ordered." Upon reconsideration, this court refused to change its former order, and entered an order as follows: "By the Court: The petition for a rehearing and a modification of the decision herein is denied. (All concur.) Waste, Chief Justice."

The above ruling and the ruling contained in the majority opinion are diametrically opposed to each other. I think the judgment should be reversed and a new trial had upon all issues.

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209 Cal. 639

PEOPLE v. NORTHCOTT.

Cr. 3220.

Supreme Court of California.

June 26, 1930.

1. Homicide ⚷253(1).

Evidence *held* to support conviction of murder in the first degree on each of three counts charging murder of different persons.

2. Homicide ⚷233.

Evidence that defendant said he killed deceased because deceased knew too much was sufficient evidence of motive.

3. Homicide ⚷233.

Absence of proof of motive does not prevent conviction of murder in the first degree, if proof of guilt is nevertheless sufficient to overthrow presumption of innocence.

4. Criminal law ⚷1166(8), 1167(5).

Refusal of motions *held* proper and not prejudicial, even though averments of purported affidavits were sufficient, where they had not been sworn to.

Motions were for permission to add plea of not guilty by reason of insanity; that defendant's sanity be determined as of time of trial, and for continuance. It appeared during the trial that none of the affidavits were sworn to before notary whose signature and seal purported to appear thereon, and that he neither signed his name nor affixed his seal thereto.

5. Criminal law ⚷1158(3).

Bias of sheriff or his deputy who served special venire is question of fact, and only when issue comes before court as matter of law has Supreme Court jurisdiction to deal with it (Pen. Code, § 1064).

6. Criminal law ⚷620(1).

Defendant's unsupported statement that he was prejudiced by joint trial of several charges is not sufficient showing of prejudice (Pen. Code, § 954).

Pen. Code, § 954, provides that indictment may charge two or more different offenses of same class of crimes or offenses, but that court may, in interest of justice and in its discretion, order separate trial.

7. Criminal law ⚷641(1).

Court's ruling that defendant must either take charge of his defense personally or through counsel and abide by his election *held* not abuse of discretion (Const. U. S. Amend. 6; Const. Cal. art. 1, § 13; Pen. Code, § 686).

Const. U. S. Amend. 6, entitles defendant in criminal cases to assistance of counsel. Const. Cal. art. 1, § 13, and Pen. Code, § 686, entitle defendant to counsel or to appear and defend in person and with counsel. The court permitted defendant electing to take charge of his own defense to have the assistance of counsel so long as trial was conducted in orderly manner, but refused to permit him to call upon counsel sporadically to examine witnesses.

8. Criminal law ⚷614(1).

Refusal of further continuance because of defendant's physical condition *held* not abuse of discretion.

On motion for continuance, recess was ordered and medical examination had, and on report of examining physician that defendant was merely suffering from slight cold, motion was denied, but was renewed the following morning when a two-day continuance was granted. When case was again called for trial, a further continuance was refused.

9. Criminal law ⚷586, 1151.

Trial court has much discretion in granting or refusing postponements or continuances, and action will not be disturbed except for plain abuse of discretion.

10. Criminal law ⚷1168(2).

Where it was shown that statements and confession by defendant were voluntary, inversion of order of proof did not require reversal in absence of prejudice.

11. Criminal law ⚷372(4).
Homicide ⚷166(1).

Evidence of other acts and offenses *held* admissible on trial for murder to show motive and establish plan to abduct boys to satisfy abnormal desires.

It was prosecution's theory that defendant was moral pervert addicted to practice of sodomy; that he brought boys to his ranch for purpose of abusing them, and to conceal his crimes, killed some of them. Evidence was admitted that he made indecent advances to one boy, attempted to abuse another boy, and negotiated with parents of four other boys to move on his ranch and work for him.

12. Criminal law ⚷757(4).

Instruction to view testimony of accomplice with great caution and distrust would violate Constitution as charge on matter of fact (Const. art. 6, § 19).

13. Criminal law ⚷824(7).

Defendant not offering proposed instructions as to testimony of accomplice cannot complain of court's failure to give instruction.

14. Homicide ⚷307(3).

Failure to charge on lesser and included offenses under one count of indictment for murder *held* not error.

The evidence indicated that victim was willfully and brutally murdered, apparently because he knew too much, and no circumstances of mitigation, justification, or excuse were shown.

15. Criminal law ⚷301.

Refusal to permit defendant pleading not guilty to change plea to not guilty by reason of insanity *held* not abuse of discretion (Pen. Code, § 1016).

Pen. Code, § 1016, provides that defendant not pleading not guilty by reason of insanity shall be conclusively presumed to have been sane, but that court may, for good cause shown, allow change of plea before commencement of trial. Defendant was fully informed of his rights, but stubbornly refused on arraignment to permit counsel to enter plea of not guilty by reason of insanity.

16. Criminal law ⚷1168(2).

Filing of affidavit of alienists, not read to jury nor made known to it in any way, was not prejudicial.

Court refused motion to have defendant's sanity determined, but on motion appointed alienists as physicians to examine defendant and report to court if doubt should arise as to his sanity. They subsequently filed affidavit averring that they were convinced he was sane. Defendant complained of lack of opportunity to cross-examine them.

In Bank.

Appeal from Superior Court, Riverside County; O. K. Morton and G. R. Freeman, Judges.

Gordon Stewart Northcott was convicted of murder in the first degree, and from a judgment and an order denying a new trial, he appeals.

Affirmed.

A. P. G. Steffes, of Los Angeles, and Earl Redwine and Loyal C. Kelley, both of Riverside, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer and John L. Flynn, deputy Attys. Gen., for the People.

WASTE, C. J.

In an indictment returned by the grand jury of the county of Riverside the defendant was charged in three counts with the crime of murder. A fourth count, charging an entirely different offense, was dismissed upon motion of the district attorney. Upon his arraignment the defendant entered a plea of not guilty to each of the murder counts. After a prolonged trial he was found guilty as charged, and, the jury having failed to make any recommendation as to punishment, he was sentenced to suffer the extreme penalty. From the judgment and from the order denying his motion for a new trial he has prosecuted this appeal.

The record presents a most unpleasant and gruesome picture and, because of this, we deem it undesirable to set forth at length the disgusting and abhorrent details leading up to and surrounding the commission of the offenses of which the appellant stands convicted. It will be sufficient to summarize only enough of the evidence to show that the contention of the appellant that his conviction was unwarranted is without merit. In the first count of the indictment the appellant was charged with the unlawful killing of "a human being whose name is unknown." The evidence introduced by the prosecution in support of this charge tends to show that on February 2, 1928, the nude and headless body of a young boy of about eighteen years of age, apparently of Mexican extraction, was found in a ditch by the side of Hudson road, near Puente. The body was covered with a sack which had formerly contained chicken feed. An autopsy was performed, which disclosed that death had been caused by gunshot wounds, and that decapitation had apparently taken place immediately subsequent to death and probably not more than twenty-four hours prior to the discovery of the body. The appellant, in the presence of his nephew, the prosecution's chief witness, stated to his parents that he had killed a Mexican boy and left his body beside a road near Puente. On or about February 1, 1928, the appellant had been absent from his chicken ranch in Riverside county until late at night. Upon his return the following morning, he removed the head of a male person, resembling a Mexican, from the back of his automobile, and stated to his nephew that he had to kill the Mexican because he "knew too much." The clothes of the victim were destroyed by fire on the ranch, and an attempt was made to destroy the head by the same means; but it was impossible to develop a fire of sufficient heat intensity to completely destroy the head, and it was smashed to pieces with an ax. Small pieces of human skull were found at the place on the ranch where it was testified that the destruction by fire was attempted. The appellant was the owner of a .22-caliber Remington rifle which he had kept almost continuously at the ranch, and which he frequently carried in his machine. The rifle was found at the home of his father in Los Angeles, together with some .22 long rifle shells, Peters ammunition. The bullet which killed the Mexican boy was a .22 long rifle bullet, with the indication that it was Peters ammunition. There was testimony that the bullet had been fired from a rifle of the same model, make, type, and caliber as the one owned by the appellant.

[1-3] This evidence, in our opinion, amply supports the verdict on the first count. Appellant's contention that it is insufficient in that "no motive was shown to substantiate a charge of murder in the first degree" is without merit. There is the evidence to the effect that the homicide was perpetrated because the victim thereof "knew too much." Aside from this, however, the decision in People v. Tom Woo, 181 Cal. 315, 328, 184 P. 389, 394, disposes of the contention now under consideration. It is therein declared: "Appellants contend that the evidence is insufficient, particularly because of the absence of proof of motive. It is true the prosecution did not offer such proof. But, as has been declared in many cases, it is not necessary to establish a motive for the perpetration of an offense. A presumption of innocence arises in favor of a person accused of crime. This presumption is disputable, and may be overcome by other evidence. The presence of a motive is evidence tending to prove guilt, for the reason that its tendency is to rebut the presumption of innocence. On the other hand, absence of motive tends to support the presumption of innocence. But the presence or absence of motive is essentially a question of fact, and, like any other fact, is not necessary to be proved, if the crime can otherwise be established by sufficient competent evidence. So, * * * the absence of proof of motive is a fact to be reckoned on the side of innocence; but, if the proof of guilt is nevertheless sufficient to overthrow the presumption of innocence, the appellants must stand convicted, notwithstanding no motive has been shown." See, also, People v. Kelley (Cal. Sup.) 281 P. 609.

Counts 2 and 3 of the indictment may well be considered together, for they are inseparably related. In these counts the appellant was charged with having unlawfully and feloniously murdered two minor boys named Nelson and Lewis Winslow. It was the theory of the prosecution that the appellant had kidnapped or abducted these boys, who were brothers, and brought them to his chicken ranch in order that he might practice a most unnatural and disgusting act upon them. The evidence very definitely establishes that the appellant is a moral pervert and degenerate of the very lowest type. When upon the stand in his own defense he readily admitted that for a number of years he had been addicted to the practice of the unnatural crime against nature. The Winslow boys disappeared at about 8 o'clock on the night of May 16, 1928, while returning to their home from a meeting of the boys' Model Yacht Club. At the time of their disappearance they were ten and twelve years of age, respectively, and had with them a library book on aeroplanes for boys and a toy banjo or ukelele fashioned out of a cigar box, the finger board of which contained two keys taken from an old violin which had been a family heirloom. Two similar keys remained on the violin at home. Sanford Clark, a nephew of the ap-

pellant, who had been illegally brought into this country from Canada by the appellant and who, during his stay at the appellant's ranch, had repeatedly been subjected to the appellant's cruelty and lustful practices, was the principal witness against him. He testified, in substance, that the appellant brought these two boys to the ranch at about 10:30 o'clock on the night of their disappearance; that they were placed in one of the chicken unit houses where the appellant and the witness had been living; that he (the witness) was thereupon required by the appellant to remove his sleeping quarters to a vacant house situated on adjoining premises; that the boys were confined in this chicken house unit for approximately ten days, the appellant remaining with them at night, and apparently giving vent to his unnatural desires; that during the period of their confinement the boys were not permitted to leave the shed in which they were held captive, their food being brought to them by the witness; that after he had held the boys for several days the appellant required the witness to dig a grave in one of the units of the chicken houses sufficiently large to permit of the interment of the bodies of the two brothers; that he was also required by the appellant to burn the aeroplane book and toy banjo belonging to the boys; that the boys were then, in turn, murdered by being struck on the head several times with an ax; that the appellant required the witness to wield the ax which deprived one of the boys of his life, appellant, however, also taking a hand; that appellant had stated to the witness that he would require him to kill one of the boys so as to insure his silence; that after the boys had been thus brutally murdered, the appellant and the witness had carried their bodies to and placed them in the grave which had been prepared for them; that loose dirt was thereupon placed over the bodies, straw scattered over the ground, and chickens turned loose over the spot so that they might scratch the straw around and give to the place a natural appearance.

In corroboration of Sanford Clark's testimony, the prosecution introduced evidence tending to show that during their incarceration the Winslow boys, apparently at appellant's suggestion and command, had written two letters to their parents, informing them that they were well and happy and roving about the country; that the paper on which these letters had been written strongly resembled the flyleaves of the aeroplane book which they had with them at the time of their disappearance; that the charred keys of the toy banjo were found upon the ranch; that the door sill in each door of the chicken unit through which the bodies had been carried to their grave was found to be impregnated with human blood; that a strong and repulsive odor of decayed human flesh greeted the investigating officers when they opened the grave described by Sanford Clark; that the dirt removed from the grave was found to be saturated with human blood; that numerous finger, hand, and foot bones, as well as finger and toe nails and particles of human flesh and hair, were found in and about the grave; that an incompletely formed human tooth, apparently being one from a juvenile of eleven or twelve years of age, was found in the grave; that a piece of cloth resembling the material in the shirt worn by one of the Winslow boys at the time of his disappearance was also found; that the cap of the younger Winslow boy was recovered in one of the chicken units; and that the handles of the axes used to murder the boys were found to be soaked with human blood. There is also evidence to the effect that when suspicion was finally directed toward appellant and an investigation started, he fled to Canada and was returned here for trial only after he had vigorously resisted extradition proceedings. In the face of this evidence, it is difficult to justify appellant's contention as to its insufficiency to support a conviction. It is our conclusion that the evidence warranted his conviction on both counts 2 and 3.

[4] At the commencement of the trial and before the selection of the jury, the appellant, through his counsel, made three motions, viz., a motion that he be permitted to add the plea of "not guilty by reason of insanity" to the plea of "not guilty" theretofore entered; a motion that his sanity be determined as of the time of trial; and a motion for a continuance in order that he might procure more and better evidence in support of the foregoing motions and to aid his counsel to more adequately prepare for the trial. Each of the motions was denied, and the appellant now attacks these rulings. Examination of the several affidavits submitted in support thereof has failed to convince us that the court below abused its discretion in so ruling. We do not propose to set out the contents of the various affidavits, nor to discuss the appellant's contention at any great length, for, during the course of the trial, it was made to satisfactorily appear that the court below had been imposed upon in that none of the affidavits had been sworn to before the notary whose signature and seal purported to appear thereon. That officer declared that he had neither signed his name nor affixed his official seal thereto. Under such circumstances, the motions were properly denied, and the court's action cannot be said to have been prejudicial to the appellant, even if it be assumed that the averments of the purported affidavits submitted in support thereof warranted the granting of the requested relief.

[5] Appellant next urges that the court below erred in denying his challenge to the

special venire. The challenge was placed upon the ground that the summoning officer was disqualified under section 1064 of the Penal Code, it being contended that the sheriff had been engaged in gathering evidence for the prosecution, and that any disqualification thus attaching to the sheriff inured to his deputy who had summoned the jury. It is also urged that this particular deputy had formed an opinion adverse to appellant by reason of an altercation arising out of a previous contact with appellant. On their voir dire examination both the sheriff and his deputy denied having formed an opinion as to the appellant's guilt, and nothing has been shown here calling for a conclusion that they were so biased or prejudiced as to disqualify them. In People v. Hartman, 130 Cal. 487, 488, 489, 62 P. 823, it is said that the condition of mind of the officer is "essentially a question of fact for the trial court to pass upon, and, as in the case of a trial juror challenged upon the ground of actual bias, it is only when the issue comes before this court as matter of law that it has jurisdiction to deal with it. Here the evidence is of a character that concludes us in holding that the denial of the challenge presents only an issue of fact. Under these conditions the action of the trial court will be upheld." This language is particularly pertinent to the present inquiry. In People v. Le Doux, 155 Cal. 535, 542, 543, 102 P. 517, strongly relied on by the appellant, it appeared that the summoning officer entertained an opinion as to the defendant's guilt. This served to disqualify him, and it was properly held in that case that the challenge to the venire summoned by him should have been allowed.

[6] Contending that there was nothing in common between the charge contained in count 1 of the indictment and the charges contained in counts 2 and 3 thereof, the appellant requested that he be accorded a separate trial on the so-called "headless Mexican" charge in order to preclude confusion. This request was denied, and the ruling is assigned as error. Among other things, section 954 of the Penal Code provides that an indictment, information, or complaint may charge "two or more different offenses of the same class of crimes or offenses, under separate counts * * * provided, that the court, in the interest of justice and for good cause shown, may, in its discretion, order that the different offenses or counts set forth in the indictment or information be tried separately. * * *" Appellant has failed to point out wherein the joint trial of the several charges worked to his prejudice. His bald and unsupported statement is not sufficient. The evidence adduced upon the trial attests the propriety of the lower court's ruling in this regard.

[7] During the progress of the trial the appellant addressed a letter to the judge presiding requesting permission to personally cross-examine certain of the prosecution's witnesses, asserting that he alone had the knowledge necessary "to bring out the truth." In making this request the appellant stated: "I do not want to have to discharge my attorneys, but, if there is no other way then I will have to." His letter also indicated that he was familiar with court procedure and had some knowledge of the law by reason of a correspondence course of study. At the next succeeding court session it was stated from the bench that the trial must proceed in an orderly and regular manner, and that it would therefore be necessary for the appellant to "elect one way or the other, to either take charge of his defense through counsel or through his own efforts." Appellant was then told that if he elected to take personal charge of the case and conduct his own defense he would be expected to abide by his election throughout the trial. The court thereupon stated: "I think, as a matter of advice to the defendant and for the protection of his rights, that this case involves and will involve expert testimony; matters that require more or less technical knowledge; also technical knowledge on the part of counsel as to the character of evidence, propounding of questions put to expert witnesses; that requires a technical knowledge as to the manner of presenting such testimony in court; that no person who is not familiar and understands the propounding of those questions and examining the experts is fully competent to represent the defendant, unless it is handled by counsel who are familiar with that class of testimony to some extent at least. Another thing that I want to call to the defendant's attention is that if he has counsel he has the privilege to request his counsel to ask any question that he may desire him to ask of any witness in the case, by communicating that question to his counsel and his counsel putting the question to the witness, and if the question is a proper one or one that is relevant to the issues in the case, I believe that his counsel would and should present the question to the witness and he would obtain all the results that he would obtain by putting the question directly to the witness himself in person." Despite the advice of the court, the appellant elected to personally conduct his own defense, and he now contends that the court's attitude and ruling in this matter served to deprive him of certain constitutional and statutory rights. Reference is made to that provision of the federal Constitution (Const. U. S. Amend. 6) wherein it is declared that in all criminal cases the accused is entitled "to have the Assistance of Counsel for his defence," and to section 686 of the Penal Code, which, so far as material here, appears to be the counter-

part of section 13 of article 1 of the state Constitution, wherein it is provided: "In a criminal action the defendant is entitled * * * to be allowed counsel as in civil actions, or to appear and defend in person and with counsel." Relying on these provisions, the appellant makes the point that he was entitled, as of right, to conduct his case personally and through counsel, determining at his pleasure whether he would examine or cross-examine the various witnesses called or permit counsel to do so. With this as a premise, he contends that the court below committed reversible error when it required him, involuntarily, to elect whether his defense was to be personally conducted or through counsel. We find no merit in the contention. At no time during the trial was the appellant denied the assistance of counsel. The trial court merely ruled, and properly so, that either the appellant or his counsel had to take charge of the actual conduct of the defense, the reason for the rule obviously being to preserve the orderly procedure of the court. That appellant had the assistance of counsel after he had elected to take personal charge of his defense clearly appears from the record. Upon numerous occasions appellant was informed that he was free to receive the assistance of counsel either in or out of court, that matter being of no concern to the court so long as the trial was conducted in an orderly manner and along the lines theretofore suggested from the bench. We are not prepared to say that the court abused its discretion in this regard. Moreover, it has been held that every invasion of even a constitutional right need not necessarily require a reversal. People v. Mayfield, 85 Cal. App. 77, 259 P. 75. That the appellant is guilty of the crimes charged, the record leaves no reasonable doubt. He was accorded every conceivable privilege and courtesy in the conduct of his defense. In the absence of a clear showing of prejudice we would be hesitant to order a reversal, even if it were to be assumed that appellant's constitutional rights had been invaded by the ruling now complained of.

[8, 9] After he had thus assumed personal charge of his defense, and on January 21, 1929, the appellant moved the court for a continuance on the ground that his physical condition at the time was such as to preclude him from effectively proceeding. A recess was thereupon ordered by the trial court to permit of a medical examination of the appellant being made. When court reconvened, the examining physicians testified, in substance, that appellant was merely suffering from a slight cold which was accompanied by an elevation of temperature of only two-tenths of one degree. Each physician gave as his opinion that appellant was physically capable of proceeding with the trial. Upon this showing the motion for a continuance was denied. On the following morning the motion was renewed, appellant urging that his eyes were swollen to such an extent as not to permit of their use. At this time, and upon recommendation of the examining physician, a two-day continuance was granted to the appellant. When the case was again called for trial on January 24, 1929, appellant again requested a continuance, this time on the ground that he had been unable to properly prepare to resume the trial after his illness. In denying the request the court below informed appellant that it had no desire to deprive him of any right, but that his inability to proceed had been brought about by his own actions. Inspection of the record readily discloses the propriety of the court's attitude. There was need that something be done to terminate appellant's dilatory tactics and to expedite the trial. At the time the request was made, the prosecution was still putting in its case in chief, and appellant appears to have satisfactorily conducted the cross-examination of the witnesses called. A trial court is allowed much discretion in the matter of granting or refusing applications for postponements or continuances, and its action thereon will not be disturbed upon appeal unless there has been a plain abuse of that discretion. 8 Cal. Jur. 210, § 281.

At a later date the appellant asked leave of court to again associate counsel with him, intimating that if the request was granted he would sporadically and when necessary call upon counsel to conduct the examination of witnesses and otherwise assume control of the defense. Consistent with its earlier ruling, the court again informed the appellant that he "must either have counsel or appear in person. You cannot appear by both." It was then suggested to him that he move to have counsel "reinstated as your attorney of record [to] conduct your case or to proceed on your own line. As to what [counsel] might do about assisting you or anything, that is no concern of the court's." The court very properly stated to the appellant that it did not intend to conduct the case by piecemeal, adding: "I cannot recognize you for one purpose * * * and recognize your counsel for another purpose. It interferes with the orderly progress of the trial." Appellant apparently agreed with the court and accepted its ruling, for he stated: "That is perfectly desirable [agreeable?], your Honor." What we have already said along this line sufficiently disposes of the present assignment of error, which is without merit.

[10] The trial court is asserted to have erroneously ruled that the prosecution might prove, without preliminary inquiry as to their competency, certain extrajudicial statements and confessions purported to have been made by the appellant. In support of this contention appellant cites the decision in People v. Miller, 135 Cal. 69, 67 P. 12, 13, in which case it is held that before "any confession of a de-

fendant can be offered in evidence, it must be shown by the prosecution that it was voluntary, and made without any previous inducement, or by reason of any intimidation or threat. This is a preliminary question upon the admissibility of the testimony, addressed to the court, and to be determined by it, and not by the jury. Upon such preliminary inquiry the court should permit a cross-examination of the witness for the purpose of showing the particular circumstances under which the confession was made, before permitting the confession itself to be given in evidence. A refusal to permit such cross-examination will not, however, justify a reversal of the judgment, when it appears from the record that the defendant was not prejudiced thereby." In the present case the prosecution satisfactorily established that the various statements and the written confession of the appellant had been voluntarily made, and without any previous inducement or by reason of intimidation or threat. In the absence of a showing of prejudice, the mere inversion of the order of proof does not call for a reversal.

[11] Appellant next complains of the introduction of certain testimony which it is asserted tended to prove the commission or attempted commission of separate and distinct crimes having no connection with or bearing on the charges then pending against him. Mr. and Mrs. Jacob Dahl, the parents of four minor boys, were called by the prosecution and testified that appellant had negotiated with them to move onto his chicken ranch where they were to work for him; that their boys, in whom the appellant showed some interest, were to accompany them; and that appellant subsequently told them that for various reasons it would be impossible for him to give them the promised employment. Stephen Black, a minor boy called by the People, testified that appellant had taken him to the ranch on divers occasions and on one of these visits had attempted to abuse him. The witness Junior Thompson, also a small boy, testified that appellant had made indecent advances to him. The father of the latter boy testified that immediately following this occurrence he had pursued the appellant, but failed to catch him. As explained by the Attorney General, it was the theory of the prosecution that appellant is a moral pervert and degenerate, addicted to the practice of sodomy; he brought a number of boys to his ranch with the express purpose of committing these unnatural practices upon them, and, in order to conceal his crimes, he killed some of the boys upon whom the offenses had been committed. It was for the purpose of establishing this general scheme or plan that the prosecution introduced the testimony above set forth. The testimony of the witnesses last mentioned was, therefore, properly admitted in evidence for the purpose of showing the motive of the defendant in committing the offenses charged, and establishing a well-planned scheme of appellant for abducting young boys in order that he might satisfy his abnormal desires, and then later kill them in order to cover up his crime. People v. Arnold, 199 Cal. 471, 486, 250 P. 168; People v. Nakis, 184 Cal. 105, 114, 193 P. 92; People v. Martin, 50 Cal. App. 71, 73, 194 P. 522.

[12, 13] Appellant offered no instructions. He now urges, however, that the court, of its own motion, should have instructed the jury to view with great caution and distrust the "evidence and testimony of an admitted accomplice, namely, Sanford Clark." Under the more recent authorities it would have been error to have so charged the jury. Such an instruction constitutes a charge upon a matter of fact in violation of section 19 of article 6 of the Constitution. People v. Wardrip, 141 Cal. 229, 233, 74 P. 744; see, also, Hirshfield v. Dana, 193 Cal. 142, 223 P. 451. Appellant concedes that the decisions are against his contention, but seeks to have an exception declared in his case. But appellant did not offer any proposed instructions on the subject, and is therefore not in a position to now urge this particular contention. People v. King, 65 Cal. App. 306, 310, 223 P. 1001.

[14] It was not error for the court to refuse to instruct upon the "lesser and included offenses of second degree murder and manslaughter." Appellant directs this particular attack to the "headless Mexican" charge, contending that as to this charge there was no showing of motive and the court should therefore have instructed upon the lesser and included offenses. With this argument we cannot agree. The evidence and the circumstances indicate that the victim designated in count 1 of the indictment had been willfully and brutally murdered and decapitated, apparently because "he knew too much." No circumstances of mitigation, justification, or excuse were shown, and it was not error for the court to fail to instruct upon the lesser and included offenses. People v. Watts, 198 Cal. 776, 794, 795, 247 P. 884. Furthermore, appellant is precluded from now urging the point because of his failure to submit or request any such instructions.

[15] Appellant's motion to be permitted to change his plea from "not guilty" to the plea of "not guilty by reason of insanity" was based upon several purported affidavits, the substance of which was that two doctors had examined appellant, and reached the conclusion that he was insane when examined by them, and that certain attorneys were present when the doctors made such examination, and heard them say the appellant was insane. Section 1016 of the Penal Code provides that a defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged, "provided

that the court may for good cause shown allow a change of plea at any time before the commencement of the trial." We concur in the view of the prosecution that "good cause" was not shown in the affidavits presented, and that the trial court did not abuse its discretion in refusing to grant appellant's motion.

When the appellant was arraigned he was represented and apparently well advised by counsel. He was fully informed as to, and aware of, his rights. From the affidavit of his own counsel it appears that he stubbornly resisted any advice and effort to have him enter the additional plea, "not guilty by reason of insanity." His sole plea, "not guilty," was not ignorantly induced, nor was it made through motives of hope or fear unduly operating upon his volition. In such a situation it was not an abuse of discretion for the trial court to refuse to permit the interposition of the additional plea. People v. Bostic, 167 Cal. 754, 141 P. 380; People v. Murphy, 62 Cal. App. 709, 711, 217 P. 810.

[16] In addition to the motion for change of plea, appellant's counsel made a motion, based upon his own affidavit, to have the question of appellant's sanity at the time of the trial submitted to a jury as provided by the sections of the Penal Code. The record is not entirely clear upon the point, but we infer that the court considered all the affidavits offered at the time bearing on the question of appellant's sanity. It found the affidavits insufficient to create a doubt of appellant's sanity, and denied the motion. Subsequently, and on motion of the appellant, the court appointed certain alienists as a commission of experts to examine the appellant as to his sanity and to report to the court, in the event any doubt should arise as to his sanity during the course of the trial. These alienists subsequently filed with the court an affidavit in which they averred that, based upon their observation of the appellant, they were convinced he was sane. Appellant complains of the filing of this affidavit, contending that he should have been confronted with the affiants and afforded an opportunity to cross-examine them. The affidavit, while filed with the court, was never read to the jury nor made known to it in any way. It is therefore difficult to understand what prejudice, if any, could have resulted to the appellant's cause.

Appellant contends that the trial court erred in refusing to pass upon the competency of alleged confessions made by him before admitting the evidence. Some evidence of statements, not amounting to a confession, were admitted in evidence without any preliminary examination; but, before the purported confession in writing of the appellant was admitted in evidence, it was shown to have been freely and voluntarily made and not induced by fear, threats, or offers of leniency, reward, or immunity.

We have examined the other points stated but not argued by the appellant in his brief, and have found nothing therein warranting a reversal.

The judgment and order are, and each is, affirmed.

We concur: RICHARDS, J.; SHENK, J.; SEAWELL, JJ.; PRESTON, J.; CURTIS, J.

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106 Cal. App. 355

BAILEY v. SCHOLTZ.

Civ. 7213.

District Court of Appeal, First District, Division 2, California.

June 11, 1930.

As Modified on Denial of Rehearing July 11, 1930.

Hearing Denied by Supreme Court Aug. 7, 1930.

1. Brokers ⟹82(4).

Evidence showing agreement for exchange of lands containing covenants employing plaintiff as broker *held* not variance from allegation of written agreement employing plaintiff to effect exchange.

2. Brokers ⟹82(4).

Agreement for exchange of property containing covenants employing broker *held* admissible under allegation of written agreement employing broker.

The paper was evidence of the allegation contained in the complaint, and it was not inadmissible because it was evidence of something else.

3. Brokers ⟹49(1).

Defendant *held* not relieved from liability for broker's commissions in exchange of property on theory of qualified acceptance of offer.

Defendant's offer was accepted by two persons who held interest in lands, and defendant asserted that he was put in position against his will of dealing with one with whom he had not contracted to deal. However, defendant had expressed desire to exchange his lands for certain other lands and material feature of contract was to obtain that particular property.

4. Brokers ⚷54.

Defendant *held* not relieved from liability for broker's commissions in exchange of lands on theory third person was unable to deliver.

This point was based on fact that another person held some interest in property, but plaintiff held her power of attorney and it did not appear that third person with whom defendant was dealing was ever asked to obtain marketable title and convey it.

5. Brokers ⚷82(4).

In action for broker's commissions, no issue was raised under pleading as to plaintiff's being part owner.

Defendant claimed that plaintiff was part owner and did not disclose such fact, but pleadings admitted ownership in others.

6. Appeal and error ⚷901.

Reviewing court is not bound to search record to ascertain whether appellant's contention can be sustained.

It was asserted that broker had not proved that he held real estate license, but without objection he had testified as to his capacity. No claim was made in trial court that any of such evidence was incompetent, and nothing was printed in briefs tending to sustain appellant's point.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by A. L. Bailey against Herbert Scholtz, to recover a broker's commissions on the exchange of real property. Judgment for plaintiff, and defendant appeals.

Affirmed.

A. A. Heer, of San Francisco, for appellant.

Louis J. Trabucco, of Oakland, for respondent.

STURTEVANT, J.

The plaintiff commenced an action to recover commissions which he alleged he had earned in procuring an enforceable contract to exchange one tract of land for another. The trial court made findings in favor of the plaintiff, and, from a judgment entered thereon, the defendant has appealed and has brought up a typewritten record.

[1, 2] The plaintiff alleged a written agreement employing him to effect an exchange of properties between the defendant and Walter Ericson. On the trial the plaintiff produced and, over the objection of the defendant, the court received in evidence an agreement for the exchange of defendant's lands for the lands of Ericson and which also contained covenants employing the plaintiff and fixing his compensation. The defendant claims there was a variance. We think he is in error. The paper was evidence of the allegation contained in the complaint and it was not inadmissible because it was evidence of something else.

[3] The defendant's offer was accepted by Ericson. It was also accepted in writing by Scheuneman, who also held an interest in the lands. The defendant asserts that such facts showed a qualified acceptance and that the defendant against his will was put in the position of dealing with one with whom he had not contracted to deal. The assertion fails to take into consideration the facts. The defendant had expressed his desire to exchange his lands for certain other lands. The document merely purported to give him that which he had sought to acquire. The question whether one person or several persons were interested in the property was not material. The material feature was to obtain that particular property. For the reasons which we have just stated it also follows that the document was not a new proposal.

[4] It is claimed that Ericson was never able to deliver. This point is based on the fact that Mrs. Monsen held some interest, the exact nature of which does not appear, but this plaintiff held her power of attorney, signed the contract, and, furthermore, no demand was ever made upon him to convey. He testified he had at all times been ready, able, and willing to convey. Assuming that Mrs. Monsen's conveyance was necessary to a marketable title it does not appear that Ericson was ever asked to obtain and convey it.

[5] The defendant states that the plaintiff was a part owner, that he did not disclose that fact to the defendant, but accepted an agency from the defendant. The plaintiff asserts he did disclose all the facts to the defendant. Furthermore, the pleadings admitted ownership in Ericson and Scholtz. There was no issue on the subject.

Again, it is claimed the findings are not within the issues. In support of the point counsel cite certain things that would constitute a variance. These are the same matters which we have treated above. In connection with this point it is asserted that some of the findings are not sustained by the evidence. In so far as this claim is material it is but another form of presenting the points which we have just discussed.

[6] Finally, it is asserted the plaintiff has not proved that he holds a real estate license. Without objection the plaintiff testified as to his capacity. No claim was made in the trial court that any of this evidence was incompetent. Nothing is printed in the briefs tend-

ing to sustain the point. This court is not bound to search the record to ascertain if it can be sustained. We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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106 Cal. App. 437

LEWIS-SIMAS-JONES CO. v. SOUTHERN PAC. CO.

Civ. 7280.

District Court of Appeal, First District, Division 2, California.

June 16, 1930.

Rehearing Denied July 15, 1930. Hearing Denied by Supreme Court Aug. 13, 1930.

Commerce ⟹85(7).

Interstate Commerce Commission *held* without jurisdiction to award damages because of unreasonable international joint through freight rate (Interstate Commerce Act § 1, pars. 1, 2, 49 USCA § 1 (1, 2).

Interstate Commerce Act, § 1, pars. 1, 2, 49 USCA § 1 (1, 2), limits Interstate Commerce Commission's jurisdiction to transportation within the United States. The Commission d'd not find that defendant railway company's published rate on shipments from the international boundary was unreasonable.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Lewis-Simas-Jones Company against the Southern Pacific Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

E. W. Hollingsworth, of San Francisco, for appellant.

Henley C. Booth, James E. Lyons, A. Burton Mason, and A. L. Whittle, all of San Francisco, for respondent.

SPENCE, J.

Appellant brought an action against respondent under the provisions of section 16 of the Interstate Commerce Act (U. S. Code, title 49 [49 USCA § 16]) to enforce an award of the Interstate Commerce Commission. This appeal is taken from a judgment in favor of respondent.

In 1923 respondent delivered to appellant at San Francisco three carloads of cow peas which respondent in conjunction with the Southern Pacific Company of Mexico had transported on through bills of lading and joint through rates from Navojoa, Mexico. The shipments were transported by the Mexican carrier from Navojoa, Mexico, to Nogales, Ariz., and by respondent from Nogales, Ariz., to San Francisco. Respondent collected the freight charges from appellant at San Francisco. These charges were based upon a joint through rate maintained by the Southern Pacific Company of Mexico and respondent, which joint through rate was published and filed with the Department of Communications and Public Works of the republic of Mexico and with the Interstate Commerce Commission. In the proceedings instituted by appellant against respondent before the Interstate Commerce Commission, the Commission found that such joint through rate was unreasonable, and awarded damages to appellant based upon the excess of the rate charged over the rate determined by the Commission to be a reasonable joint through rate. In the present action to enforce the award, the trial court found that at all times during which appellant's shipments were in the course of transportation from Navojoa, Mexico, to San Francisco the respondent maintained and published in a tariff on file with the Interstate Commerce Commission a rate applicable on carload shipments of cow peas originating at the international boundary line at Nogales, Ariz., and destined to San Francisco; that said rate was at all times reasonable and lawful and that said rate was not alleged to be unreasonable in the complaint filed with the Interstate Commerce Commission; that appellant introduced no evidence before the Commission to show that last-mentioned rate was other than reasonable and lawful for application upon shipments of cow peas from Nogales, Ariz., to San Francisco; and that the Commission made no finding with respect hereto. Respondent's defense was that the Commission was without jurisdiction to make the award for damages. The trial court so concluded, and rendered judgment in favor of respondent. This appeal is taken upon the judgment roll alone, and the jurisdictional question is the sole question presented for determination.

The jurisdictional question here involved does not relate to the power of Congress under the Constitution, but to the jurisdiction conferred upon the Interstate Commerce Commission by the Interstate Commerce Act. The transportation over which the Commission has jurisdiction is defined and limited by section 1 of the act. Paragraph 2 of such section [49 USCA § 1(2)] reads in part: "The provisions of this chapter shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

States." A similar limitation is found in the language of paragraph 1 of that section (49 USCA § 1(1). It is conceded by appellant that the Commission has no power under the act to determine the reasonableness of joint through rates for the purpose of fixing future joint rates on transportation originating in foreign countries. It is further conceded that the jurisdiction of the Commission to award damages extends only to cases where a carrier subject to the provisions of the act has failed to comply with its duty under the act. It is contended, however, that the Commission had jurisdiction to award damages in the present case under the authority of News Syndicate Co. v. New York Central Railroad Co., 275 U. S. 179, 48 S. Ct. 39, 40, 72 L. Ed. 225. That decision was handed down during the pendency of the present litigation, and is relied upon both by appellant and respondent on this appeal.

In that case the shipment originated at Thorold, Ontario, Canada, destined for New York City. The Commission found that the joint through rate charged was unreasonable and that the plaintiff in error suffered damages in the amount by which the charges were found to be unreasonable and was entitled to reparation from the carrier that engaged in the transportation of these shipments within the United States. No rates were made or published for the transportation of such shipments from the international boundary to New York City, and the Commission did not determine what would be a reasonable rate for this transportation. In the District Court the defendants in error demurred to the complaint on the grounds that the complaint failed to state a cause of action and that the Commission's order was void for want of jurisdiction. The demurrer was sustained and judgment of dismissal entered. After hearing in the Circuit Court of Appeals that court certified certain questions to the United States Supreme Court.

The first question certified was: "1. Where a railroad of the United States and a railroad of the Dominion of Canada unite in the publication of a joint through rate from a point within the Dominion of Canada to a point within the United States, the rate covering transportation both in Canada and in the United States, has the Interstate Commerce Commission of the United States jurisdiction, on complaint of a shipper or consignee made against the United States railroad alone, to determine the reasonableness of such joint through rate?"

The answer given was: "Question 1 is answered 'Yes, for the ascertainment of damages.'"

In discussing this question, the court said: "The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City, section 1(1) and (2) [49 USCA § 1(1, 2)]. It was the duty of defendants in error to establish just and reasonable rates for that service. Section 1 (5); section 6 (1) and (7) [49 USCA §§ 1 (5), 6 (1, 7)]. They failed to make or publish any rate applicable to that part of the transportation. Section 8 [49 USCA § 8] makes them liable for damages sustained in consequence of such failure. Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error. Its right to reparation does not depend upon the amounts retained by defendants in error pursuant to agreed divisions. Louisville & Nashville R. Co. v. Sloss-Sheffield Co., 269 U. S. 217, 231, 46 S. Ct. 73, 70 L. Ed. 242. Their breach of the statutory duty was a proximate cause of the losses complained of. The failure to establish rates covering the transportation from the international boundary contravened the provisions of the act and compelled plaintiff in error to pay the through charges complained of. The Commission had jurisdiction to determine whether plaintiff in error was entitled to an 'award of damages under the provisions of this act for a violation thereof.' Section 16 (1) [49 USCA § 16 (1)]. And it was the duty of the Commission to ascertain the damages * * * the Commission had jurisdiction to determine the reasonableness of the charges exacted."

The second question certified was: "2. Where a shipper or consignee of freight shipped to it at a destination in the United States from such point in the Dominion of Canada has paid at destination to the United States railroad the full published joint through freight rate thereon, has the Interstate Commerce Commission, upon a finding by it that such joint through rate was unreasonable and unjust, but in the absence of a finding that the charges for the transportation in so far as it took place within the United States were unjust and unreasonable, jurisdiction to make an order for the payment of damages to such shipper or consignee in the amount that the entire transportation charges on the basis of the joint through freight rate exceeded the charges which would have been assessed on the basis of the joint through freight rate found by the Commission to have been reasonable?"

The answer given was: "Question 2 is answered, 'Yes.'" In discussing this question, the court in part said: "By their failure to comply with the act, plaintiff in error was compelled to pay charges based on the through rates. On the facts stated, the Commission was authorized to hear the complaint, section 13 (1) [49 USCA § 13(1)]; and had jurisdiction to make the order."

It is apparent that the United States Supreme Court in answering these questions very clearly pointed out that the violation of the act consisted of the failure to establish rates covering the transportation from the

international boundary to New York City. In answering the first question regarding the jurisdiction to determine the reasonableness of the joint through rate, the court qualified its affirmative answer by the words "for the ascertainment of damages." The answer to the second question was in the affirmative, but the Commission's authority was decided "on the facts stated." The act was there violated by the carrier's failure to make or publish any rate whatsoever applicable to that part of the transportation between the international boundary and New York City, and this violation of the act compelled the plaintiff to pay the unreasonable joint through rates complained of. In determining the damage proximately caused to the plaintiff in error by this violation of the act, it was necessary for the Commission to determine the reasonableness of the joint through charges.

In the present case respondent maintained and published a rate as required by the act on shipments from the international boundary at Nogales, Ariz., to San Francisco, which rate was not found to be unreasonable by the Commission. The appellant was not compelled to pay the joint through rate by reason of any violation of the act on the part of respondent. The jurisdiction of the Commission to award damages must be predicated upon a violation of the act, and, where there is no evidence to show that there has been such violation, the Commission is without jurisdiction to make an award of damages.

The question relating to the judgment awarding to respondent its costs has now become moot, as respondent has filed in the trial court a satisfaction of the judgment for costs and a certified copy thereof has been filed with this court.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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106 Cal. App. 485

Ex parte WEILER.

Cr. 1579.

District Court of Appeal, First District, Division 2, California.

June 17, 1930.

1. Husband and wife ⚷278(2).

Law authorizes spouses living apart to make written contract settling property rights.

2. Husband and wife ⚷278(2).

In contract settling property rights of husband and wife, covenants releasing husband from alimony claims, attorneys' fees, and support, *held* not contra bonos mores.

3. Divorce ⚷236.

Divorce court has power to examine contract between parties settling property rights and accept or reject it in whole or in part.

This was true regardless of whether there was covenant that "the provisions of this agreement shall be referred to in any judgment of divorce between the parties hereto and made a part thereof," and that husband be released from all claims "for alimony, support and maintenance, attorneys fees, and costs of suit."

4. Divorce ⚷236.

Trial court having confirmed agreement of parties settling property rights, it became part of court's decree.

The fact that a copy of the agreement was not attached to nor pleaded in hæc verba in the complaint was of no moment.

5. Divorce ⚷154.

Divorce court, if awarding more relief than demanded, was in error, but not beyond jurisdiction (Code Civ. Proc. § 580).

6. Judgment ⚷252(1).

Where general law prescribes manner of framing judgment and carrying it into execution, court does not violate statute by following that manner whether expressly prayed for or not (Code Civ. Proc. § 580).

It is the general rule that the trial court, when determining what is demanded in a complaint, will be guided by an inspection of the prayer.

Application by A. Judson Weiler for a writ of habeas corpus prayed to be directed to the Sheriff of the City and County of San Francisco to secure the release of the petitioner from custody on a commitment for contempt of court.

Petitioner remanded. Writ discharged.

Robert H. Borland, of San Francisco, for petitioner.

Benjamin L. McKinley and William Meinhold, both of San Francisco, C. W. Burbrow, for respondent.

Leo A. Cunningham, of San Francisco, for respondent Sheriff.

STURTEVANT, J.

Formerly A. Judson Weiler, the petitioner, and Helen C. Weiler were husband and wife.

They entered into a formal written contract settling their property rights. Later Mrs. Weiler applied for divorce. Among other things she pleaded "that prior to the commencement of this action, by a written agreement, plaintiff and said defendant settled and adjusted between themselves their respective rights in and to all community property of said marriage, which said settlement plaintiff hereby requests the court to approve and confirm." In her complaint she did not pray for counsel fees, costs or maintenance. The husband allowed his default to be taken. In the interlocutory decree the trial court inserted the following: "It is further ordered, adjudged and decreed that this court does hereby approve and confirm and make a part of this decree the provisions of that certain property settlement agreement made and entered into between the parties hereto and executed by them on the 15th day of May, 1928." In the final decree that order was repeated. The defendant failed to make some of the payments provided in the written agreement and so adopted by the trial court. A motion was duly and properly made in the trial court asking that he be required to make the payments. After certain proceedings were had, the order was made, but nevertheless the defendant neglected and refused to make the payments. He was adjudged guilty of contempt of court and later applied to this court for a writ of habeas corpus. In support of his application he makes the following points:

[1-4] It is claimed the contract purported to limit the power of the court to provide alimony, counsel fees, and costs. To this claim there are several answers. There is nothing on the face of the instrument which necessarily supports that claim. No request was made, no ruling was made, and the point is before us ex gratia. The identical covenant was not approved expressly, and the record does not show any request was made that it be approved or disapproved.

The agreement recites that the parties are now (May 15, 1928) living separate and apart. It does not contain a word to the effect that either party does, or will do, anything to facilitate either party in obtaining a divorce. With much care it provides for a division of the property owned by the parties. The law does not prohibit, but it authorizes the making of such contracts. Roberts v. Roberts, 83 Cal. App. 345, 351, 256 P. 826. When the parties are settling their property rights, the law does not provide that they may settle some and that they may not settle others. In the instant case, having divided their properties in kind, there was inserted a covenant that the husband was released from all claims "for alimony, support, and maintenance, attorney fees, and costs of suit." That covenant was not contra bonos mores. It contained a further covenant that "the provisions of this agreement shall be referred to in any judgment of divorce between the parties hereto and made a part thereof." As stated above, the plaintiff's complaint pleaded the execution of the agreement and asked its adoption by the divorce court. Said pleading furnished support for the judgment subsequently rendered. Whether the latter covenant was present or absent, the divorce court had full power to examine the contract and to examine into all of the facts surrounding its execution and to accept or reject it in whole, or in part, according to the law and the facts. Roberts v. Roberts, supra. The force of the agreement depended on the sanction of the divorce court. Loveren v. Loveren, 106 Cal. 509, 513, 39 P. 801. The trial court having confirmed the agreement, it became a part of the court's decree. Locke Paddon v. Locke Paddon, 194 Cal. 73, 81, 227 P. 715. The fact that a copy of the agreement was not attached to, nor pleaded in hæc verba, in the complaint is of no moment. We are not considering a demurrer. By an appropriate passage contained in the interlocutory decree and repeated in the final decree the agreement was made a part of each decree. What was formerly merely an agreement of the parties became a part of the judgment of the trial court. Tripp v. Superior Court, 61 Cal. App. 64, 214 P. 252. The case entitled Andrews v. Superior Court (Cal. App.) 284 P. 494, was based on a different set of facts and is not controlling in the instant case.

[5, 6] Because of the wording of the prayer to the complaint, the petitioner asserts the trial court awarded the plaintiff more relief than demanded in her complaint. Code Civ. Proc. § 580. To this charge there are many answers. If it did as claimed it was an error and not an excess of jurisdiction. 14 Cal. Jur. 908. As the basic judgment was in a divorce case, we have just shown that in passing on the terms of the written agreement and making an order adopting or rejecting it the trial court did not exceed its jurisdiction, and that it but performed a duty enjoined by law. In the body of her complaint the plaintiff pleaded the execution of the agreement and asked its adoption and ratification by the divorce court. Now it will be conceded that it is the general rule that the trial court when determining what is "demanded in a complaint" will be guided by an inspection of the prayer. 14 Cal. Jur. 906. But there is a well-established exception. When, as here, the general law prescribes the manner of framing a judgment and carrying it into execution, if the trial court follows that manner, whether expressly prayed for or not, the court does not violate the provisions of section 580, Code of Civil Procedure. Bank of Ukiah v. Reed, 131 Cal. 597, 601, 63 P. 921; Security, etc., Co. v. Boston, etc., Co., 126 Cal. 418, 424, 58 P. 941, 59 P. 296; Elston v. Hix, 67 Mont. 294, 215 P. 657, 659.

We find no error in the record. The petitioner is remanded and the writ is discharged.

We concur: NOURSE, P. J.; SPENCE, J.

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106 Cal. App. 602

Ex parte MORGAN.

Cr. 1932.

District Court of Appeal, Second District, Division 2, California.

June 20, 1930.

1. Marriage ⚷50(2).

Marriage may be established by testimony of one party thereto.

2. Marriage ⚷40(11).

Burden of proving marriage rests on party asserting it.

3. Marriage ⚷40(11).

Where second marriage is attacked upon ground of prior existing union between one of spouses and third person, burden of proving prior marriage rests on party asserting it.

4. Marriage ⚷40(1).

Where marriage in fact is established, it is presumed to be regular and valid.

5. Marriage ⚷40(11).

Where, at hearing on alimony order, wife proved marriage, burden shifted to husband to establish that his marriage to her was invalid because of wife's prior existing marriage.

In the divorce action, wife alleged that she was husband's lawful wife, whereas he averred that their marriage was illegal and void for reason that wife at time had husband living from whom she had not been divorced. The wife proved marriage by her testimony.

6. Divorce ⚷168.

Where husband did not establish invalidity of marriage, he could not complain of alimony order in habeas corpus proceeding to secure release from custody on order adjudging him in contempt for failure to pay alimony.

7. Divorce ⚷168.

Where husband did not appeal from alimony order, attack in habeas corpus proceeding was collateral and could not properly be made.

Application by Earl D. Morgan for a writ of habeas corpus.

Writ discharged, and petitioner remanded.

Medler & Wood, of Los Angeles, for petitioner.

J. W. Barbee, of Long Beach, for respondent.

GATES, Justice pro tem.

Petitioner having formerly applied for a writ, which was denied, the facts are there stated. (Cal. App.) 277 P. 740. The question is, Was petitioner guilty of a contempt of court for having failed and refused to pay alimony pursuant to an order based upon conflicting evidence as to the validity of the marriage of the parties?

The plaintiff in the divorce action alleged that she was petitioner's lawful wife, whereas he averred that their marriage was illegal and void for the reason that the wife at the time had a husband living from whom she had not been divorced. Authorities are cited and quoted to the effect that an asserted prior marriage, and the illegality of the marriage of the parties litigant cast the burden upon the party urging them of so showing.

[1-3] It is well established that a marriage may be established by the testimony of one of the parties thereto. Budd v. Morgan, 187 Cal. 741, 203 P. 754; In re Richards, 133 Cal. 524, 65 P. 1034; 38 C. J. 1335. The burden of proving a marriage rests on the party who asserts it. 38 C. J. 1321. This obligation was satisfactorily met when the plaintiff in the divorce action proved by her own testimony that she married petitioner. It then became incumbent upon the latter to show that his marriage to Mrs. Morgan was invalid. It is well settled that if a second marriage is attacked upon the ground of a prior existing union between one of the spouses and a third person, the burden of proving the prior marriage rests on the party asserting it. Wilcox v. Wilcox, 171 Cal. 770, 155 P. 95; Perry's Estate, 58 Cal. App. 420, 208 P. 987. In Hunter v. Hunter, 111 Cal. 261, 267, 43 P. 756, 757, 31 L. R. A. 411, 52 Am. St. Rep. 180, our Supreme Court said: "There is also a presumption, and a very strong one, in favor of the legality of a marriage regularly solemnized. Rather than hold a second marriage invalid, and that the parties have committed a crime or been guilty of immorality, the courts have often indulged in the presumption of death in less than seven years, or where the absent party was shown to be alive, have allowed a presumption that the absent party has procured a divorce. A more correct statement perhaps would be that the burden is cast upon the party asserting guilt or immorality to

prove the negative,—that the first marriage had not ended before the second marriage." In the rather recent case of Kelsey v. Miller, 203 Cal. 61, 263 P. 200, 212, the court used these words: "The mere proof of a prior marriage and the continued life of both spouses is not sufficient to make a case against a *second ceremonial marriage*. There must be a further showing that the first marriage had not been set aside by judicial decree. There is a very strong presumption in favor of the legality of a marriage regularly solemnized." Petitioner herein concedes that there was a marriage ceremony of himself and Effie Morgan, but contends that the attempted marriage was invalid.

[4] Where a marriage in fact was established, as in the instant case, it is presumed to be regular and valid. In re Hughson, 173 Cal. 448, 160 P. 548; In re Pusey, 173 Cal. 141, 159 P. 433; Wilcox v. Wilcox, supra; In re Perry, supra. The duty of proving the contrary rests on the party who attacks it. In re Hughson, supra; In re Pusey, supra; Wilcox v. Wilcox, supra; In re Perry, supra; Everett v. Standard Accident Ins. Co., 45 Cal. App. 332, 187 P. 996. And it has been held that this is so even though it requires proving a negative. Hunter v. Hunter, supra.

[5, 6] It is clear, therefore, that at the time of the hearing on the alimony order, and after the plaintiff, Mrs. Morgan, had proved her marriage to petitioner herein, the burden was shifted to the latter to establish the fact that his marriage to her was invalid by reason of a prior existing marriage undissolved by decree of divorce or otherwise. The record conclusively shows that he offered no evidence in the matter, as well as that neither Mrs. Morgan nor any one else gave evidence concerning a prior marriage. This burden he did not meet, and he therefore cannot, at this time, complain of the order made by the court. We conclude from the record that there was satisfactory proof of the marriage of Effie Morgan to this petitioner. The trial court found upon such issue. It had jurisdiction of the parties and possessed the power to make the order which was granted.

[7] Petitioner further contends that his application to vacate the alimony order should have been granted. The court heard the evidence and denied the application to vacate, and there was ample evidence to warrant and sustain the action of the court in so doing. If petitioner was dissatisfied with the order granting Mrs. Morgan alimony and counsel fees, he should have appealed and had the matter reviewed and a determination made as to whether the court had abused its discretion in the matter. His present attack upon the order is collateral and cannot be properly made in this matter. Ex parte Joutsen, 154 Cal. 540, 543, 98 P. 391.

Writ discharged. Petitioner remanded.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

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106 Cal. App. 605

BROWN v. TROPP.

Civ. 4129.

District Court of Appeal, Third District, California.

June 20, 1930.

1. Bankruptcy ⟹436(1).

Bankrupt knowing residence of creditor and failing to state it in schedule must prove that creditor had notice or knowledge of bankruptcy proceedings (Bankr. Act, §§ 7, 17 [11 USCA §§ 25, 35]).

It has been held sufficient in schedule to give name of city in which creditor resides, without stating street address, but, in the present case, the bankrupt not only failed to state creditor's street address, but he gave false address.

2. Appeal and error ⟹931(1).

It will be presumed that court found prevailing party's statement true in case of conflict.

3. Bankruptcy ⟹425.

That creditor had knowledge of bankruptcy proceedings on certain date *held* insufficient to warrant recalling of execution in creditor's action on note.

The time for making proof of claims in bankruptcy proceedings expired July 10, 1927. In such case, creditor's knowledge of proceedings on and after June 20, 1927, was insufficient, especially where creditor claimed he was not formally notified or notified to file claim until July 9, 1927.

4. Bankruptcy ⟹425.

As respects claim of discharge of debt not duly scheduled by bankrupt, creditor's right to equal opportunity to participate in administration of bankrupt's estate will not be disregarded on surmise that participation would have "made no difference."

The affidavit of the trustee in bankruptcy showed that he received all votes of all creditors attending meeting called to elect trustee, and that, if plaintiff had been present and had voted for any other trustee, it would not have made any difference in election.

Appeal from the Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Theodore W. Brown against E. Tropp. Defendant's motion to recall execution was denied, and he appeals.

Affirmed.

De Groot & Schaumer, of Los Angeles (Samuel De Groot, of Los Angeles, of counsel), for appellant.

Meserve & Meserve, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for respondent.

FINCH, P. J.

This is an appeal by the defendant from an order denying his motion to recall an execution issued on the judgment herein and to stay the execution of the judgment perpetually, on the ground that the judgment "was discharged by the defendant being adjudicated bankrupt on the 10th day of July, 1926," and "discharged in bankruptcy on the 5th day of November, 1926, and * * * that the claim upon which the judgment was obtained was scheduled as a liability in said bankruptcy."

It appears that the judgment, which was for the amount of a promissory note and interest thereon, was entered December 10, 1924. In his affidavit in support of the motion, the defendant states "that he filed his schedules in said bankruptcy and in the said schedules was included the name of the plaintiff, * * * Theodore Brown; that the address of the said Theodore Brown at the time of filing said schedules was unknown to the affiant; that this affiant exercised every means in his possession in the city of San Francisco to determine the address of said Theodore Brown; that this affiant believed that one Carroll Allen, attorney in the city of Los Angeles, was acquainted with said Theodore Brown and said Theodore Brown's address, being unknown to the affiant, his address was scheduled in care of said Carroll Allen, of the city of Los Angeles, State of California."

The affidavits on behalf of the plaintiff are amply sufficient to warrant the inference that, at the time the schedule was filed, the defendant knew that the plaintiff was residing in Los Angeles and his particular street address therein, that the plaintiff had no notice or knowledge of the bankruptcy proceedings prior to June 20, 1927, and that he was not formally notified of said proceedings or notified to file his claim therein until July 9, 1927; and it must be presumed in support of the order that the court found the facts accordingly. The time for making proof of claims expired July 10, 1927.

Section 7 of the Bankruptcy Act (11 USCA § 25) provides that a bankrupt must set forth in his schedule "a list of his creditors, showing their residences, if known, if unknown, that fact to be stated." Section 17 (11 USCA § 35) provides: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankrupty."

[1, 2] Since the defendant knew the residence of the plaintiff and failed to state it in his schedule, the burden was on him to prove that the plaintiff had notice or knowledge of the proceedings in bankruptcy. Hill v. Smith, 260 U. S. 592, 43 S. Ct. 219, 67 L. Ed. 419; Miller v. Guasti, 226 U. S. 170, 33 S. Ct. 49, 57 L. Ed. 173; Santa Rosa Bank v. White, 139 Cal. 703, 73 P. 577. It has been held sufficient in such a schedule to give the name of the city in which a creditor resides, without stating his street address. Kreitlein v. Ferger, 238 U. S. 21, 35 S. Ct. 685, 59 L. Ed. 1184. But the defendant not only failed to state the plaintiff's street address, but he gave a false address. The plaintiff states in his affidavit that he did not know Carroll Allen and had never heard his name mentioned "until advised thereof by the reading of the affidavit of said defendant." It is to be presumed that the court found this statement to be true.

[3] The fact, if it be a fact, that the plaintiff had knowledge of the bankruptcy proceedings on and after June 20, 1927, is not sufficient to warrant a reversal of the order. In Birkett v. Columbia Bank, 195 U. S. 345, 25 S. Ct. 38, 40, 49 L. Ed. 231, it appears that the bankrupt was discharged September 12, 1899, and the creditor in question had no notice or knowledge of the proceeding until November, 1899. After stating these facts, the court said:

"Knowledge, therefore, it is contended, came to defendant in error in time to prove its claim (§ 65 [11 USCA § 105]), and to move to revoke the discharge of the bankrupt (§ 15 [11 USCA § 33]). It is hence argued that defendant in error must be held to have had 'actual knowledge of the proceedings in bankruptcy,' as those words of § 17 must be construed. We do not think so, nor is that construction supported by the other provisions of the law urged by plaintiff in error. Actual knowledge of the proceedings, contemplated by the section, is a knowledge in time to avail a creditor of the benefits of the law,—in time to give him an equal opportunity with other creditors,—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate, or to deprive him of dividends (§ 65). The provisions of the law relied upon by plaintiff in error are for the benefit of creditors, not of the debtor. That the law should give a credi-

tor remedies against the estate of a bankrupt, notwithstanding the neglect or default of the bankrupt, is natural. The law would be, indeed, defective without them. It would also be defective if it permitted the bankrupt to experiment with it,—to so manage and use its provisions as to conceal his estate, deceive or keep his creditors in ignorance of his proceeding, without penalty to him. It is easy to see what results such looseness would permit, —what preference could be accomplished and covered by it."

[4] In the affidavit of the trustee in the bankruptcy it is stated that no dividends were declared prior to July 10, 1927, that the affiant received all of the votes of all the creditors attending a meeting called to elect a trustee, and that, had the plaintiff been present at such meeting and had "voted for any other trustee, it would not have made any difference in the election of trustee and affiant would nevertheless have been so elected." As stated in the case last cited, the plaintiff was entitled to "an equal opportunity with the other creditors" to participate "in the administration of the affairs of the estate," and this right is not to be disregarded on the surmise or conjecture that his participation therein would have "made no difference."

The order is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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106 Cal. App. 346

RIGHETTI v. MONROE, LYON & MILLER, Inc.

Civ. 7364.

District Court of Appeal, First District, Division 2, California.

June 11, 1930.

Appeal and error ⟹800.

Where transcript was filed February 26, and points and authorities May 3, motion presented May 12 to dismiss appeal for delay was denied.

Appellant's attorney served and filed affidavit from which it appeared he was diligently employed during period of his apparent delay, and that he did not neglect this appeal, but was prevented by overwork from filing his points and authorities at earlier date. Affidavit also showed appeal had been taken and presented in good faith, and that delay had not appreciably postponed hearing on merits.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by A. A. Righetti against Monroe, Lyon & Miller, Incorporated. From a judgment for plaintiff, defendant appeals. On motion to dismiss appeal.

Motion denied.

Arnold C. Lackenbach, of San Francisco, for appellant.

Roy Daily, of San Francisco, for respondent.

STURTEVANT, J.

This is a motion to dismiss an appeal. The motion is based on the ground that the appellant did not file its points and authorities within the time allowed by law. The transcript was filed February 26, 1930. Notice of the presentation of this motion was served April 7, 1930. The notice was accompanied with an affidavit of the attorney for the respondent. In that affidavit it is stated that no order has been made and that no stipulation has been made extending the time to file said points and authorities. The motion was noticed for presentation on May 12, 1930, and on that day it was presented. Prior to that time, to wit, on May 3, 1930, the points and authorities were printed and filed and were on file when the motion was presented. The appellant's attorney has served, filed, and presented an affidavit from which it appears that he was most diligently employed during the period of his apparent delay; that he did not neglect this particular piece of work; but that he was overworked and could not get the points and authorities on file at an earlier date. Furthermore, the affidavit shows that the appeal has been taken and presented in good faith and that the delay has not appreciably postponed the hearing of the appeal on its merits.

We think the motion should be denied, and it is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

CHURCH v. BOARD OF SUP'RS OF FRESNO COUNTY et al.*

Civ. 310.

District Court of Appeal, Fourth District, California.

June 11, 1930.

Rehearing Denied July 7, 1930. Hearing Granted by Supreme Court Aug. 7, 1930.

1. Constitutional law ⚷48.

Statutes ⚷206.

Courts must construe statute to give it full effect as far as possible, and to uphold it if language used will reasonably permit (Civ. Code, § 3541).

2. Constitutional law ⚷48.

Courts will not hold law invalid unless clearly compelled to do so.

3. Criminal law ⚷90(4).

Jurisdiction of police court of city of Fresno *held* limited to proceedings arising within city limits, so that there was existing office of justice of peace which supervisors of county were required to fill.

The charter of the city of Fresno provides that "within the city limits" city police court shall have concurrent jurisdiction with township justice court in all matters within justice court's jurisdiction, and that the police court shall have such jurisdiction "in the city" as may hereafter be conferred on the township justice court. It must be presumed that phrases "within the city limits" and "in the city" were used advisedly, and that accordingly the jurisdiction of the police court of the city of Fresno is less than that of the city justice court.

4. Criminal law ⚷90(4).

Justices of the peace ⚷39½.

City justice court can hear cases where crimes were committed or cause of action occurred outside city limits.

Original proceeding by Earle J. Church for mandamus to be directed to the board of supervisors of the County of Fresno and W. A. Collins and others, members of the board.

Peremptory writ granted.

B. W. Gearhart, Loren A. Butts, and David E. Peckinpah, all of Fresno, for petitioner.

Glenn M. DeVore, Dist. Atty., and Arthur C. Shepard, Deputy Dist. Atty., both of Fresno, for respondents.

MARKS, J.

This is an original proceeding instituted in this court whereby the petitioner, who is an attorney duly licensed to practice in all the courts of California, and is a resident and taxpayer of the city of Fresno, seeks a peremptory writ of mandate directed to respondents, who compose the board of supervisors of Fresno county, commanding them to fill the office of justice of the peace of the city of Fresno. The parties hereto have stipulated to all of the facts in this case. The sole issue for us to determine is whether or not, under the provisions of the Constitution and laws of California, and of the charter of the city of Fresno, there is existing the office of justice of the peace of such city.

Recent decisions of the Supreme Court and of the District Courts of Appeal have clearly and fully established the rule of laws which must govern us in reaching our conclusions in this case. In re Lovall (Cal. Sup.) 279 P. 452, 453; Proctor v. Justice's Court of City of Berkeley (Cal. Sup.) 285 P. 312; Robertson v. Langford, 95 Cal. App. 414, 273 P. 150, 154; Kenyon v. Johnson (Cal. App.) 276 P. 110; Frioux v. Johnson (Cal. App.) 276 P. 128. From these decisions it appears that the law is well settled to the effect that if the jurisdiction of the police court of the city of Fresno is equal, joint, and concurrent in all respects to the jurisdiction of the city justice court, were there one that the establishment of a city justice court would not be permitted by law; but if the jurisdiction of the city justice court is greater and extends beyond the jurisdiction of the city police court, then the city justice court exists and the office of city justice of the peace must be filled by respondents. In other words, if cases, actions, or proceedings can be heard in the city justice court, of which the city police court would have no jurisdiction, then the creation of a city police court under the charter of the city of Fresno would not automatically supersede and terminate the city justice court and the office of city justice of the peace.

The determination of this question rests entirely upon the construction to be given to the language of the charter of the city of Fresno authorizing the city police court, and under which this court was created. This charter provides as follows:

"Within the city limits, said court shall have concurrent jurisdiction with township justices courts in all matters and things in which said justice courts now or hereafter may have jurisdiction; and said police court shall have in addition to the special jurisdiction conferred in this article, like authority, power, and jurisdiction in the city as now or hereafter may be conferred upon township justices courts."

In the case of Robertson v. Langford, supra, it was held that under the language of the charter of the city of San José, the jurisdiction of the police judge of such city was equal and coextensive with that which would

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied 290 P. 522.

be exercised by a city justice of the peace, were there one, and that therefore the city justice court was abolished by the provisions of the charter of the city of San José creating the city police court. The provisions of this charter were as follows:

"Said police court and police judge shall have all the powers, authority and jurisdiction, both civil and criminal, that are now or may hereafter be conferred by law upon justices of the peace in California."

In the case of In re Lovall, supra, the Supreme Court held that the creation of a city police court under the charter of the city of Stockton did not abolish the city justice court, because the justice court had larger jurisdiction than the police court. The provisions of the charter of the city of Stockton under which the city police court was created, were as follows:

"Said police court shall have exclusive jurisdiction of all misdemeanors punishable by fine or by imprisonment * * * committed within the corporate limits of the city. * * * Said police court shall have jurisdiction in all civil cases, concurrently with the justices' courts of all actions and proceedings arising within the corporate limits of the city and which might be tried in such justices' court."

It will be observed that the charter of the city of San José did not limit the jurisdiction of the city police court to cases arising within the city limits, while the charter of the city of Stockton did contain such a limitation.

It will be further observed that the charter of the city of Fresno provides that within the city limits the police court shall have the same jurisdiction as a justice's court in the city. It is necessary for us here to construe the phrases "within the city limits" and "in the city," as used in the Fresno charter. If these phrases are words of limitation of the jurisdiction of the city police court giving the jurisdiction only in cases and proceedings arising within the city limits, the writ of mandate must be granted.

[1, 2] It is a well-settled rule of statutory construction in California that the courts must construe a statute or law so as to give it full force and effect as far as is possible, so that it may stand in its entirety. Kydd v. San Francisco, 37 Cal. App. 598, 174 P. 88; Hunt v. Manning, 24 Cal. App. 44, 140 P. 39. If the language used will reasonably permit, a construction will be given a statute which will sustain it and will render it valid and operative rather than defeat it. Section 3541, Civ. Code; Glassell Development Co. v. Citizens' National Bank, 191 Cal. 375, 216 P. 1012, 28 A. L. R. 1427; Cuthbert v. Woodman, 185 Cal. 43, 195 P. 673. The power to adopt a city charter is vested in the electors of the city, subject to the approval of the Legislature of the state. The courts will not hold a law invalid, or a provision of the law inoperative and without effect, unless it is clearly compelled to do so by the circumstances of the case. Bickerdike v. State, 144 Cal. 681, 78 P. 270.

When the people of the city of Fresno adopted the city charter, and used the language "within the city limits" and "in the city" in connection with the jurisdiction of the city police court, we must conclude that they intended to give these words some effect and meaning and used them in their usual ordinary sense. If the police court of the city of Fresno was to be given jurisdiction equal to the jurisdiction of a city justice court, the section of the charter in question could have read as follows:

"* * * Said court shall have concurrent jurisdiction with township justices' courts in all matters and things in which said justices' courts now or hereafter may have jurisdiction; and said police court shall have in addition to the special jurisdiction conferred in this article, like authority, power, and jurisdiction * * * as now or hereafter may be conferred upon township justices' courts."

[3, 4] With these two phrases under consideration, eliminated from the charter provisions, its effect is exactly similar to the provisions of the charter of the city of San José, which we have quoted. We must conclude that these two phrases were inserted in the charter advisedly and for some purpose, as we cannot conclude that the freeholders who prepared the charter, and the electors who adopted it, would do a useless act. With these phrases inserted, the charter provision is of similar character to the provision of the charter of the city of Stockton which we have quoted. We are of the opinion that the two phrases were used with the definite intention of limiting the jurisdiction of the police court of the city of Fresno to cases, actions, and proceedings arising within the city limits of the city of Fresno, and that therefore the jurisdiction of the police court of the city of Fresno is less than that of the city justice court. The city justice court possesses jurisdiction extending beyond the limits of the city of Fresno, and also possesses jurisdiction to hear and determine certain civil cases, certain criminal cases, and preliminary examinations, where the crimes were committed, or the cause of action occurred outside the city limits. In re Lovall (Cal. Sup.) 279 P. 452; Proctor v. Justice's Court of City of Berkeley (Cal. Sup.) 285 P. 312; Robertson v. Langford, 95 Cal. App. 414, 273 P. 150; Kenyon v. Johnson (Cal. App.) 276 P. 110; Frioux v. Johnson (Cal. App.) 276 P. 128.

Let the peremptory writ of mandate issue as prayed for.

We concur: BARNARD, Acting P. J.; OWEN, Justice pro tem.

106 Cal. App. 616

PEOPLE v. REID.

Cr. 104.

District Court of Appeal, Fourth District, California.

June 20, 1930.

Rehearing Denied June 30, 1930.

1. Criminal law ⚷301.

Court properly denied motion to withdraw plea for purpose of moving to set aside count charging manslaughter.

Defendant's argument was based on premise that appellate court had expressly held there was no probable cause shown for binding over defendant for trial on count charging manslaughter, but language of decision of appellate court in habeas corpus proceeding was to effect that, if only basis for commitment was charge of manslaughter, court might be justified in holding that proof was insufficient to establish probable cause, and thus there was no express holding made on point.

2. Automobiles ⚷355(8).

In prosecution for failing to render assistance following automobile accident, evidence warranted jury's finding pedestrian struck by automobile lived several minutes and was in need of assistance.

3. Indictment and information ⚷125(47).

Count of information *held* to charge only failure to render assistance to pedestrian struck by automobile, and not failure to stop (St. 1923, p. 562, § 141, as amended, St. 1929, p. 544, § 62).

The count referred to charged: "The District Attorney of County of F. hereby accuses J. A. R. of felony, to-wit: Failure to Stop and Render Assistance (Violation of Section 141 of the California Vehicle Act [St. 1923, p. 562, as amended, St. 1929, p. 544, § 62])," in that defendant while driving motor vehicle struck pedestrian, resulting in injury and death of pedestrian, and, after striking pedestrian, defendant did not immediately thereafter render pedestrian reasonable assistance, in that he did not carry pedestrian to physician, surgeon, or hospital for medical or surgical treatment, it being apparent at the time that such treatment was necessary.

4. Automobiles ⚷357.

Where motorist was charged with failure to render assistance to pedestrian struck, instruction jury might find him guilty of not immediately stopping *held* erroneous.

5. Automobiles ⚷355(8).

Evidence *held* sufficient to warrant conviction for failure to render assistance to pedestrian struck by automobile (St. 1923, p. 562, § 141, as amended, St. 1929, p. 544, § 62).

6. Criminal law ⚷1184.

Where count charged only failure to render assistance following automobile accident, but defendant was convicted also of failing to stop, error could be rectified by appellate court (Pen. Code, § 1260).

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

James A. Reid was convicted of failing to stop and render assistance following an automobile accident, and he appeals.

Reversed in part, and in part affirmed.

See, also, 284 P. 518.

B. M. Benson, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

CAREY, P. J.

The defendant was charged in the information with manslaughter in the first count and a violation of section 141 of the California Vehicle Act in the second. The jury was unable to agree on the first count. The second count, from a conviction on which defendant appeals, is as follows:

"Second Count. The District Attorney of the County of Fresno hereby accuses James A. Reid of a felony, to-wit: Failure to Stop and Render Assistance (Violation of Section 141 of the California Vehicle Act), in that on or about the 18th day of November, 1929, in the County of Fresno, State of California, while driving a motor vehicle, the said James A. Reid collided with and struck one Clarence T. Linstrum, which said collision and striking thereby resulted in the injury and death of the said Clarence T. Linstrum; that after colliding with and striking the said Clarence T. Linstrum with the motor vehicle which he, the said James A. Reid was then and there driving, the said James A. Reid did not immediately thereafter render to the said Clarence T. Linstrum, injured by the said collision, reasonable assistance, in that he did not carry the said Clarence T. Linstrum to a physician, surgeon or hospital for medical or surgical treatment, it being apparent at such time that such treatment was necessary."

There was no eyewitness to the accident, but the evidence showed that Linstrum had been seen walking along the highway in a westerly direction about 8:30 o'clock on the night in question. An automobile likewise traveling westward in the same vicinity at

a high rate of speed struck some object with sufficient force to cave in the bar upon which the front license plate was fastened and to cave in the radiator and the front portion of the hood, giving evidence of a terrific impact. The car was seen to stop, back up, stop, and then drive away all within a brief space of time. A few minutes thereafter Linstrum was discovered lying on the road crushed and mangled, and various articles carried on his person prior to the accident were found scattered along the roadway at intervals over a distance of approximately 130 feet. Broken portions of a headlight lens identical with the lens in the defendant's car and one of the license plates from defendant's car were found near the scene. Without giving the evidence in detail it may be said that the circumstances left no reasonable doubt but that the car driven by defendant had caused the death of Linstrum.

The court instructed the jury in part as follows:

"You are instructed that the California Vehicle Act provides as follows:

" 'Duty to Stop in Event of Accident: The driver of any vehicle involved in an accident resulting in injury or death to any person shall immediately stop such vehicle at the scene of such accident,' and 'shall also give his name, address and the registration number of his vehicle and exhibit his operator's or chauffeur's license to the person struck or to the driver or occupants of any vehicle collided with, and shall render to any person injured in such accident, reasonable assistance, including the carrying of such person to a physician, surgeon, or hospital for medical or surgical treatment, if it is apparent that such treatment is necessary, or such carrying is requested by the injured person', and 'any person failing to stop or to comply with said requirements under such circumstances shall be guilty of a felony.' "

"You are instructed that the failure on the part of any person to do or perform any one of the acts required by section 141 of the California Vehicle Act, as defined for you in these instructions, is a separate offense, and, therefore, even though the defendant complied with one or more of the requirements of said section, he may still be convicted of the violation of said section, if you find from the evidence, beyond a reasonable doubt, that he failed to do one or more of the acts required by said section."

"Therefore, under the second count of the information in this case, you may render any two of the following verdicts:

"First: Guilty of a violation of Section 141 of the California Vehicle Act in not immediately stopping his vehicle at the scene of such accident;

"Second: Not guilty of a violation of Section 141 of the California Vehicle Act in not immediately stopping his vehicle at the scene of such accident;

"Third: Guilty of a violation of Section 141 of the California Vehicle Act in not rendering to the person injured in such accident reasonable assistance;

"Fourth: Not guilty of a violation of Section 141 of the California Vehicle Act in not rendering to the person injured in such accident reasonable assistance."

Two verdicts were returned as follows:

"We, the jury in the above entitled action, find the defendant James A. Reid guilty of a violation of section 141 of the California Vehicle Act in not rendering to the person injured in such accident reasonable assistance. R. S. McLellan, Foreman."

"We, the jury in the above entitled action, find the defendant James A. Reid guilty of a violation of section 141 of the California Vehicle Act in not immediately stopping his vehicle at the scene of such accident. R. A. McLellan, Foreman."

The judgment, after reciting the various proceedings had prior to and during the trial, also included copies of the two verdicts and then contained the following:

"That whereas, the said James A. Reid having been convicted of a crime of Violation of section 141 of the California Vehicle Act, as charged in the second count of the information,

"It is therefore ordered, adjudged and decreed, That the said James A. Reid, be punished by imprisonment in the State Prison of the State of California, at San Quentin, California, until legally discharged, and that the sentence on each verdict of conviction run concurrently."

Defendant assigns some 28 errors, most of which concern rulings on evidence and the balance instructions, misconduct of the district attorney, insufficiency of the evidence to sustain the verdicts, and denial of defendant's application to withdraw his plea to the first count in order that he might move to set that count aside.

[1] Defendant, after entering a plea of not guilty to the first count, made application to this court for a writ of habeas corpus upon the ground that the evidence adduced at the preliminary hearing failed to show the probable cause requisite to hold him for trial in the superior court. This court, after a hearing, dismissed the proceedings and remanded defendant to the custody of the sheriff. In re Application of James A. Reid for Writ of Habeas Corpus (Cal. App.) 284 P. 518. Based on certain language in that decision defendant made application to the superior court to withdraw his plea to the first count for the purpose of moving to set aside that count, which application was denied. As there may

be a retrial under that count we will here consider the correctness of this ruling.

Defendant's entire argument is based on the premise that, this court having expressly held there was no probable cause shown for binding over the defendant for trial on the first count of the information, the superior court erred in refusing to allow him an opportunity to move to set aside that count. It is true that the following language is found in the opinion: "There is however nothing to support the conclusion that the accident was occasioned by the criminal negligence of the driver." However, the court later says: "If the only basis for the commitment was the charge of manslaughter we might be justified in holding that the proof was insufficient to establish probable cause," thus clearly showing that no express holding was made on that point, since none was necessary. There was thus no error in the denial of the motion.

Defendant assigns as prejudicial error the language used in a number of instances by the district attorney in his closing argument. A review of the record shows, however, that in practically all instances complained of the court carefully admonished the jury to disregard these remarks and in the few instances, where no admonition was given, the remarks were well within the legitimate field of argument.

We have carefully examined the record regarding rulings on evidence and find no errors of sufficient importance to be considered prejudicial.

Counsel for defendant asserts with great earnestness that the evidence is insufficient to support the verdicts of guilty on the second count. The argument is as follows: First, but one offense was charged in that count, namely, failure to render assistance in that defendant did not carry Linstrum to a physician, surgeon or hospital for treatment, it being apparent that such treatment was necessary. Second, the evidence shows without contradiction that Linstrum died immediately. And, third, instead of it being apparent as charged in the information that it was necessary to carry Linstrum to a physician, surgeon, or hospital for treatment, it was on the contrary apparent that Linstrum was beyond all need for any such treatment, and therefore defendant was under no duty to carry Linstrum anywhere.

[2] The first of these contentions must be sustained, as will be more fully developed later. Now as to the second—the immediate death of Linstrum. While counsel quotes testimony of a physician who gave as his opinion that Linstrum died instantly from the injury, yet there is evidence in the record which, if believed by the jury, might well have led to a contrary conclusion. The witness Crumley while driving east on this same road had passed Linstrum shortly before the accident. Crumley, just as he stopped at a farmhouse near by, heard the sound of the impact without then realizing what had happened. In order to make clear the interval of time elapsing between the impact and the time Crumley discovered Linstrum lying on the highway we give his testimony at this point in some detail. He saw the lights of a car which other testimony clearly showed to be that driven by the defendant stop for approximately 30 seconds, then back up, then stop another 30 seconds, and then drive on. Crumley then went into the ranchhouse on an errand which took approximately 3 minutes and then entered his car and drove west about 150 feet when he discovered Linstrum lying in the roadway. He then testifies that he ran to the nearest house and told the occupant "there was a man lying out in the roadway and he was not quite dead yet." When asked how he knew the man was not dead he replied: "His fingers were moving." It is thus apparent that the jury had ample evidence upon which they could have found that Linstrum lived for several minutes after the accident and was in need of assistance, which included being carried to a physician for treatment. The argument of counsel that no assistance was necessary being based as it is upon a false premise is without merit.

Nothing herein should be construed as holding that, even where a person is killed instantly, the driver whose vehicle caused the death is relieved from the necessity of rendering reasonable assistance, since that situation is not before us for decision.

[3] Now as to whether the second count charges two offenses or merely one. Appellant maintains that but one offense was charged, namely, failure to render assistance in that defendant did not carry the injured person to a physician, surgeon, or hospital for medical or surgical treatment, it being apparent at such time that such treatment was necessary. Counsel for respondent insists that the second count charges not only the offense conceded by appellant, but also failure to stop immediately. A careful examination of that count shows that, except for the following: "The District Attorney of the county of Fresno hereby accuses James A. Reid of a felony to-wit Failure to Stop and Render Assistance (Violation of section 141 of the California Vehicle Act)," no mention of the failure to stop is made therein. The remainder of the count relates exclusively to the failure to render assistance. It could hardly be contended that an information containing merely the words quoted above would be a sufficient charge of either failure to stop, or failure to render assistance under section 141 of the California Vehicle Act (St. 1923, p. 562, as amended St. 1929, p. 544, § 62). It is therefore clear that under the second count defendant stood charged

only with failure to render assistance in not carrying Linstrum to a physician, surgeon, or hospital for medical or surgical treatment, it being apparent at such time that such treatment was necessary.

[4] While it is true that a failure to do any one of the several acts required by section 141 of the California Vehicle Act is a separate offense (People v. Scofield, 203 Cal. 703, 710, 265 P. 914), yet the trial court in giving the instruction quoted above regarding possible verdicts told the jury that they might find the defendant guilty of not immediately stopping his vehicle at the scene of the accident—an offense with which he was not charged—and, further, the jury returned such a verdict. Obviously this was error.

[5, 6] As to the offense with which defendant was actually charged in the second count of the information and of which he was found guilty, we find the judgment to be amply supported by the evidence and the record to be free from prejudicial error. The error regarding the alleged charge of failure to stop may, under the provisions of Penal Code, § 1260, be rectified by this court.

That part of the judgment relating to the charge of failure to stop is reversed, and that part relating to the charge of failure to render assistance is affirmed.

We concur: BARNARD, J.; MARKS, J.

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106 Cal. App. 469

WARREN v. BURCH et al.

Civ. 69.

District Court of Appeal, Fourth District, California.

June 16, 1930.

1. Appeal and error ⚷996, 1011(1).

Finding will not be disturbed on conflicting evidence, nor because different inferences may reasonably be drawn from testimony.

2. Money received ⚷18(3).

Evidence *held* sufficient to support judgment for defendant in action for money had and received.

Plaintiff alleged that defendant received sum belonging to plaintiff and assignors, which he agreed to pay them on demand, and that he without authority delivered it to another defendant; and that defendant, while acting as plaintiff's attorney, fraudulently appropriated money received for use and benefit of plaintiff and assignors.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action for money had and received by J. A. Warren against Charles E. Burch and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Luce & Swing and Hamilton & Lindley, all of San Diego, for appellant.

Wright & McKee, of San Diego, for respondent Burch.

Fredericks, Hanna & Morton, of Los Angeles, for respondents M. E. Lyon and Imperial Live Stock & Mortgage Co.

BEAUMONT, Justice pro tem.

Plaintiff's complaint is in two counts. The first alleges that defendant Charles E. Burch received the sum of $17,500 belonging to plaintiff and his assignors, which he agreed to pay them on demand, but that without authority he delivered the same to the other two defendants, M. E. Lyon and Imperial Live Stock & Mortgage Company. The second count alleges that Charles E. Burch was attorney of plaintiff and his assignors; that he, while acting as their attorney, received said sum of money for the use and benefit of plaintiff and his assignors; that, with the aid of defendant Lyon, he fraudulently appropriated it to his own use and to the use of defendants Lyon and Imperial Live Stock & Mortgage Company. Each count alleges demand was made on all defendants, but that payment was refused. In addition to the denials contained in the answer of each defendant, said Imperial Live Stock & Mortgage Company pleaded that plaintiff and his assignors had notice that the money in question was to be applied to the credit of George W. McCain and that there was no objection made thereto; that the money was so applied, and that the Imperial Live Stock & Mortgage Company had delivered to said McCain certain evidences of indebtedness; that McCain received the benefit of said money, and that defendant Imperial Live Stock & Mortgage Company by reason thereof had suffered detriment in the sum of $17,500. The court found against plaintiff's contentions. From the judgment in favor of defendants plaintiff has appealed solely on the ground of the insufficiency of the evidence.

[1, 2] There are substantial conflicts of evidence upon many of the material points of the case. The finding of the trial court will not be disturbed where the evidence is conflicting, nor can it be disturbed because of the fact that different inferences might be reasonably drawn from the testimony. Ritchey v. Watson, 204 Cal. 387, 268 P. 345. We are of the opinion the evidence is sufficient to support the judgment.

The evidence shows that the Imperial Investment Company, which will be herein referred to as the investment company, was a partnership, and that it undertook to sell securities of Imperial Live Stock & Mortgage Company, a corporation. The corporation will be designated as the mortgage company. Agents of the investment company sold stock in the mortgage company to J. A. Warren, plaintiff herein, and to Charles Hook, J. L. McCain, Pete McCain, Arthur McCain, George W. Cameron, and J. W. Vasey, plaintiff's assignors. A comparatively large quantity of this stock was purchased by George W. McCain. These men were, at the time of the purchase of stock in the investment company or had been prior thereto, engaged in the cattle business in San Diego county. Plaintiff and plaintiff's assignors, with the exception of Vasey and Cameron, were related either by blood or marriage to George W. McCain. George W. McCain died before the trial was had. At the time of the purchase of stock by plaintiff and his assignors, notes were given by them to the investment company in payment thereof. Certain of these notes were hypothecated to the Ramona State Bank. In 1923 complaint was made that the cattlemen had been defrauded, and the district attorney of San Diego County made an investigation of the charges. One of the stock salesmen was arrested; the matter was brought before the grand jury. George W. McCain, in addition to buying stock in the corporation, had borrowed money from it. The mortgage company had a mortgage upon some of his cattle, and suit was brought to foreclose this mortgage. The record shows that the mortgage company claimed that he had, without its consent and in violation of the terms of the mortgage, sold certain of the mortgaged cattle. It will not serve any purpose to go into further details of this phase of the evidence. It may be well to state, however, that it clearly appears that Charles E. Burch, representing the cattlemen, including George W. McCain, had various contacts with the investment company and the mortgage company regarding settlements of the controversies.

The evidence shows without conflict that C. W. Francis, one of the partners in the investment company, in March, 1924, placed the sum of $11,666.67 in the hands of his attorneys, Fickeisen and Richardson. After testimony as to how Francis had procured said sum, there appears in the transcript the following: "Q. And when you turned it over to your attorney, did you give any instructions as to disposition of that fund? A. Yes, sir." There was then transmitted by letter from Fickeisen and Richardson to Byron C. Hanna, acting as attorney for the mortgage company, the said sum of money. Accompanying the money were ten promissory notes of appellant, his assignors, and George W. McCain. Forms of release were also enclosed for execution by each of the cattlemen, and directions were given to the effect that when they were executed Hanna should, unless further instructed, deliver to Burch and Lyon, or either of them, the cashier's checks inclosed.

O. N. Shaw, formerly president of the mortgage company, according to the testimony of Hanna, deposited with Hanna $5,833.33 and stated to the latter that said sum was "to be applied in the settlement with George W. McCain. * * *" Hanna advised respondent Lyon that he had the checks and notes. Thereupon Lyon wrote respondent Burch under date of March 31, 1924. His letter is, in part, as follows:

"Mr. Hanna also advises me that he is in receipt of the necessary funds to conclude a settlement along the lines of our agreement, which he is authorized to deliver to the undersigned 'to be applied to the credit of Mr. George W. McCain and notes to Mr. Burch when Mr. Burch shall have had waivers and releases in the form enclosed with the communication above referred to executed by each of the persons above named and also by J. W. Vasey of Miramar, California.'

"I hand you herewith the waivers and releases which Mr. Hanna was requested to have executed in this matter, and when you have secured the execution of these documents, we will then be ready to conclude the matter.

"Mr. Hanna suggests in this case that you procure a letter of instructions from the persons whose notes have been deposited with him, authorizing him to deliver these notes to you upon compliance with the terms of this escrow."

Thereafter Burch procured the signatures of appellant and his assignors to the releases, and he received on their behalf the notes that had been given to the investment company and not hypothecated with the Ramona State Bank. Credit was given George W. McCain in the sum of $17,500, and evidences of his indebtedness to the mortgage company were surrendered to respondent Burch.

At the time of the execution of a release to the mortgage company, appellant signed the following letter:

"San Diego, Cal., April 2, 1924.

"Imperial Live Stock and Mortgage Company,
"Imperial Investment Company,
"M. E. Lyon, Vice President and General Manager of Imperial Live Stock and Mortgage Company,
"Byron C. Hanna, Attorney for Imperial Live Stock and Mortgage Company,
"Los Angeles, California.

"Gentlemen:

"In compliance with yours March 31, 1924, addressed to M. E. Lyon, Merchants National Bank Building, Los Angeles, California, you are hereby instructed to deliver to C. E. Burch, my attorney of San Diego, California,

any and all notes or evidences of obligations on the part of the undersigned herewith to the Imperial Live Stock and Mortgage Company or/and Imperial Investment Company concerning any and all transactions heretofore entered into.

"You are hereby further authorized and notified to accept for and in behalf of myself any and all receipts as may be signed by the said C. E. Burch for me and in my behalf as for me and in my behalf and stead with reference thereto.

"[Signed] J. A. Warren."

The letter of March 31, 1924, from Hanna to Lyon so referred to, tells of the receipt of checks from Fickeisen and Richardson, and states: "I am authorized to deliver these checks to yourself to be applied to the credit of Mr. McCain. * * *" The part that relates to application of the money to the credit of George W. McCain is quoted in Lyon's letter to Burch, also dated March 31, 1924, excerpt from which is set out hereinabove. Each of appellant's assignors signed a like letter to the one appearing over the signature of appellant Warren. Appellant and his assignors testified they did not know the contents of the letter from Hanna to Lyon when they executed the releases and wrote the letters. The conflict of evidence upon this point was resolved in respondents' favor.

The judgment is affirmed.

We concur: MARKS, Acting P. J.; BARNARD, J.

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106 Cal. App. 542

WILSON v. FLEMING et al.

Civ. 232.

District Court of Appeal, Fourth District, California.

June 18, 1930.

Rehearing Denied July 14, 1930. Hearing Denied by Supreme Court Aug. 11, 1930.

1. Executors and administrators ⟹97.

Broker could not recover on contract with executrices not providing for payment from proceeds of sale (Code Civ. Proc. § 1559).

Code Civ. Proc. § 1559, provides that executor or administrator may contract with bona fide agent to secure purchaser for real or personal property, which contract shall provide for payment of commissions to agent out of proceeds of sale to purchaser secured by him.

2. Executors and administrators ⟹97.

Failure of broker's contract with executrices to provide for payment from proceeds of sale was not cured by purchaser's part payment.

Purchaser had paid sufficient on contract to cover the commission claimed.

3. Executors and administrators ⟹97.

Procuring of purchaser, to whom sale was confirmed without execution of deed and mortgage, was not "actual sale" entitling broker to commission (Code Civ. Proc. §§ 1551, 1559).

Under Code Civ. Proc. § 1551, executor may make sale on credit, but must take mortgage or deed of trust for deferred payment. Section 1559, provides that by execution of contract with broker, no liability shall be incurred by estate unless actual sale is made and confirmed. Return of executrices showing sale on deferred payments, last of which was to be secured by trust deed, was confirmed, but purchaser thereafter defaulted.

[Ed. Note.—For other definitions of "Actual Sale," see Words and Phrases.]

4. Executors and administrators ⟹97.

Broker attacking order providing for payment of commission on contingency cannot recover without having commission fixed by court (Code Civ. Proc. § 1559).

Code Civ. Proc. § 1559, authorizes executor or administrator to contract with agent to secure purchaser for property, the contract to provide for payment of commission, amount of which must be fixed and allowed by court on confirmation of the sale. Court confirmed return of sale by executrices by order providing for payment of specified commission to broker upon payment by purchaser of specified sum. Purchaser defaulted, and broker, claiming agreement to pay commissions was unconditional, sued to reform order by striking out provision as to commission and to recover agreed commission.

5. Executors and administrators ⟹97.

Until court exercises discretion as to terms of sale by executrices, and amount payable before deed passes, there is no "actual sale" entitling broker to commission (Code Civ. Proc. §§ 1552, 1554, 1559).

Under Code Civ. Proc. § 1554, court must be satisfied that sale by executor or administrator was legally made and fairly conducted, and, under section 1552, it must examine into the advantage, benefit, and interest of the estate in having sale made. Section 1559, provides for payment of commission only on actual sale made and confirmed.

6. Executors and administrators ⟹97.

Court, in considering benefit to estate from sale by executrices, must consider any commissions to be paid (Code Civ. Proc. § 1552).

7. Executors and administrators ⟹97.

Alleged fraud of executrices, resulting in proper order as to payment of commissions to broker, did not harm broker (Code Civ. Proc. § 1559).

Code Civ. Proc. § 1559, requires executor's contract with brokers to provide for payment of commission from proceeds of sale, and allows commission only on actual sale made and confirmed. Broker claimed promise to pay commission was unconditional and alleged fraud on part of executrices in procuring entry of order which provided for payment of commission only upon making of specified payment by purchaser.

Appeal from Superior Court, San Diego County; Wm. D. Dehy, Judge.

Action by G. L. Wilson against Mabel Vivian Fleming and another, executrices of the last will and testament of A. G. Gassen, deceased. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Clarence S. Preston and Jesse George, both of San Diego, for appellant.

Sweet, Stearns & Forward and E. L. Eckert, all of San Diego, for respondents.

BARNARD, J.

In this action plaintiff seeks to recover a commission for his services, as a real estate broker, in finding a purchaser for land belonging to the estate of a decedent. The action finally went to trial on a fourth amended complaint, which itself had been twice amended. When the first witness was called to the stand the defendants objected to the introduction of any evidence on the ground that the complaint did not state facts sufficient to constitute a cause of action. After argument, the trial court sustained this objection and entered a judgment of dismissal of the action, from which judgment the plaintiff has appealed.

The complaint is lengthy, but for the purposes of this appeal it may be briefly summarized as follows: After alleging that the plaintiff is a licensed real estate broker, and that the defendants are the duly appointed executrices of the last will and testament of A. G. Gassen, deceased, it alleges that on or about September 22, 1922, pursuant to employment by the defendants in their said representative capacity, the plaintiff as a broker procured a purchaser who was desirous, willing, and able to purchase certain lands belonging to said estate; that the defendants entered into a contract to sell said land to said purchaser for $210,000, receiving $10,000 on account; that at the same time they agreed to pay the plaintiff the sum of $10,000 as a commission for procuring said purchaser; and that on October 23, 1922, they made a return of said sale to the court, praying confirmation thereof. It is then alleged that said return of sale "was and is in writing and subscribed by the defendants and each of them as such executrices, and contained a memorandum of their aforesaid agreement to pay plaintiff said sum of Ten Thousand Dollars (10,000.00) for his services in the finding of said purchaser as aforesaid, and negotiating said sale"; that the court later made an order confirming said sale and confirming said agreement to pay to the plaintiff the sum of $10,000; that the terms of sale as set forth in the return of sale were: $10,000 already paid; $10,000 on November 1, 1922; $65,000 on February 12, 1923; and $125,000 on February 12, 1924, the last payment of $125,000 to be secured by a trust deed on the property; and that in said return of sale the defendants set forth the following: "That the said Executrices have agreed, subject to the approval of this court, to pay a real estate broker a commission of $10,000 in the event said sale shall be consummated and the said property conveyed and disposed of as hereinbefore stated by virtue thereof."

It is then alleged that said defendants and their attorney "with the intent on the part of the defendants to defraud and deprive plaintiff of his right to the payment promptly of said broker's commission, and to deprive and defraud him of his said commission in toto in the event said purchaser should suffer default in the payment of said instalment of $65,000.00," falsely and fraudulently misled the plaintiff into believing that they would have said sale confirmed with a provision therein for the payment of a commission to plaintiff in any event, and without regard to whether any further payments were made by the purchaser, which is alleged to have been agreed between them; that, although the plaintiff was in court at the time the purported sale was confirmed, he did not hear what was said; and that, although plaintiff relied upon the good faith of defendants and their attorney, they fraudulently concealed from the court that they had agreed to pay plaintiff a commission in any event, and falsely, and with intent to defraud plaintiff, represented to the court that they had agreed to pay said commission only when the sum of $65,000 was paid. It is then alleged that in consequence of such fraudulent acts on the part of the

defendants, the court, in confirming the sale, provided for the payment of a commission as follows: "It is further hereby ordered that the said Executrices are hereby authorized to pay to G. L. Wilson, a real estate broker of the City of San Diego, California, the sum of Ten Thousand ($10,000.) Dollars as and for his commission for making said sale, such payment to be made only upon the execution by him of a receipt acknowledging the payment and satisfaction of all his charges and commissions in connection with said sale, and upon the payment to said Executrices, of the said sum of Sixty-five Thousand ($65,000.) Dollars."

It is then alleged that after said order of confirmation was filed the purchaser therein mentioned paid the defendants a second instalment of $10,000; that no other or further payment has ever been made by said purchaser; that said purchaser defaulted in the payment of the $65,000 when due; that several extensions of time were given him and thereafter the said contract of purchase was terminated and canceled; and that the defendants have ever since retained the amount paid as part of the assets of the estate. It is further alleged that the defendants failed to take steps to enforce payment from said purchaser, but later sold the land in question to another buyer; that the defendants failed to collect from the defaulting purchaser as deficiency a sum sufficient to pay plaintiff his commission; that shortly after the order of confirmation defendants paid the plaintiff $1,000, but failed to pay the rest of the amount due; that because of said provision of said order of confirmation of sale, which was secured by the false representations and fraudulent conduct of the defendants, the plaintiff is unable to collect the amount due him until said order of confirmation is corrected and reformed by striking therefrom the words "and upon the payment to said executrices of the said sum of Sixty-five Thousand ($65,000.00) Dollars." Plaintiff then prays that said order of confirmation of sale of real estate be by decree of the court corrected and reformed by striking out the words above mentioned, and that he recover $9,000 with interest, payable out of the assets of the estate of A. G. Gassen, deceased.

It is appellant's contention that the order confirming the sale was procured by fraud, in that the return of sale fraudulently set forth an agreement to pay a commission conditioned upon certain facts, when the actual agreement was to pay a commission without any conditions, and that under such circumstances an action in equity may be brought to reform and correct the order so fraudulently obtained, and declaring that the estate is holding the amount due to the plaintiff in trust for him.

Assuming that such a return of sale in an estate constitutes a sufficient memorandum under subdivision 6 of section 1624 of the Civil Code, and leaving out of consideration a number of other questions (such as whether the plaintiff herein was bound by his notice of the proceedings, both actual and constructive, and by his failure to pursue his remedy as an interested party in the probate proceedings; whether such an order confirming a sale of real estate could be modified in such a proceeding as this; and whether such fraud as is here alleged is extrinsic or intrinsic), we think that the complaint here shows upon its face that the plaintiff cannot recover, for a number of reasons.

[1] In the first place, plaintiff's right to recover depends upon section 1559 of the Code of Civil Procedure, and depends upon his having entered into a contract which not only meets the requirement of the statute of frauds, but meets the requirements of such section. This section provides that such a contract shall provide for the payment of a commission to an agent "out of the proceeds of sale to any purchaser secured by him." Even if we assume that such a contract between an executor and an agent need not be in writing, or that the contract referred to in this complaint was in writing, the complaint shows that no such provision as just quoted was contained in the contract here relied on. The complaint contains no allegation that the purported contract had any provision that such a commission should be paid out of the proceeds of the sale to the purchaser secured by the agent. Plaintiff throughout his complaint, in alleging the actual agreement as made and in alleging that the return of sale to the court fraudulently represented an agreement as to the commission which was not in fact made, alleges that the payment of the commission in question was never at any time or in any manner dependent upon whether anything was paid at all by the purchaser, but that the actual agreement was that the commission was to be paid "in any event." After a number of general allegations to that effect, the complaint contains a separate paragraph reading as follows:

"That there never was at any time any agreement by and between plaintiff and defendants or either of them that the payment of plaintiff's aforesaid broker's commission or any part thereof should await or depend upon any payment or payments to be made or agreed to be made by the purchaser of said land, but, on the contrary defendants, as such executrices, at the time of their employment of plaintiff as aforesaid, promised and agreed to pay him his aforesaid broker's commission at all events and when he should procure a purchaser of said lands at the aforesaid price and acceptable to them, all of which services were by plaintiff performed and rendered for defendants as hereinbefore alleged."

[2] Nor is the absence of such a provision in the contract relied on cured by the coincidence that in this particular case, according to the complaint, an amount of money had already been paid by the purchaser sufficient to just pay the commission claimed. Plaintiff's only right to a commission depends upon such a contract as is authorized by this section, and which complies with the requirements thereof. Neither he nor the executrices had the right to make a contract such as he claims to have made, whereby the commission was payable in any event when he had procured a purchaser, and which should not depend upon any payment, or upon any payments agreed to be made, by said purchaser. The contract must provide that the commission must be paid out of the proceeds of that particular sale. We think that to hold this provision of the statute does not mean what it says, would open the door to the many evils which the statute was thus worded in order to prevent. If that portion of the statute means nothing in one case, it means nothing in other cases, and to so hold would be to permit the making of such a contract, with that provision left out, in cases where the down payment was not sufficient to cover the commission claimed. The failure to comply with the positive provisions of the statute is not cured by the fact that in this case there was money available which happened to come from that source.

[3] In the second place, the complaint shows no actual sale was made within the meaning of section 1559 of the Code of Civil Procedure. This section provides in part: "By the execution of any such contract no personal liability shall attach to the executor or administrator, and no liability of any kind shall be incurred by the estate unless an actual sale is made and confirmed to the purchaser procured by said agent."

It is true that as between individuals, and unless the terms of their contract are to the contrary, the broker is entitled to a commission when the purchaser procured by him is accepted by the owner. The result in any case depends upon the contract in that case. But where such a contract is made with the executors of an estate, it is subject to the additional provisions and limitations of section 1559. In fact, this section is by law a part of any such contract, and the provisions thereof must be read into the same. Caine v. Polkinghorn, 54 Cal. App. 387, 201 P. 936. In the case of Dunne v. Colomb, 192 Cal. 740, 221 P. 912, 913, the court said: "The default of the vendee, with the consequent destruction of the right of the broker to his commission, was a contingency inherent in the contract, the risk of the occurrence of which was assumed by the broker."

That was so held in that case because the contract there in question provided that the commission was to be paid in the event a contract for the purchase of the land should be entered into by the buyer, and in the further event that the full purchase price should be paid. While a satisfactory contract was entered into and $10,000 paid down, the balance of the purchase price was never paid. The same principle applies in the instant case. Under section 1559, which must be read into plaintiff's contract and without which he has no right at all, it is particularly provided that no liability of any kind shall be incurred by the estate, unless the sale is confirmed to the purchaser procured by the broker and unless an actual sale is made. This last contingency is inherent in the contract, and the risk of a default by such a vendee must be assumed by the broker. Under section 1551 of this code, an executor is permitted to make a sale upon credit, but must take a mortgage or deed of trust for deferred payments. This necessarily implies the passing of a deed. We think that not until such a deed is passed, and a mortgage or deed of trust taken for such payments as are deferred, has a sale been actually completed within the meaning of section 1559. No other kind of sale is permitted by our law. We think this provision was expressly adopted for the purpose of protecting an estate from any liability for the payment of such a commission, in any case where the purchaser fails to complete the deal, even though the same has been confirmed by the court, and even though the contract for a commission would otherwise be binding under the preceding sentence of this section. Any other interpretation would open the door to innumerable frauds and to the frittering away of estates while they are in the hands of and under the protection of the court, both where the sale is fraudulent, and where it is, though honestly made, to a purchaser who cannot or will not complete the transaction.

[4-6] A third reason why the plaintiff may not recover in this action is that, under the circumstances alleged by him to be true, the amount of his commission has not been fixed by the court, which is a prerequisite under section 1559. While an amount was fixed by the court as being justly due and payable under certain conditions, plaintiff seeks by his complaint to set aside and wipe out those conditions and yet recover the amount fixed. Not only must the amount of the commission be fixed and allowed by the court, but the amount thereof is necessarily within the discretion of the court. Unquestionably, a proper use of this discretion would involve an allowance of compensation that was in fair proportion to the benefits conferred upon the estate. If, as may be assumed, $10,000 would have been a fair compensation for the plaintiff had the estate received the benefit of the sale in question and actually sold the land for $210,000, it would by no means follow that this was a fair amount to be allowed, if

all the estate received was $10,000, which amount had been paid prior to the confirmation. Not only has the court a discretion as to the amount of such commission, but under section 1554 of the same Code, the court must be satisfied that the sale was legally made and fairly conducted, and under section 1552 thereof, the court must examine into not only the necessity for the sale, but "the advantage, benefit and interest of the estate in having the sale made." As we understand the law, if a return had been made of the sale of the land here in question for $210,000 payable at $10 a month, the court would not have been compelled to confirm the sale. The requirement that the court must examine into the advantage, benefit, and interest of the estate in passing upon the sale, involves a duty upon the court to see that the terms of sale are fair. In performing this duty the court has a discretion in determining what the terms shall be and how much shall be paid before a deed to the land passes from the estate. We think that this discretion must be exercised, and that a proper compliance therewith must be had, before there is an actual sale within the meaning of this section. Until that occurs no commission ordered to be paid by the court can become a liability against the estate. In considering the benefits to the estate, the court must consider any commission to be paid, and unless the court abuses its discretion in naming the conditions upon which a commission will be paid in its order of confirmation, those conditions must be met before the estate is liable. In the instant case, the court has not fixed or allowed a commission to be paid under such circumstances as are alleged in the complaint to exist.

[7] Nor are the allegations of fraud set up by the plaintiff of assistance to him in the situation in which he finds himself. Aside from all other considerations, the fraud claimed and relied upon is that the court was fraudulently induced to enter an order along such lines as alone could be legally followed by the court, and that the defendants fraudulently failed to attempt to get the court to enter such an order as it could not legally enter. If the acts complained of were done by the defendants, they resulted in no harm to the plaintiff.

Many other points are raised and discussed in the briefs which it is unnecessary to consider under the view we take of the points we regard as controlling.

For the reasons given, the judgment is affirmed.

We concur: MARKS, Acting P. J.; AMES, Justice pro tem.

106 Cal. App. 659

SHIPLEY et al. v. SAN DIEGO ELECTRIC RY. CO.

Civ. 254.

District Court of Appeal, Fourth District, California.

June 24, 1930.

Rehearing Denied July 19, 1930. Hearing Denied by Supreme Court Aug. 21, 1930.

1. Street railroads ⟹85(1).

Public streets of city are constructed for use of all travelers, as regards respective rights of street railroads and automobiles.

2. Street railroads ⟹85(1).

Street cars have no greater right to use of streets than other traffic, except that others must recognize that street car travels upon tracks and govern themselves accordingly.

3. Street railroads ⟹85(1).

Rights and duties of users of public streets are reciprocal, subject to duty of free vehicle to yield way to street cars when necessary, and of motor vehicles to obey California Vehicle Act (St. 1923, p. 517, as amended).

4. Street railroads ⟹81(5).

Street car operator must exercise ordinary care in management and operation of car and in maintaining vigilant lookout.

5. Street railroads ⟹81(5).

Street car operator must use ordinary care, give usual warnings of approach, and take usual precautions to avoid injury to others.

6. Street railroads ⟹81(3).

Street car operator must operate car in manner and run it at speed customary at place.

7. Street railroads ⟹81(5), 99(1).

Street car operator, as well as automobilist, must be watchful for others in his path.

8. Trial ⟹253(4).

Instruction to find for defendant if automobilist carelessly assumed position of danger, from which he could not escape, and motorman, when aware of danger, made every effort to avoid collision but could not, *held* error, as omitting elements of defendant's negligence, proximate cause, and contributory negligence.

This instruction was erroneous in failing to take into consideration the street car operator's duty to the public, to use ordinary care in the operation of the car so that it might not injure other users of the highway. It deprived the jury of the

right to pass on the evidence before it, and to determine whether the street car operator in charge of the car had taken ordinary care towards the traveling public. It also omitted to consider and submit to the jury the questions of proximate cause and contributory negligence.

9. Negligence ⟹82.

Negligence alone is not bar to recovery unless proximate or contributing cause of accident.

10. Street railroads ⟹117(5).

In action for death, *held* that court should have submitted to jury question of street car operator's negligence at time and place of head-on collision.

Defendant's street car was traveling westwardly at a point where there was but a single track. Deceased's automobile was being operated on the south rail in an eastwardly direction. The track was on the south-half of this street. Deceased was killed in a head-on collision with the street car.

11. Appeal and error ⟹699(1).

Where instruction was incorrect statement of law and appellant quoted no portions of the record throwing light on question of prejudicial error, appellate court did not inquire into question of actual prejudice (Code Civ. Proc. § 953c; Supreme Court and District Courts of Appeal, Rule No. 8).

The lower court granted a new trial to plaintiff on the ground that an instruction was prejudicial error. Defendant appealed from this order. The statement of the law contained in the instruction was incorrect. Appellant did not quote from the very voluminous record such portions thereof as would indicate whether the incorrect statement of law was actually prejudicial to the rights of the plaintiff. Under those circumstances, it was not incumbent upon the appellate court to examine the record.

Appeal from Superior Court, San Diego County; James A. Allen, Judge.

Action by Mattie E. Shipley and Dorothy Louise Shipley, by her guardian ad litem, Mattie E. Shipley, against San Diego Electric Railway Company. Verdict for defendant. From an order granting plaintiffs' motion for new trial, defendant appeals.

Affirmed.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco (V. F. Bennett, of San Diego, and C. Coolidge Kreis, of San Francisco, of counsel), for appellant.

Heskett, Weinberger & Miller, of San Diego, and A. Fairchild, of Los Angeles, for respondents.

MARKS, J.

From the record before us it appears that James F. Shipley, the husband of Mattie E. Shipley and father of Dorothy Louise Shipley, a minor, was killed at about 6 o'clock on the morning of February 8, 1927, in a head-on collision with a street car belonging to appellant. The deceased was driving his automobile east on University avenue in the city of San Diego, county of San Diego, state of California, with its wheels astride of or near the south rail of the track of the appellant. On this street at the point of collision there was but a single track, both rails of which were on the south half of University avenue. Appellant's street car was being operated in a westerly direction by a motorman in the employ of appellant. There was also a conductor on the car.

Respondents sought to recover damages in this action, but after an extended trial the jury returned a verdict in favor of appellant. Respondents made a motion for new trial, which was granted upon the particular grounds of errors in four instructions to the jury, requested by appellant and given by the court. The correctness of this order is the question to be considered on this appeal.

The first of these instructions was as follows:

"If you find from the evidence that said James F. Shipley by reason of carelessness on his part placed or was placing himself and his automobile in a position of danger from which he was unable to escape and the motorman of the street car of the defendant, when he became aware of the danger of said James F. Shipley, used every effort on his part to avoid the collision, but was unable to do so, then the motorman of said street car was not negligent and the defendant is not responsible for the collision between the automobile driven by James F. Shipley and said street car and injury, damage or loss which plaintiffs may have sustained, and the plaintiffs are not entitled to any compensation whatever from the defendant and your verdict in that event must be in favor of the defendant and against the plaintiffs."

[1-7] In determining the question of whether or not this instruction correctly states the law in this state, we must consider the duty of one operating a street car upon a city street. It has been held by a long line of well-considered decisions that the public streets of a city are constructed for the use of all travelers, and that a public service cor-

poration operating street cars has no greater or superior right to use these streets than any other person or persons, with the exceptions, that, as the street car travels upon its tracks from which it cannot turn, other traffic must recognize this fact and govern itself accordingly, and the driver of a motor vehicle must obey the provisions of the California Vehicle Act (St. 1923, p. 517, as amended). The rights and duties of those in charge of a street car are reciprocal with the other users of the public streets. It is therefore the duty of one operating a street car to exercise ordinary care to avoid a collision with another user of the public street of a city. Simmons v. Pacific Electric Ry. Co., 60 Cal. App. 140, 212 P. 641; Langford v. San Diego Electric Ry. Co., 174 Cal. 729, 164 P. 398. The operator of an electric car upon a city street is charged with the duty of using ordinary care in the management and operation of his car (Henderson v. Los Angeles Traction Co., 150 Cal. 689, 89 P. 976), and to use ordinary care in maintaining a vigilant lookout for other users of the street (Charves v. Terminal Railways, 44 Cal. App. 221, 186 P. 154). It is the duty of an operator of a street car to use ordinary care and give to others on the street some warning of its approach (O'Connor v. United Railroads, 168 Cal. 43, 141 P. 809), and to operate street cars "in the manner and run them at the speed which is customary at the particular place, and that they will give the usual warnings and signals, and take the usual precautions to avoid injury to others" (Scott v. San Bernardino Valley, etc., Co., 152 Cal. 604, 93 P. 677, 679). The rights and duties of the users of the public streets are reciprocal, subject to the duty of free vehicles to yield a clear right of way to the operation of the street car over its tracks when necessary (O'Connor v. United Railroads, supra; Lawyer v. Los Angeles Pacific Co., 161 Cal. 53, 118 P. 237) and of motor vehicles to obey the provisions of the California Vehicle Act (Sartori v. Granucci, 204 Cal. 28, 266 P. 280). Ordinary care requires the operator of a street car, as well as the driver of a motor vehicle, to be watchful for others in his path. Havens v. Loebel (Cal. App.) 284 P. 676; Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027.

[8-10] The instruction which we have quoted omits to take into consideration the duty which the operator of appellant's street car owed to the public, to use ordinary care in the operation of the car so that it might not injure other users of the highway. To this extent it was erroneous and took away from the jury the right to pass on the evidence before it, and to determine whether or not the employees of appellant in charge of the car had taken ordinary care to perform their duties to the traveling public. It also omits to take into consideration and submit to the jury the questions of proximate cause and contributory negligence. Negligence alone will not bar a recovery unless it was either the proximate cause of the accident or contributed to it. The question of negligence of the employees of appellant in the operation of the street car at the time and place of the accident should have been submitted to the jury in this instruction.

[11] Respondent complained of this instruction because of the fact that there was a conductor on that street car, and, as stated by them in their brief, the conductor was in charge of the car, and that therefore any negligence on his part would be attributable to appellant and should have been submitted to the jury. No quotation from the testimony, or reference to any part of the transcript, which is typewritten, is contained in respondent's brief in support of this argument. Appellant's brief contains no quotation from the transcript. There is a statement in appellant's opening brief as follows:

"The street car was run to the end of the line at University and Euclid, and while the motorman changed the trolley the conductor switched the headlight from the east to the west end of the car in preparation for the return trip. However, before starting back it was the motorman's duty to make sure the headlight was properly lighted, assuming the visibility was such as to require this. These facts were testified to by both the motorman and the conductor (Rep. Trans. p. 535, line 18 to p. 539, line 24; p. 590, lines 7-22), and were not contradicted by plaintiffs."

This is the only reference to the reporter's transcript contained in any of the briefs before us. Thirty-three witnesses testified in the court below. The reporter's transcript contains 931 pages, besides several exhibits. We have read approximately 200 pages of this transcript, or a little more than one-fifth of it, and have failed to find, in the testimony read, any evidence of negligence on the part of the conductor.

We desire to call counsel's attention to the provisions of section 953c of the Code of Civil Procedure and rule 8 of the Rules of the Supreme Court and District Courts of Appeal of the state of California, and the interpretation thereof by the Supreme Court in the case of Bryant v. Kelly, 203 Cal. 721, 265 P. 817, 818, in which it was held as follows:

"Respondents' further motion to dismiss the appeal from, or to affirm, the judgment is made upon the ground that the appellant had not complied with the requirements of section 953c of the Code of Civil Procedure, which provides that, in filing briefs on appeals, taken on a typewritten record, the par-

ties must print in their briefs, or in supplements appended thereto, such portions of the record as they desire to call to the attention of the court, and on which they rely to justify a reversal of the judgment or order appealed from. * * * The record on appeal in this case consists of 190 typewritten pages. The amended complaint covers 34 pages without the exhibits attached thereto, one of which, comprising the clerk's and reporter's transcripts of the proceedings in a former action, including a number of exhibits, consists of 133 pages. Yet the appellant has printed in his brief but 8 very short extracts from the record, all of them being fragmentary quotations from the exhibits to the amended complaint. Appellant must be credulous to think that the court can be induced by him to believe that this 'little leaven leaveneth the whole lump.' We are not called upon to make an independent examination of the record necessary to determine whether or not it does. * * * The motion to affirm the judgment is also granted."

In the case of Hamlin v. Pacific Electric Railway, 150 Cal. 776, 89 P. 1109, 1112, it was held as follows:

"It is incumbent upon the party appealing to show, not only abstract error, but error prejudicial to him upon the facts in evidence, and, to avail himself of the point that an instruction was erroneous, he must bring before the court sufficient evidence to show that, upon a proper instruction, there might have been a finding in his favor. If he does less than this, he presents for consideration a mere question of abstract error."

The instruction which we have heretofore quoted was not a correct statement of the law. The trial court has held that it was prejudicial to the rights of respondents. From the portions of the records which we have read there might have been some reasonable question as to the correctness of this conclusion. However, the question of whether the instruction was actually prejudicial to the rights of respondents was not argued nor presented in any of the brief before us. To pass upon it here would require a careful reading and analysis of the entire record. As counsel for appellant has not seen fit to undertake the very considerable task of presenting this question to us, we can see no reason why we should be called upon to do this work for them. It is not necessary to consider the other instructions complained of.

Order granting a new trial is affirmed.

We concur: CARY, P. J.; AMES, Justice pro tem.

106 Cal. App. 347

SOUZA v. MARKET ST. RY. CO. et al.

Civ. 7202.

District Court of Appeal, First District, Division 2, California.

June 11, 1930.

Rehearing Denied July 11, 1930. Hearing Denied by Supreme Court Aug. 7, 1930.

1. Carriers ⟹300.

Motorman of street car struck by fire engine *held* not negligent in stopping short distance beyond curb in intersecting street, instead of crossing street, after hearing siren (St. 1923, p. 560, § 133).

California Vehicle Act, § 133 (St. 1923, p. 560), requires that street car, crossing intersection when fire engine signals, be operated so as to clear intersection and then stopped.

2. Pleading ⟹350(3).

Defendant's motion for judgment on pleadings admitted untruth of its undenied allegations deemed controverted by statute (Code Civ. Proc. § 462).

Code Civ. Proc. § 462, provides that statement of any new matter in answer must be deemed controverted by plaintiff.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by John V. Souza against the Market Street Railway Company and the Underwriters' Fire Patrol of San Francisco. From judgments for defendants, plaintiff appeals.

Affirmed as to defendant street railway company and reversed as to defendant fire patrol.

B. M. Jackson, R. M. Estcourt, and William Sea, Jr., all of San Francisco, for appellant.

William M. Abbott, K. W. Cannon, Cyril Appel and Ivores R. Dains, all of San Francisco, for respondent Market St. Ry. Co.

J. Hampton Hoge, of San Francisco, for respondent Underwriters' Fire Patrol of San Francisco.

STURTEVANT, J.

The plaintiff was a passenger on one of the cars operated by the Market Street Railway Company. A collision occurred between engine No. 14 of the regular fire department of San Francisco and fire patrol No. 2, operated by Underwriters' Fire Patrol of San Francisco, in such a manner that engine No. 14 was thrown against the street car and the plaintiff was injured. He commenced this action and made the Market Street Railway Company one of the defendants, and he also made the Underwriters' Fire Patrol of San Francisco another defendant. The trial court granted

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

a motion for a nonsuit in favor of the Market Street Railway Company, and it granted a motion for judgment on the pleadings in favor of the Underwriters' Fire Patrol of San Francisco. The plaintiff appealed. We will take up the appeal as to the defendant the Market Street Railway Company first and the appeal as to the Underwriters' Fire Patrol of San Francisco will be considered later.

[1] The plaintiff contends that the trial court erred in granting the defendant's motion for a nonsuit. That company replies that the record does not present the question. It shows that the motion was made on February 25, 1929, and that on that date the court made a minute order granting the motion and that the minute order was at that time entered by the clerk. It shows also that a judgment was "Recorded Feb. 26, 1929, 1:30 o'clock p. m. Vol. 294 page 396," and "Judgment entered 3/21/29." It is headed, "Minute Order In Open Court, Monday, Feb. 25th, 1929." But, in form, it is the ordinary judgment for costs, and recites verbatim the minute order first mentioned. Continuing, it shows that the plaintiff appealed from that formal judgment, whereas it should have appealed from the minute order. There is a great deal that can be said in favor of this contention. Brown v. Sterling Furniture Co., 175 Cal. 563, 564, 166 P. 322; Carton v. Superior Court, 76 Cal. App. 434, 436, 244 P. 932; Henry v. Lingsweiler, 81 Cal. App. 142, 144, 253 P. 357; Burks v. Bronson, 58 Cal. App. 143, 144, 207 P. 1018. However, as we understand the record, we think it is unnecessary to pass on the point. Taking the evidence most favorable to the plaintiff, there was evidence supporting the following facts: On the 15th day of May, 1926, plaintiff and his family were seated on the left-hand side in the front portion of a McAllister street car traveling from east to west on McAllister street. When the car was in the neighborhood of Buchanan street, fire engines sounded their sirens. The street car stopped, and presently engine No. 14, while traveling east on McAllister, collided with fire patrol No. 2, and engine No. 14 scraped the side of the street car, thus causing the injury. The plaintiff's wife testified: "The street car had stopped and left off passengers, and then it started, and when the motorman, I guess noticed the fire truck was coming he stopped and I was knocked on the side of my arm." The witness, continuing, stated that the front gate of the street car at said time and place was a short distance from the sidewalk curb out in Buchanan street—it was the distance out there equal to the distance between the witness in the witness chair and the desk where the trial judge was sitting. The plaintiff cites this testimony and claims that the street car was negligent because it did not go clear across Buchanan street and then stop. California Vehicle Act (St. 1923, p. 560) § 133. In different sections the statute uses the verbs "enter" (section 131, as amended by St. 1925, p. 412, § 15), "approach" (section 133), "cross" (section 123 [St. 1923, p. 557]), and "traverse" (section 113, subd. (b). So far as the matter has been called to our attention, each of those words has been used with due care as to its accepted meaning. There is a clear distinction as to the meaning of each one of those words. Looking at the above evidence, it is clear that there was some evidence that at the time the street car stopped it had "entered" Buchanan street, but there was no evidence that it was "crossing" when the siren sounded. In stopping where it stopped, the car acted in accordance with the mandate of the statute—to clear the intersection. That is the purpose of the statute as addressed to such a set of circumstances. If the car had attempted to make the opposite corner, it would have placed itself as an immediate obstruction in the intersection in the path of the fire vehicle, which was traveling north on Buchanan street, and would have done the very thing the statute was enacted to prevent. There is not a particle of claim that in any other regard the motorman was negligent. The trial court did not err in granting the motion for a nonsuit.

[2] Before proceeding to discuss the judgment on the pleadings in favor of the underwriters, it is necessary to note the condition of the pleadings at the time the motion for judgment on the pleadings was made. The complaint contained ordinary allegations regarding the agency being operated by each defendant at the time and place of the accident. It then alleged general negligence as against both defendants. Continuing it alleged the injuries sustained by the plaintiff. The underwriters filed an amended answer in which it denied nearly every single allegation contained in plaintiff's complaint. Continuing, it pleaded affirmatively the contributory negligence of the plaintiff. Continuing further, it pleaded with meticulous care that it is a duly created benevolent corporation operated without profit and maintained by compulsory assessments upon its members; that it is formed and maintained for the purpose of discovering and preventing fire, of saving, at its own cost, property and human lives from conflagration and without any compensation therefor. Continuing, it pleaded some additional allegations to the effect that at the time and place of the accident it was exercising a governmental function. None of the affirmative allegations contained in the answer were denied by the plaintiff, but by operation of the statute they were all deemed denied. Code Civ. Proc. § 462. Under these circumstances, when the motion was made, it is patent that no particular set of facts could be said to be admitted or uncontroverted. In 49 C. J. 668, the rule is stated as follows: "Like a demurrer, the motion admits the truth of all well-pleaded facts in the pleadings of the opposing party, together with all fair

inferences to be drawn therefrom. The party moving for judgment on the pleadings also admits the untruth of his own allegations in so far as they have been controverted." The foregoing rule is applicable where allegations are deemed controverted by statute. Chemung Min. Co. v. Hanley, 9 Idaho, 786, 77 P. 226, 228; Seely v. Seely, 164 App. Div. 650, 150 N. Y. S. 66, 68. To the same effect are McGowan v. Ford, 107 Cal. 177, 40 P. 231, and Cuneo v. Lawson, 203 Cal. 190, 193, 263 P. 530.

The judgment in favor of the Market Street Railway Company is affirmed, and the judgment in favor of the Underwriters' Fire Patrol of San Francisco is reversed, and the plaintiff will recover one-half of his costs on appeal as against the last-named corporation.

We concur: NOURSE, P. J.; SPENCE, J.

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106 Cal. App. 434

PEOPLE v. GEONZELIS.

Cr. 1582.

District Court of Appeal, First District, Division 2, California.

June 14, 1930.

1. Infants ⟹20.

Conviction may be had for violation of statute on uncorroborated testimony of prosecuting witness (Code Civ. Proc. § 1844; Pen. Code § 288).

Pen. Code § 288, prohibits willful and lewd commission of lewd or lascivious acts upon body of child under age of fourteen with intent of arousing, appealing to, or gratifying lust or passions or sexual desires.

2. Infants ⟹20.

In prosecution for violation of statute, testimony of prosecuting witness *held* not, as matter of law, unbelieveable (Pen. Code, § 288).

Defendant argued that the story told by the prosecuting witness was such as to render it practically impossible that alleged act could have occurred, since place where act was claimed to have taken place was in full view of those passing by.

3. Criminal law ⟹939(1).

Denial of new trial for newly discovered evidence was not error, where no foundation was laid for assertion that testimony was newly discovered.

The newly discovered testimony would have been given by an employee of defendant, working in store where offense was alleged to have been committed, who would have stated that offense did not take place.

4. Criminal law ⟹1036(1).

Defendant, not having objected to testimony that he was Greek, cannot claim on appeal that asking of question was misconduct on part of district attorney.

5. Criminal law ⟹673(1).

If testimony that defendant was Greek was material and relevant, it was not erroneous because used for all purposes.

6. Criminal law ⟹825(4).

Defendant if he wished additional instruction on reasonable doubt should have asked for it (Pen. Code § 1096).

The court read Pen. Code § 1096, as instruction on reasonable doubt, and defendant claimed that court should have given more complete instruction on subject.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Louis P. Geonzelis was convicted of violating Penal Code § 288, and he appeals.

Affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for the People.

STURTEVANT, J.

The defendant was convicted of the violation of the provisions of section 288 of the Penal Code. He made a motion for a new trial. The motion was denied. From the order denying said motion and from the judgment of conviction, the defendant has appealed.

[1, 2] The defendant claims that he was convicted on the uncorroborated testimony of George Wagner, the prosecuting witness. Even though that were so, the law, in this kind of a case, does not require corroboration. Code Civ. Proc., § 1844; People v. Hulbart, 55 Cal. App. 112, 202 P. 939. In the next place, the defendant states that the story as told by the prosecuting witness was such as to render it practically impossible that the alleged act could have occurred. In this connection the defendant argues that the alleged place where the act was claimed to have taken place was in full view of those passing by. Conceding such to be the fact, that fact and all other facts were for the consideration of the jury and this court may not say as a matter of law

that the circumstance of want of closed doors in connection with all of the other circumstances rendered the testimony given by the witness unbelievable.

[3] In support of his motion for a new trial the defendant tendered, as newly discovered evidence, the affidavit of Frank Clancy. In that document the affiant alleged that he was an employee of the defendant, working in the store where the offense was alleged to have been committed, and that the said offense did not take place. If the defendant had wanted the testimony of Clancy he should have produced him as a witness at the trial. No foundation was laid for the assertion that the testimony of such a witness was newly discovered evidence.

[4, 5] The defendant called, as one of his witnesses, Mrs. Winifred Tobey. On cross-examination, in reply to a question by the prosecution, the witness testified that the defendant was a Greek. No objection was made to this question and no motion to strike out was made. The defendant may not now make the claim that the mere asking of the question was misconduct on the part of the district attorney. The defendant does not show that the question was not material and relevant to issues on trial. If it was, then it was not error because the prosecution used the testimony for all purposes.

[6] As an instruction on reasonable doubt, the court read section 1096 of the Penal Code. The defendant claims the court erred because it did not give a more complete instruction on the subject. People v. Knight, 63 Cal. App. 63, 218 P. 79. If he wanted an additional instruction on the subject, the defendant should have asked for it.

We find no error in the record. The order and judgment appealed from are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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106 Cal. App. 563

HALL v. HOLSTROM.

Civ. 4075.

District Court of Appeal, Third District, California.

June 19, 1930.

Rehearing Denied July 18, 1930. Hearing Denied by Supreme Court Aug. 18, 1930.

1. Trade-marks and trade-names and unfair competition ⟹53, 68(1).

Clear distinction exists between unfair competition in similar business and infringement of registered trade-name and design; former may be included within latter, but latter must exist independently of former.

2. Trade-marks and trade-names and unfair competition ⟹14, 43.

One may appropriate and register trade-mark, name, symbol, or design to designate ownership of business (Civ. Code, § 991).

3. Trade-marks and trade-names and unfair competition ⟹43.

Restaurant trade-name, "The White Spot," and accompanying design being purely artificial and fanciful, and not descriptive, *held* subject to registration (Civ. Code, § 991; Pol. Code, § 3197).

Design accompanying trade-name, "The White Spot," consisted of circular white spot over black background.

4. Trade-marks and trade-names and unfair competition ⟹23.

Trade-name or design used as a sign is "property," and therefore susceptible of private ownership (Civ. Code, § 655).

Civ. Code, § 655, provides that there may be ownership of all inanimate things which are capable of appropriation or manual delivery, the good will of a business, trade-mark and sign, and of rights granted by statute.

[Ed. Note.—For other definitions of "Property," see Words and Phrases.]

5. Trade-marks and trade-names and unfair competition ⟹31.

Possession of trade-name, design, or sign entitles owner to its exclusive use (Civ. Code, § 654).

Civ. Code, § 654, provides that ownership of thing is right of one or more persons to possess and use it to exclusion of others.

6. Trade-marks and trade-names and unfair competition ⟹45.

Exclusive use of trade-name of business or enterprise may be reserved to owner by registration (Pol. Code, § 3196, 3197; Civ. Code, § 991).

Pol. Code, §§ 3196, 3197, provide that phrase "trade-mark" includes every description of word, letter, device, implement, etc., used by any mechanic, manufacturer, merchant, or tradesman to denote goods imported, manufactured, or sold by him, and that any person may record trade-mark or name by filing claim and copy or description thereof with the secretary of state.

7. Statutes ⟹225.

Section of Political Code authorizing registration of trade-name must be construed with section of Civil Code authorizing appro-

priation of trade-names (Pol. Code, §§ 3197, 4480; Civ. Code, § 991).

Pol. Code, § 4480, provides that, with relation to each other, provisions of four Codes must be construed as though all such Codes had been passed at same moment of time and were parts of same statute.

8. Trade-marks and trade-names and unfair competition ⚷1.

Purpose of trade-mark and trade-name statute is to protect exclusive use of name, symbol, or sign of ownership of business, to preserve and increase value of patronage and good will (Pol. Code, § 3197; Civ. Code, § 991).

9. Trade-marks and trade-names and unfair competition ⚷1.

Trade-mark, name, or sign of business is auxiliary to, and inseparable part of, "good will" of possessor.

[Ed. Note.—For other definitions of "Good Will," see Words and Phrases.]

10. Trade-marks and trade-names and unfair competition ⚷14, 43.

Appropriation and registration of name, sign, design, or symbol indicating ownership of business is permissible, though business may be operated in various units in remotely separated localities (Pol. Code, § 3197; Civ. Code, § 991).

11. Trade-marks and trade-names and unfair competition ⚷59(2).

Owner of trade-name and design, "The White Spot," duly registered, *held* entitled to injunctive relief against infringement by owner of similar restaurant 40 miles distant.

12. Trade-marks and trade-names and unfair competition ⚷59(2).

Fact that original place of business of owner of trade-name was lunch counter *held* not to preclude injunction restraining infringement of trade-name and sign by another restaurant.

13. Trade-marks and trade-names and unfair competition ⚷86.

Laches is not generally defense to injunction against use of duly registered and privately owned trade-name.

14. Trade-marks and trade-names and unfair competition ⚷86.

Where public has not been misled to its damage by delay, mere laches will not furnish defense to trade-name infringement suit.

15. Trade-marks and trade-names and unfair competition ⚷86.

Delay of over year between discovery of trade-name infringement and assertion of rights under registration *held* not laches, precluding injunction.

Owner of trade-name and sign duly registered suffered infringement of trade-name in early part of 1927 and demand for cessation of use of name was not made until June, 1928. Suit was not commenced until October of same year. Owner of trade-mark and design conducted three restaurants in city of Los Angeles, while defendant conducted restaurant using same trade-name and design in city of Riverside, some 40 miles distant.

16. Trade-marks and trade-names and unfair competition ⚷92.

Allegation of complaint to restrain infringement of trade-name and design *held* sufficient, absent demurrer, to support evidence of circumstances showing damages warranting injunction.

Complaint in suit to restrain infringement of trade-name and design alleged that "the standing and reputation of plaintiff's business has been and now is greatly injured and damaged by reason of use" by defendant of plaintiff's trade-name.

17. Trade-marks and trade-names and unfair competition ⚷1.

Standing and reputation of business is vital part of "good will," of which trade-mark is expression, symbol, or part.

18. Trade-marks and trade-names and unfair competition ⚷66.

Injury to standing and reputation of business is injury to good will, and therefore infringement of trade-name and design, warranting injunction.

19. Trade-marks and trade-names and unfair competition ⚷66.

Damage to marketability of business of owner of trade-name and design, resulting from use of trade-name and design, constitutes injury to good will.

20. Trade-marks and trade-names and unfair competition ⚷66.

Proof of actual sustaining of damages is not necessary to restrain infringement of trade-name and design.

21. Trade-marks and trade-names and unfair competition ⚷55.

Actual knowledge of plaintiff's prior appropriation of trade-name and design is im-

material in action to restrain infringement; registration being constructive notice.

22. Trade-marks and trade-names and unfair competition ⟹59(2).

That defendant owned building, prior to registration of plaintiff's trade-name and design, "The White Spot," known as "The White Spot of Riverside," *held* not to preclude injunction.

23. Trade-marks and trade-names and unfair competition ⟹43.

Name of place also referring to location of place of business *held* not subject to registration as trade-name (Civ. Code, § 991).

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by C. M. Hall against G. W. Holstrom to enjoin infringement of trade-name and design. Judgment for defendant, and plaintiff appeals.

Reversed, with directions.

Estudillo & Schwinn, of Riverside, for appellant.

A. Heber Winder, of Riverside, for respondent.

R. L. THOMPSON, J.

This is an appeal from a judgment denying injunctive relief from an alleged infringement of a trade name and design called "The White Spot." This name, together with the design of a white spot over a black background, was registered and used by the plaintiff to designate his ownership of three restaurants which he maintained in Los Angeles.

From and after June, 1924, the plaintiff established and thereafter operated his first restaurant on Wilshire boulevard in Los Angeles. The second one was opened in March, 1927, on Beverly boulevard. The third one was instituted in August of the same year, and was also located on the last-mentioned boulevard. The business prospered. In 1928 the aggregate income from these restaurants was $495,000. In 1924, before the defendant owned or operated a restaurant, the plaintiff recorded with the secretary of state of California, pursuant to section 3197 of the Political Code, as a trade-name and mark, the words "The White Spot," together with the design of a circular white spot, to be used in connection with, and as a sign to designate the ownership of, his said restaurant business. On April 6, 1927, he again recorded with the secretary of state, pursuant to law, a similar trade-mark to be used in connection with his said restaurant business, being the same words "The White Spot," together with the design of a white spot on a black background.

December 15, 1925, the defendant established for the first time and thereafter maintained a restaurant at Riverside, in a building, which building, since August, 1923, was called "The White Spot of Riverside." This restaurant he named and advertised as "The White Spot," and also adopted and used, in connection with his restaurant, a design of a white spot similar to the sign which had been previously registered and was employed by the plaintiff to advertise his restaurant business of the same character. On March 10, 1927, the defendant and his wife filed with the county clerk of Riverside county articles of copartnership under the fictitious name of "White Spot Cafe." The court found that the "marketability of plaintiff's business" was "greatly injured and damaged" by the defendant's use of the name "The White Spot," together with his use of the design of a white spot as a sign. But the court further found that the "standing and reputation" of the plaintiff's business had not been injured. It was also found that the defendant adopted the name and design of "The White Spot" at the time his restaurant was first opened in December, 1925, as the result of a prize contest in the suggestion of an appropriate name for a restaurant; that he then had no knowledge of the plaintiff's use or registration of that name and design; that the defendant first learned of the plaintiff's use of this trade term in the "early part of the year 1927"; that the defendant has expended a large sum of money in advertising his restaurant as "The White Spot" and in establishing the good will of his business under that name; that he will suffer great loss if he is required to cease using the trade-name and design; that the plaintiff's original business enterprise was merely a lunch counter and not a restaurant; and that "no competition exists between the business of plaintiff and that of defendant." Thereupon judgment was rendered denying the plaintiff injunctive relief. From this judgment the appeal was perfected.

The appellant contends that the findings do not support the judgment, for the reason that his uncontradicted prior appropriation, use, and registration of the trade-name and design as determined by the court entitles him to the exclusive use of the same and to an injunction prohibiting defendant from infringing thereon, and that the court's finding that "the marketability of plaintiff's business is being injured and damaged by reason of defendant's use of the name 'The White Spot'" is in irreconcilable conflict with the further finding that "no competition exists between the business of plaintiff and that of defendant."

On the contrary, the respondent asserts that: (1) The name "The White Spot," as applied to a place of business, is not subject to

registration; (2) there is no infringement, since the character of plaintiff's lunch counter and defendant's restaurant business are entirely different; (3) the plaintiff is barred by laches from his asserted remedy; (4) the plaintiff failed to assert that his business was damaged by the alleged infringement, but upon the contrary merely claimed that "the *standing* and *reputation* of plaintiff's business" was injured and damaged by defendant's use of the trade name and design.

[1] There is a clear distinction between unfair competition in similar businesses and an infringement upon an appropriated and registered trade-name and design. The former may be included within the latter, but the latter may exist independently of the former. The court found that the plaintiff duly recorded the trade-name and design in controversy pursuant to section 3197 of the Political Code prior to the defendant's establishment of his restaurant or use of the name or design.

[2] The statute does authorize one to appropriate to his exclusive use and register a trade-mark, name, symbol, or design to designate the ownership of a business as well as a brand of merchandise, device, or thing. Section 991 of the Civil Code provides:

"One who produces or deals in a particular thing, *or conducts a particular business*, may appropriate to his exclusive use, as a trade-mark, any form, symbol, or name which has not been so appropriated by another, to designate the origin or ownership thereof; but he cannot exclusively appropriate any designation, or part of a designation, which relates only to the name, quality, or the description of the thing or business, or the place where the thing is produced, or the business is carried on."

[3] The fact that the name "The White Spot" and the design of a white spot on a black background or otherwise is purely artificial and fanciful, and not merely descriptive of the quality, location, or thing, is not controverted. The court found that "said words and design are purely and entirely fanciful and artificial, and in no way descriptive of either the nature, kind or location of either of said businesses of plaintiff or defendant." We are therefore of the opinion that both the name and design are legally susceptible of registration and protection as a trade-name and design.

[4-10] A trade-mark or design used as a sign is property, and is therefore susceptible of private ownership. Section 655, Civ. Code. The possession of a trade-mark, design, or sign entitles the owner thereof to its use to the exclusion of others. Section 654, Civ. Code. While it is true that the definition of a trade-mark, as that term is used in section 3196 of the Political Code, does not include a name which designates the ownership of a business, clearly the exclusive use of such a trade-name of a business or enterprise may be reserved to the owner by registration, as provided by section 3197 of the Political Code, which declares that "any person may record any trade-mark or *name* by filing with the secretary of state his claim to the same. * * *" Moreover, the last-mentioned section must be read and construed with section 991 of the Civil Code, which specifically authorizes one to "appropriate to his exclusive use, as a trade-mark, any form, symbol, or *name* * * * to designate the origin or ownership thereof." Section 4480 of the Political Code provides: "With relation to each other, the provisions of the four codes must be construed * * * as though all such codes had been passed at the same moment of time, and were parts of the same statute." It would be unreasonable to hold that a fictitious or fanciful name, symbol, or design, not otherwise objectionable, could be appropriated and registered by the owner as a trade-mark to identify merchandise or other objects, but that the same protection would not be afforded the owner of a business to protect the name or design of a proper sign under which he operates. Woodward v. Lazar, 21 Cal. 448, 82 Am. Dec. 751; 26 R. C. L. 860, § 38. The benefits of an exclusive trade-mark are to create and preserve a favorable reputation, to stimulate the sale of a particular article, and to distinguish it from similar competing products. Sun-Maid Raisin Growers v. Mosesian, 84 Cal. App. 485, 494, 259 P. 630. It may be added that it is the purpose of the law to protect by registration or injunction the exclusive use of a name, symbol, or sign of the ownership of a particular business to preserve and increase the value, patronage, and good will of the enterprise. A trade-mark, name, or sign of a particular business of an owner thereof is auxiliary to, and an inseparable part of, the good will of its possessor. Nims on Trade-Marks, p. 505, § 188. The appropriation of the exclusive use and registration of a suitable name, sign, design, or symbol indicating the ownership of a business, although it may be operated in various units and in remotely separated cities or localities, may not be questioned. Thus it is not open to controversy that the registration or exclusive appropriation of such terms as "Piggly-Wiggly," "Cash and Carry," "Anna-May Tea Room," "Pig'n Whistle," "Silver Slipper Cafe," "Blue Bird Cafeteria," "Tait's Tavern," "Hudson Bay Fur Co." and "Philadelphia Shoe Co.," as an indication of the owner's place of business, will be protected by equity. This is true, although the owners may operate a chain of similarly named restaurants or stores at various and remote places. 24 Cal. Jur. 624, § 12; Benioff v. Benioff, 64 Cal. App. 745, 222 P. 835. With respect to the protection of a trade-mark or name, section 3199 of the Political Code provides that:

"Any person who has first adopted and used a trade-mark or name, *whether within or beyond the limits of this state*, is its original owner. Such ownership may be transferred in the same manner as personal property, and is entitled to the same protection by suits at law."

[11] There is, therefore, no reason why the name or design of "The White Spot," as the same was used and duly registered to designate the plaintiff's ownership of his several restaurants, may not be protected from infringement by injunctive relief, even though a similar business is operated by the defendant under the same name and design at Riverside, which is forty miles distant from the city of Los Angeles where plaintiff's restaurants are located.

[12] There is no merit in respondent's contention that equity will afford no relief because plaintiff's original place of business was a lunch counter rather than a restaurant. Both are operated for the purpose of preparing and selling food to satisfy hunger. The respective names indicate only a difference in the magnitude of the business rather than a distinction in the character thereof. Moreover, plaintiff's business increased until his income from that source amounted to $495,000 in the year 1928, while the defendant received but $84,000 from his restaurant during the same year.

[13-15] The plaintiff's remedy against infringement of his registered trade-name is not barred by laches. Only about a year elapsed from his discovery of defendant's use of the name until he formally demanded a cessation thereof. The court found that the plaintiff first learned of defendant's use of the trade term "in the early part of 1927." It was March 10, 1927, when the defendant and his wife, filed their certificate of copartnership under the name "White Spot Café." June 21, 1928, demand was made on the defendant to cease using the name and design. October 23d of the same year the suit was commenced. The trial court did not find that the plaintiff was guilty of laches. We are of the opinion that this delay under the circumstances did not constitute laches, and that the doctrine of laches is not ordinarily a defense to an application for injunction to restrain an infringement on the use of a duly registered and privately owned trade-mark or name. Where the public has not been misled or deceived to its damage by the delay in instituting an action for infringement against the use of a trade-mark or design, mere laches will not furnish a defense. In Hopkins on Trade-Marks (4th Ed.) p. 206, § 89, it is said:

"By the recent decision of the Supreme Court in the case of McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828, it was held that acquiescence of long standing was no bar to an injunction [for infringement of a trade-mark.]"

So, also, in 38 Cyc. p. 881, it is said:

"In suits for unfair competition or infringement it is well settled that mere laches in the sense of delay to bring suit does not constitute a defense. Such laches may, under some circumstances, bar an accounting for past profits, but under no circumstances will it bar an injunction against a further continuance of the wrong. Laches or delay must be accompanied by circumstances amounting to an abandonment or an estoppel before it constitutes any defense. Mere delay and silence, although with knowledge of infringement, does not amount to consent and is no bar to relief against a continuance of the infringement." Nolan Bros. Shoe Co. v. Nolan, 131 Cal. 271. 63 P. 480, 53 L. R. A. 384, 82 Am. St. Rep. 346; Nims on Trade-Marks, p. 1025, § 413.

[16, 17] The allegation of the complaint, "That the standing and reputation of plaintiff's business has been and now is greatly injured and damaged by reason of the use by said defendant of the said name 'The White Spot,'" is sufficient, in the absence of a demurrer, to support evidence of circumstances tending to show injury such as will warrant the issuing of an injunction to prevent a continuing infringement of a registered trade-mark or name. It is claimed the foregoing allegation will not support evidence of injury or damage *to the business* of the plaintiff. Actual damages were not sought by the plaintiff in this action. Moreover, the "standing and reputation" of a business is a vital part of the good-will of the business. In Nims on Trade-Marks, p. 506, § 188, it is said:

"The trade-mark is the expression, the symbol, of part or all of the good-will of the business using the mark. Separate from the good-will of the business it identifies, a trade-mark is useless, valueless."

[18-20] It follows that injury to the "standing and reputation" of the business becomes an injury to the good will of the business. Infringement upon a trade-mark which results in injury to the good will of the business may be enjoined. In this case the court found that "the marketability of plaintiff's business is being injured and damaged by reason of defendant's use of the name 'The White Spot' and the design of a circular white spot." That which affects the marketability of a business affects the good will and value of the business itself. Moreover, for the purpose of restraining infringement of a trade-mark, proof of the actual sustaining of damages is unnecessary. In Hopkins on Trade-Marks, p. 448, it is said:

"Proof of injury is unnecessary if the evidence establish the fact that injury will result unless such use * * * will be restrained. The infringement of a trade-mark implies injury."

In the case of Lanahan v. John Kissel & Son (C. C.) 135 F. 899, 903, the court says:

"The object of injunctive relief is to prevent injury, threatened and probable to result, unless interrupted. Why should a person be required to stand by and see his property impaired, before he may stay the hand of the person seeking to offend? Actual injury may be the best evidence of its own existence, but a person should not be compelled to abide the results of trespass for the purpose of obtaining evidence of its injurious effects. Wrongs which are the probable result of given means should be prevented, not awaited. The infringement of the trade-mark implies injury."

In 26 R. C. L. 897, § 75, it is said:

"Relief by way of injunction will be granted against the unauthorized use of the plaintiff's name in business although there is no allegation that he has been damaged thereby." Bagby v. Rivers, 87 Md. 400, 40 A. 171, 40 L. R. A. 632, 67 Am. St. Rep. 357.

[21] The question of actual knowledge on the part of the defendant of plaintiff's prior appropriation and use of the trade-name and design is immaterial. The registration of the trade-name according to law is constructive notice of the appropriation thereof. In 24 Cal. Jur. 626, § 15, it is said:

"One who has obtained the exclusive right to a trademark is entitled to restrain an infringement, whatever the motive or intent of the infringer, the relief being granted, not on the ground of fraud, but because a right of property—i. e., plaintiff's exclusive right to the use of his trademark—has been invaded." Italian Swiss Colony v. Italian Vineyard Co., 158 Cal. 252, 110 P. 913, 32 L. R. A. (N. S.) 439; United Security, etc., Co. v. Superior Court, 205 Cal. 167, 270 P. 184.

In the case of Banzhaf v. Chase, 150 Cal. 180, 88 P. 704, the court held that one using the trade-mark of another, to his injury, will be restrained, even though he be entirely ignorant of the owner's prior use thereof, and regardless of the motive or intent with which it is employed. In Sun-Maid Raisin Growers v. Mosesian, 84 Cal. App. 485, 497, 258 P. 630, 635, it is said:

"The authorities are fairly uniform to the effect that it is not necessary to prove actual fraud or deception, but this may be assumed where the facts indicate that a purchaser [or customer], exercising ordinary care, would be likely to be deceived by the imitation of a trade-mark."

The case of Dunston v. Los Angeles Van & Storage Co., 165 Cal. 89, 131 P. 115, upon which the respondent relies, with respect to the necessity of proving fraud, was determined upon the ground that the name "Los Angeles Van & Storage Company," the infringement of which was there involved, was not susceptible of exclusive appropriation or registration, for the reason that it "has reference in its first words to the place of business; in the remaining words to a description of the business."

[22, 23] The fact that the defendant in this case owned a building at Riverside prior to the registration of the trade-name and design of the plaintiff, which building was known as "The White Spot of Riverside," furnishes no valid reason why an injunction should not issue in the present case. The name of the defendant's building was not associated with the restaurant business. The defendant then had no restaurant. The name also referred to the place where the business was carried on. That name was, therefore, not subject to registration under the provisions of section 991 of the Civil Code as that section was construed in the Dunston Case, supra. Moreover, the defendant abandoned that name, and subsequently sought to carry on his restaurant in the same building under the exact name of "The White Spot," with a similar white spot design as a sign, which had been previously appropriated and registered by the plaintiff.

We are satisfied the court erred in refusing to enjoin the defendant from infringing on the use of plaintiff's prior appropriation and registration of his said trade-name and design. The findings of the court are adequate, and under the law, as we view it, they seem to require a reversal of the judgment.

The judgment is accordingly reversed, and the court is directed to enter a judgment enjoining the defendant from infringing on the plaintiff's exclusive right to the use of his said trade-name and design.

We concur: FINCH, P. J.; PLUMMER, J.

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106 Cal. App. 489

VALDICK v. LECLAIR et al.

MADSEN v. SAME.

Civ. 7176.

District Court of Appeal, First District, Division 2, California.

June 17, 1930.

Rehearing Denied July 15, 1930. Hearing Denied by Supreme Court Aug. 11, 1930.

1. Master and servant ⟹301(4).

Servant may be loaned so that only new master is liable for his acts.

2. Master and servant ⟹301(4).

General employer is not relieved from liability for servant's negligence unless he resigns full control over servant.

3. Master and servant ⚷332(1).

Whether hoisting contractor's employee operating hoisting equipment rented to building contractor became special employee of latter *held* jury question.

Defendant hoisting contractor rented to building contractor, engaged in erecting a stadium, a tractor and hoisting attachment and furnished an operator, charging for use of hoisting apparatus and operator a specified sum per day, part of which included wages of operator. Building contractor's foreman testified that when he wanted a hoist operator he would call up hoisting contractor, who would furnish a man to operate hoisting apparatus. The operator testified that the only instruction given him by general contractor's foreman was that they were ready to pour concrete, and that thereafter he operated hoisting apparatus without further orders.

4. Master and servant ⚷301(4).

That servant of one employer takes orders as to details of work from servant of another employer does not necessarily make him special servant of latter employer, as respects liability for negligence.

5. Master and servant ⚷332(1).

Negligence of hoisting operator in attempting to lift load beyond capacity of hoisting apparatus *held*, under evidence, for jury.

The hoisting apparatus was built to raise a load of from 1,000 to 1,500 pounds, which was less than the weight of the two wheelbarrows thereon loaded with concrete which weighed approximately 900 pounds each. When the accident occurred, elevator cage used to raise the concrete to workmen above the ground level was being held aloft by brake of the hoist. When plaintiffs, who were employees of building contractor, stepped on floor of elevator to remove the two wheelbarrows, the additional weight caused cotter pin holding brake lock to shear off, releasing brake and precipitating elevator with plaintiffs and loaded wheelbarrows to ground.

6. Trial ⚷139(1), 141.

Court may direct verdict where evidence is undisputed, or is so conclusive that, in exercise of sound discretion, court would be compelled to set contrary verdict aside as unsupported by evidence.

7. Trial ⚷139(1).

Directed verdict for defendant is unauthorized where there is substantial evidence tending to prove all controverted facts necessary to establish plaintiff's case.

Appeals from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Actions by F. Valdick and by A. Madsen against S. D. LeClair and others, consolidated in the trial court. From judgments on verdicts directed in favor of named defendant, plaintiffs appeal.

Reversed.

Cooley, Crowley & Gallagher, of San Francisco, for appellants.

Barry J. Colding and Theodore Hale, both of San Francisco, for respondents.

PRESTON, Justice pro tem.

The above-entitled actions are for personal injuries. They were consolidated in the trial court and tried before a jury. At the conclusion of the evidence the court directed a verdict in favor of the defendant S. D. LeClair. From the judgment entered upon this verdict, the plaintiffs prosecute this appeal.

The undisputed facts are briefly these: On the day of the accident in which plaintiffs and appellants were injured, they were employees of one J. A. Bryant, a contractor, who was at the time erecting a concrete structure in Golden Gate Park, San Francisco, known as the "Kezar Stadium." In raising concrete to workmen above the ground level, an elevator and hoist was used. The mixed concrete was contained in large steel wheelbarrows, called by concrete workers "buggies." These "buggies" were placed upon a platform, called an elevator or cage, and raised from the ground, one or two at a time, by the hoist to the level of a runway about thirty feet above the ground. As appellants stepped from this runway onto the floor of the elevator, each to remove a "buggy," the elevator fell, precipitating them to the ground and causing the injuries to appellants upon which these two actions are predicated. The elevator upon which the "buggies" were resting when it fell, together with the guides which support it, was owned by the said contractor, J. A. Bryant. The defendant and respondent S. D. LeClair had rented or hired to Bryant a Fordson tractor, equipped with a hoisting attachment of the drum and cable type, known as "Herschted Hoist." With this Fordson tractor and hoist attachment respondent LeClair furnished an operator, one Arthur M. Pratt. The hoisting apparatus was built to raise from 1000 to 1500 pounds. This was less than the weight of two loaded "buggies," which weighed approximately 900 pounds each. When the accident occurred, the elevator cage was being held aloft by the

brake of the hoist. The brake on this hoist is set or locked by a "Woodruff Key," which is a steel wedge or cotter pin, inserted in a slot of a steel rod or shaft. When the brake is locked or "set," this key is engaged by a slot in the bushing of the brake or shaft. The weight of two filled concrete "buggies," plus the added weight of the apparatus and appellants, when they stepped on the floor of the elevator to remove the "buggies," caused the "Woodruff Key" to shear off, releasing the brake and precipitating the elevator with appellants and the two loaded concrete "buggies" to the ground.

The complaint charges that the defendant (LeClair) so carelessly and negligently managed and controlled said hoisting engine and said hoisting apparatus that plaintiffs, Valdick and Madsen, were thrown from a height of approximately thirty feet above the ground to the surface of the ground, and as the proximate result thereof sustained serious bodily injuries. LeClair, in his answer, denies any negligence on his part, and charges contributory negligence on the part of plaintiffs.

The principal controversy seems to be over the "status of Pratt," the operator of the hoist, at the time of the accident; or, in other words, was Pratt in the employ and under the control of Bryant, the contractor, or LeClair, the owner of the Fordson tractor and hoist, or partially in the employ and under the direction and control of both?

LeClair had been for thirty years prior to the accident a "hoisting contractor"; that is, in the business of renting or hiring hoisting engines, machinery, and apparatuses to other contractors. With each equipment hired or rented, LeClair would furnish an operator known as a "hoisting engineer"; his office, machine shops, and yards were in San Francisco, and he owned and operated some thirty-five hoisting outfits; he had a number of men in his employ, some of them were mechanics, whose duty was to keep the machinery and equipment in repair; others were known as "hoisting engineers," whose duty was to operate the hoisting equipment in any work in which LeClair's machinery was used. Pratt was a "hoisting engineer" and had been in the employ of LeClair for about fourteen years immediately prior to the accident; at the time of the accident he was receiving for his services $8 per day, and was paid by LeClair, who, in turn, charged Bryant, the contractor, $18 per day for the use of the Fordson tractor, hoist, and equipment, and the services of Pratt.

Bryant did not testify in the case, but his foreman, Mr. Jack Haglund, testified in part as follows:

"Q. Under whose supervision did he (A. M. Pratt) go to work—as to what time he started, and what time he stopped? Who had control of him? A. Well, he came in with the concrete gang; he naturally had to comply with our working time, or hours, on the concrete gang.

"Q. Well, who had supervision of him when he was out on your lot? A. I did.

"Q. You had charge of the man that operated the hoist, and all other men working there, is that right? A. To a certain extent he would be under our charge. He had to comply with our working hours, and had to comply with our mode of working up above to see there was no tie-up, but so far as being in direct charge, taking particular orders, or orders so far as taking care of his mechanical appliance that he had, we couldn't give any. That is why we had a hoisting engineer. * * * If he was doing something that was detrimental to the well-being of our business, I could kick him off the job; that was one thing; he was that much under my supervision. If he was doing something that was radically wrong, he could be kicked off the job. * * *

"Q. Did you regulate the hours or the days that he would come to work for you? A. Yes. He was to be there whenever we had concrete hoisting to do, and I made a point to tell LeClair the day before to be sure and have a man there. * * *

"Q. Now, who installed the hoist? A. We built the tower and built the platform; LeClair's men set up the hoist, run the cable through, and made the connections. * * *

"Q. Now, who told the operator of the hoist when to shoot it up or to lower it? A. He was to use his judgment, the same as hoist men do; he was to take it up when he saw it loaded and take it down when it was unloaded, and he made a special point to have the hoist in plain sight all the time. * * *

"Q. I understand that, but so far as the sending up or lowering of this hoist, who directed him to do that? Who was he under for that. * * * If he was under anybody? A. No, he was not under anybody so far as getting signals for taking that hoist up or down.

"Q. He could lower or raise it whenever he wanted to, whether there was anything on it or not? A. Absolutely, he could. * * *

"Q. Was his position any different than anybody else there? A. Yes.

"Q. How was his position different? A. Well, the other men were under our direct control. We could hire and fire the other men and pay them off. When we hired them and paid them off we were done with their services, whereas with him I just merely told him 'You go on back to LeClair's' or, 'We haven't any hoisting for you tomorrow,' or whenever I wanted him again. I never called

the man myself. I called LeClair, and I would say, 'We are pouring concrete tomorrow, and have a man out there.' I wasn't demanding that particular man. I just called Mr. LeClair's office and said, 'Have a man out here for hoisting' and that is where the difference is. * * * *I had absolutely no authority to fire him.*"

The witness Warren S. McMains, office manager for S. D. LeClair, testified in part as follows:

"Q. This book shows the time for the week ending June 16, 1928? A. Correct.

"Q. And these are the employees of Mr. LeClair for that week? A. They are.

"Q. Does there appear in that book an employee by the name of Pratt, for that week? A. Yes sir. * * *

"Q. Is that A. M. Pratt, a hoisting engineer? A. It is. * * * Mr. Gallagher (reading from the time-book): Week ending June 16th, 1928. In that appears the name of Pratt, Monday, 8 hours; Tuesday, 8 hours; Wednesday, 8 hours; Thursday, 8 hours; Friday, the 15th, 8 hours; Saturday, the 16th, 4 hours. * * *

"Q. Was any arrangement made as to the price that you were to charge Bryant? A. Yes, it was understood that it was to be $18 a day, and we were to furnish the tractor and a man, and the necessary equipment at the rate of $18 a day.

"The Court: The man to be furnished for what purpose? What was the man to do? A. To operate the tractor.

"The Court: Yes; all right.

"Mr. Hale: Q. A man is always furnished? A. That is always understood, yes; the man is furnished.

"Q. In your dealings with these contractors, you furnished a man with the tractor? A. We do, yes. * * *

"Q. Mr. LeClair furnished the gasoline and oil used by this tractor, didn't he? A. Yes, sir."

Arthur M. Pratt testified, in part, as follows: "Q. Mr. Pratt, what is your business? A. Engineer.

"Q. By whom are you employed? A. *S. D. LeClair.*

"Q. How long have you been so employed? A. For LeClair, about twelve or fourteen years.

"Q. Steadily? A. Steadily, yes, sir.

"Q. In that employment, I assume you receive monthly wages, but I will not ask you how much? A. No, sir; daily wages.

"Q. Daily wages. Aren't you a hoisting engineer? A. Yes, sir.

"Q. Are you familiar with a certain hoisting apparatus that was being used at Kezar Stadium on June 15th, 1928? A. I should be; I happened to run it for about five years.

"Q. You say you ran it for about five years that identical hoisting machine involved in the accident—is that the one you ran for five years? A. It was. * * *

"Q. From whom did you take your orders, while you were working on that job? A. Mr. Haglund. * * *

"Q. When you say that you took your orders from Mr. Haglund, do you mean by that you took his direction when to hoist and when not to hoist? A. No, sir.

"Q. State what Haglund told you, state everything Haglund told you about it? A. He said. 'We are ready to pour concrete.' I said, 'What time do we have to be ready?' and he said '8 o'clock.' That is all that is necessary for him to say, when they placed the buggies on the elevator I took them up.

"Q. Is that all the conversation? A. It was.

"Q. That is what you meant when you said you took orders from Mr. Haglund? A. Yes, sir. * * *

"Q. Operating this Fordson tractor, drum and so forth, did you do that yourself? A. Yes, sir.

"Q. Nobody told you what to do about that? A. No, sir."

The appellants contend that the court erred in directing a verdict in favor of defendant, for the reason that the evidence supports the following inferences of fact: "(1) That Arthur M. Pratt was the servant of the defendant, S. D. LeClair, at the time the plaintiffs received the injuries complained of, and that he was at said time acting within the scope of his employment; (2) That the proximate cause of the falling of the hoist or elevator cage was the fact that the load which said Arthur M. Pratt attempted to lift with S. D. LeClair's hoisting apparatus was far beyond the capacity of said hoisting engine, and braking equipment attached thereto, to hoist or hold, and that said Arthur M. Pratt knew before he hoisted said load just exactly what the plaintiffs would do in all probability, and that it was not safe to use the Fordson tractor and the braking apparatus attached thereto because of said lack of capacity."

Respondent, on the other hand, contends that Pratt, at the time of the accident, was the agent and employee of Bryant, and, if Pratt was negligent, his negligence would be imputed to Bryant and not to LeClair. This seems also to have been the opinion of the trial court, and the reason given by it for directing a verdict in defendant's favor.

[1, 2] The rule is recognized in this state that a servant may be loaned by his master to another so that the act done by the servant becomes the act of the master to whom he has

been loaned, and for the time being the general master is not responsible for his acts. Burns v. Jackson, 59 Cal. App. 662, 211 P. 821; Pruitt v. Industrial Accident Commission, 189 Cal. 459, 209 P. 31; Billig v. Southern Pacific Co., 189 Cal. 477–483, 209 P. 241; Moss v. Chronicle Publishing Co., 201 Cal. 610–616, 258 P. 88, 91, 55 A. L. R. 1258. This rule, however, is only applicable in cases *where the power of control exists in the special master;* that is, *where the original master resigns full control over the servant for the time being.* Moss v. Chronicle Publishing Co., supra; Flori v. Dolph (Mo. Sup.) 192 S. W. 949; Billig v. Southern Pacific Co., supra. The power of control does not exist in a situation where the special employer has no voice in the selection or retention of the negligent employee, nor where the negligent employee is *partially under the control of the special master.* Billig v. Southern Pacific Co., supra; Du Pratt v. Lick, 38 Cal. 691; Higham v. Waterman, 32 R. I. 578, 80 A. 178; Quinn v. Complete Electric Const. Co. (C. C.) 46 F. 506.

In 39 Corpus Juris, page 1275, § 1462, the rule is stated as follows: "To escape liability the original master must resign full control of the servant for the time being, it not being sufficient that the servant is partially under the control of a third person; and it is necessary to distinguish between authoritative direction and control and mere suggestions as to details or the necessary cooperation where the work furnished is part of a larger operation."

From Moss v. Chronicle Publishing Co., supra, we quote: "A familiar illustration of the lack of full control is found in the case of Chamberlain v. Lee, 148 Tenn. 637, 257 S. W. 415, 417. There the servant of an independent contractor went to the building of another master to repair the elevator. There the operator of the elevator, the servant of the owners of the building, was told to operate the cage in such way and manner as he might be directed by the servant of the independent contractor. In manipulating the elevator, the latter servant was injured. The owners of the building were held liable upon the ground that, although their servant was directed to place himself for certain purposes under the control of the independent contractor, nevertheless their control over said servant was not completely resigned, and the cause of action by the employee of the independent contractor against them was sustained, the court saying: 'This does not make out a case of lending a servant. The servant was put under the control of plaintiff for one purpose alone; that is, to move the car up and down as plaintiff desired while the particular job was being done. The elevator car was put under the control of the plaintiff for the time, but it was put under his control along with its attendant, who remained in the service of the defendants. There is nothing to show that plaintiff could have discharged this boy, and put another boy to running the elevator at this time. Plaintiff certainly had no right to use this elevator boy for any purpose in connection with the work other than running the elevator up and down. The plaintiff could not have required the elevator boy to remain on duty for a longer period than his regular hours under his contract with defendants. In order to escape responsibility for the negligence of his servant on the theory that the servant has been loaned, the *original master must resign full control of the servant for the time being.*' "

[3] We are of the opinion that the testimony is susceptible of the inference that the work of hoisting or raising the concrete "buggies" to the workmen on the stadium was being done by respondent LeClair through his employee, Arthur M. Pratt; that the jury might well have concluded, without abusing the discretion vested in it as the trier of the facts, that LeClair at no time had surrendered full control over Pratt to Bryant, nor had Bryant exercised that degree of control over Pratt which would establish the relation of *special employer and employee between Pratt and Bryant,* but LeClair had himself retained the right to control Pratt; Bryant merely, through his foreman, giving Pratt directions as to the details of the work and the manner of doing it.

[4] Respondent lays great stress upon the fact that Pratt was subject to the orders of Haglund, the foreman for Bryant. The fact that one servant may have taken orders as to the details of the work from the servant of the other employer would not affect the rule above announced.

In 39 Corpus Juris, page 1275, it is said: "A servant of one employer does not become the servant of another for whom the work is performed merely because the latter points out the work to the servant, or gives him signals calling the service into activity, or gives him directions as to the details of the work and the manner of doing it." Moss v. Chronicle Publishing Co., supra; Quinby Co. v. Estey, 221 Mass. 56, 108 N. E. 908; McNamara v. Leipzig, 227 N. Y. 291, 125 N. E. 244, 8 A. L. R. 480; Flori v. Dolph, supra.

[5] Therefore, the evidence in the record being sufficient to support a finding that at the time of the accident *LeClair had not resigned full control of Pratt,* it follows that LeClair could be held liable for damages, if Pratt was negligent, and his negligence was the proximate cause of the injuries which appellants received. Stewart v. California Imp. Co., 131 Cal. 125–129, 63 P. 177, 724, 52 L. R. A. 205. The question of Pratt's negligence was a question of fact for the jury to determine from all the evidence in the case. Where the facts were clear and undisputed,

and the dictates of common prudence pointed to only one reasonable conclusion, the question was then, and only then, one of law for the court. Moss v. H. R. Boynton Co., 44 Cal. App. 476, 186 P. 631; Chrissinger v. Southern Pacific Co., 169 Cal. 619, 149 P. 175; Wing v. Kishi, 92 Cal. App. 495, 268 P. 483; Monroe v. Switzer et al., 91 Cal. App. 364–368, 267 P. 125; Smith v. Associated Oil Co., 53 Cal. App. 143, 199 P. 879.

We think the jury might well have found from the testimony of Pratt alone that the falling of the hoist and elevator was due to the fact that Pratt attempted to lift, with LeClair's hoisting apparatus, a load that he knew was far beyond the capacity of said hoisting equipment to hoist and hold safely; that he also knew, before he lifted the overload, that appellants would have to step on the elevator floor to remove the concrete "buggies," thereby placing additional weight on the elevator and greater strain on the hoisting apparatus. If the jury found these facts to be true, it could not be doubted that Pratt was guilty of negligence, and that such negligence was the proximate cause of plaintiffs' injuries. We find no evidence whatever of any contributory negligence on the part of appellants.

[6, 7] The law is, of course, well settled that the court may withdraw the case from the jury and direct a verdict in favor of either party, where the evidence is undisputed, or is of such a conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set a contrary verdict aside as unsupported by the evidence. Davis v. California St. C. R. R. Co., 105 Cal. 131, 38 P. 647; In re Estate of Baldwin, 162 Cal. 471, 123 P. 267; Diamond v. Weyerhaeuser, 178 Cal. 540, 174 P. 38; Burgesser v. Bullock's, 190 Cal. 673–683, 214 P. 649; Stephenson v. Southern Pacific Co., 102 Cal. 143, 34 P. 618, 36 P. 407; 24 Cal. Jur. 916, 917; Umsted v. Scofield Eng. Const. Co., 203 Cal. 224–228, 263 P. 799; Wayland v. Latham, 89 Cal. App. 59, 264 P. 766; Jensen v. Sprigg, 84 Cal. App. 522, 258 P. 683; McCarthy v. Pacific Elec. Ry. Co., 82 Cal. App. 503–508, 255 P. 868. But it is equally well established by the foregoing authorities, and many others that could be cited, *that a directed verdict in favor of a defendant is unauthorized where there is substantial evidence*, as we find exists in the case at bar, *tending to prove in favor of plaintiff all of the controverted facts necessary to establish his case.*

It follows from what has been said that we are of the opinion that Pratt's status at the time of the accident, that is, whether he was the servant of LeClair or Bryant, and also whether or not he was negligent, were both questions of fact which should have been submitted to the jury for its determination, under proper instructions from the court.

The judgments are therefore reversed.

We concur: STURTEVANT, J.; SPENCE, J.

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106 Cal. App. 313

BOLTON v. TERRA BELLA IRR. DIST. et al.

Civ. 215.

District Court of Appeal, Fourth District, California.

June 9, 1930.

Rehearing Denied June 30, 1930. Hearing Denied by Supreme Court Aug. 7, 1930.

1. Counties ⟹1.

Waters and water courses ⟹224.

Irrigation district and county are public agencies of state for performing certain functions of government.

2. Taxation ⟹296, 544.

Legislature may determine whether revenues shall be levied and collected by state or by local legislative or administrative agency.

3. Counties ⟹194.

Purchaser of land on sale for delinquent county taxes does not take title free from lien for delinquent irrigation district taxes or assessments (Irrigation District Act, § 40; Pol. Code, §§ 3718, 3786, § 3787, as amended, §§ 3764 and 3771 as amended by St. 1913, pp. 556, 557, §§ 1 and 2, § 3785b as amended by St. 1925, p. 448, § 3771a as added by 1921, p. 109, § 3; Municipal Utility District Act, St. 1921, p. 245).

The word "taxes," as used in 1917 amendment of Pol. Code, § 3787, refers to annual assessments of irrigation districts, and includes both general taxes and special assessments.

[Ed. Note.—For other definitions of "Tax; Taxation," see Words and Phrases.]

4. Taxation ⟹509.

As regards tax or assessment liens, question of priority is one of legislative intent.

5. Statutes ⟹206.

Statute should be construed, if reasonably possible, to give each part meaning and effect which from act as whole appears to have been intended.

For this reason, it is necessary to read various sections of statutes together, and in relation to each other, to give effect to plain intent of Legislature.

6. Statutes ⟹245.

Where individual attempts to escape taxes or assessments legally levied, any doubt as to statutory authority is resolved against individual.

7. Taxation ⟹604.

Individual seeking to escape taxes or assessments must stand on legal rights and cannot ask for equitable relief.

8. Counties ⟹194.

Statutes providing irrigation district taxes shall be excepted from absolute title conveyed by deed following sale for county taxes *held* valid (Pol. Code, § 3787 as amended; Const. art. 13, § 6).

It was contended that Pol. Code, § 3787, as amended, would give priority to irrigation assessments over state taxes, but no such priority was given.

9. Taxation ⟹28.

Powers of taxation delegated to irrigation districts by Legislature may be at any time changed or withdrawn.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by W. A. Bolton against the Terra Bella Irrigation District and others. From a portion of an interlocutory decree, named defendant appeals.

Reversed.

Farnsworth, Burke & Maddox, of Visalia, for appellant.

Herbert C. Kelly, of San Diego, for respondent.

Hankins & Hankins, of San Francisco, Griffin & Boone, of Modesto, A. L. Cowell, of Stockton, and Charles L. Childers, of El Centro, amici curiæ.

BARNARD, J.

This action is in form one of partition, although the plaintiff seeks to quiet his title against the defendants. On June 30, 1924, plaintiff, with one T. G. Kelly, purchased at a tax sale a parcel of land situated within the borders of Terra Bella irrigation district, in Tulare county, Cal. The land was sold for delinquent county taxes of the fiscal year 1918–19, and said purchasers received a deed from the county tax collector of Tulare county. It is admitted that all proceedings leading up to and included within this sale were regular and valid in all respects. Commencing with the year 1918 and up to and including the year 1924, Terra Bella irrigation district had in each and every year levied assessments for district purposes on said land. No part of these assessments has ever been paid, and at the date of the above-mentioned sale they were all delinquent. From year to year the land was noticed for sale for these delinquencies, and certificates of sale therefor were delivered to said irrigation district in accordance with the Irrigation District Act, but no deed has yet been passed. Plaintiff commenced this action against the said T. G. Kelly and numerous other defendants for the partition of a number of pieces of land, including the land above referred to, seeking to quiet his title to the same, and joining the appellant irrigation district as a party defendant, as claiming a lien on the particular parcel referred to. The defendant Terra Bella irrigation district appeared and set up its lien for the unpaid assessments levied by it, as aforesaid. Defendant Kelly joined with plaintiff against the Terra Bella irrigation district. After a trial upon stipulated facts, the trial court adjudged that as against the plaintiff and T. G. Kelly, the defendant Terra Bella irrigation district has no lien upon the land and entered its interlocutory decree accordingly. The defendant irrigation district has appealed from that portion of the decree.

[1-3] The only question herein presented is whether or not a purchaser of land upon a sale thereof for delinquent county taxes, takes title thereto free from any lien for delinquent irrigation district taxes or assessments levied on the same land.

Section 40 of the Irrigation District Act provides "The assessment upon land is a lien against the property assessed from and after the first Monday in March for any year." Page 1255, Henning's General Laws. County taxes also become a lien on the first Monday in March in each year. Section 3718, Pol. Code. An irrigation district is a public agency of the state. It has been held that the legislature could, without referring the matter to local authority, institute and carry out projects, having purposes similar to those of an irrigation district. People v. Sacramento Drainage District, 155 Cal. 373, 103 P. 207. The Legislature has power to determine how revenues shall be levied and collected, whether by the state itself or by local legislative or administrative agencies. The county is an agency of the state for performing certain functions of government. The Legislature has likewise provided for, and authorized, irrigation districts to carry out another function of government. In the case of In re Madera Irrigation District, 92 Cal. 296, 28 P. 272, 278, 675, 14 L. R. A. 755, 27

Am. St. Rep. 106, in discussing the nature and powers of an irrigation district the court said:

"For the purpose of meeting the cost of acquiring this property, the district is authorized, upon the vote of a majority of its electors, to issue its bonds; and these bonds, and the interest thereon, are to be paid by revenues derived under the power of taxation, and for which all the real property in the district is to be assessed. Under this power of taxation, one of the highest attributes of sovereignty, the title of the delinquent owner to the real estate assessed, may be divested by sale, and power is conferred upon the board of directors to establish equitable by-laws, rules, and regulations for the distribution and use of water among the owners of said lands, and generally to perform all such acts as shall be necessary to fully carry out the purpose of the act. Here are found the essential elements of a public corporation, none of which pertain to a private corporation. The property held by the corporation is in trust for the public, and subject to the control of the state. Its officers are public officers chosen by the electors of the district, and invested with public duties. Its object is for the good of the public, and to promote the prosperity and welfare of the public. 'Where a corporation is composed excusively of officers of the government, having no personal interest in it, or with its concerns, and only acting as organs of the state in effecting a great public improvement, it is a public corporation.' Ang. & A. Corp. § 32."

Such districts have been held to be public agencies. Lindsay-Strathmore Irrigation District v. Superior Court, 182 Cal. 315, 187 P. 1056. In the case of Whiteman v. Anderson-Cottonwood Irrigation District, 60 Cal. App. 234, 212 P. 706, 708, the court said:

"In fact, it has been consistently held by the Supreme Court from the beginning that these districts created under the elaborate scheme devised for their organization and operation by the Legislature are public agencies for the promotion of a public purpose."

The general rule in reference to the relation of state taxes to local asessments is thus put in 37 Cyc. 1748:

"Where the statute makes the state taxes a superior lien to municipal taxes or local assessments, or where both classes of taxes are to be collected in the same manner and by the same proceedings those of latter class will be cut off and their lien extinguished by a sale for state taxes in which the local taxes or assessments might have been included. But otherwise the purchaser will take subject to existing taxes of the inferior class."

It is true that an irrigation district assessment, although it be an annual charge, has been usually interpreted as an assessment for benefits. San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 41 P. 291, 35 L. R. A. 33; In re Madera Irrigation District, supra; Barber v. Galloway, 195 Cal. 1, 231 P. 34. In referring to the method used by irrigation districts in making assessments, the Supreme Court has said:

"* * * This court * * * basing its decision upon the very early case of Emery v. San Francisco Gas Co., 28 Cal. 372, as approved in the case of In re Madera Irr. Dist., 92 Cal. 325, 28 P. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106, * * * held that the Legislature was authorized to apportion the amount of money to be raised in order to meet the expenses of the improvement according to either the ad valorem or assessment according to benefits plan, or to adopt any principle of apportionment which might be devised under the sovereign power of taxation." County of Los Angeles v. Hunt, 198 Cal. 753, 247 P. 897, 902.

In the Municipal Utility District Act, St. 1921, p. 245, the distinction between assessments and taxes is entirely eliminated. Under that act its so-called assessments become taxes and are collected with other taxes. While county taxes are made up of a composite rate for general purposes, for road districts, for school districts, and for a number of other purposes, irrigation taxes are not included. It is true, however, that such assessments are levied by an agency created by the state for a public purpose, and under an authority delegated by the state. While the cases have referred to the annual assessments levied by an irrigation district as assessments rather than as taxes, they are in many respects more like county taxes than like assessments for street improvements or assessments for the benefit of other particular property. While general county taxes are often referred to as state taxes, as a matter of fact, no taxes for purely state purposes have been levied on real estate in California since 1911, But all general taxes have been levied by authority delegated from the state, either to the county or some other subdivision or district. During the same time there has also been apparent a growing tendency, as shown by the statutes adopted by the Legislature, to treat the taxes or assessments levied under such delegated authority as equal.

The respondent relies upon the decisions in a number of cases from other jurisdictions and in such cases as Dougherty v. Henarie, 47 Cal. 9, and California Loan, etc., v. Weis 118 Cal. 489, 50 P. 697, 699. In Dougherty v. Henarie the court held that a deed based upon a tax sale transferred the title free from all prior liens for taxes or assessments. This

decision was based on a statute then existing which provided that the tax deed "shall convey to the grantee the absolute title to the lands described in said deed, free and clear of all incumbrances, liens, claims, rights, titles and interests of every kind of any person or persons * * * excepting only the right and title of the United States or of the State of California," and further that "all right, title, interest, claim, and possession acquired by any individual corporation, or body politic, has been subrogated to the grantee." In California Loan, etc., v. Weis the court also held that a tax deed conveyed the property free from any other lien basing its decision upon the statute as it then existed, which provided that such deed conveys to the grantee the absolute title to the land described therein free of all encumbrances except the lien for taxes which may have attached subsequent to the sale. This case also held that while it is within the power of the Legislature to make the lien of taxes paramount to all other liens upon the land, so that when a sale is made the purchaser takes title free from all incumbrance, whether or not this state has so provided is to be determined only by its statutes; the court saying: "As this matter, the power being conceded depends for its determination entirely upon statutory enactment, adjudications in sister states will be of little value, unless based upon identical laws."

[4] This case being one where an individual is seeking to quiet title against assessments levied by an agency created and empowered to levy assessments by authority delegated from the state, his claims must rest on his strict legal rights and these depend upon the proper interpretation of statutory enactments. The question of priority is one of legislative intent. In Guinn v. McReynolds, 177 Cal. 230, 170 P. 421, 422, the court said: "A lien for unpaid taxes or assessments is generally held to be superior to all contract liens, whether prior or subsequent in time. But the authorities declare, virtually without dissent, that even a tax lien is not entitled to rank ahead of a pre-existing mortgage, or other contract lien, unless the legislative enactment creating the tax lien has given it priority," citing 37 Cyc. 1143, where the rule is stated thus: "It is competent for the legislature to make taxes a paramount lien on the property of the taxpayer, and this has been done in many states, the consequence being that a lien for taxes takes precedence of every other lien or claim upon the property of whatsoever kind, however created, and whether attaching before or after the assessment of taxes. But this preference does not belong to the tax lien unless it is so declared by statute, and a law, for example, which merely enacts that taxes shall be a lien on real property does not make them a first lien."

Again in the case of Guinn v. McReynolds the court said: "In dealing with tax or assessment liens, as with others, our decisions have recognized that the question of priority is one of legislative intent."

There is no statute making county taxes paramount to irrigation district assessments in the sense here claimed, unless this results from a proper interpretation of those sections of the Political Code governing deeds given to an individual in pursuance of sales whereby former owners have been divested of title for nonpayment of taxes.

Prior to 1913 all sales for delinquent state and county taxes were made only to the state, the form of such a deed to the state being provided in section 3785 of the Political Code. In 1913, sections 3764 and 3771 of the Political Code were amended (St. 1913, pp. 556, 557, §§ 1, 2) to provide also for a sale by the tax collector direct to an individual, and it is pursuant to such a sale that the respondent herein claims title. In 1913 section 3785b was added to the same Code (St. 1913, p. 558, § 4) providing the form of a deed where real property should be sold to an individual instead of to the state, in accordance with the amendments of that year, and also providing that such deed should not be delivered until redemption had been made of all taxes and penalties of any previous tax sale or delinquency. It further provided as follows:

"The provisions of sections 3786 and 3787 of this code are hereby made applicable to the deed herein provided for."

Section 3786 has not since been amended and provides that such deed is primary evidence of certain things set forth in that section. Section 3787 provides that such deed is conclusive evidence of certain other proceedings, and also provides what title shall pass by the deed. In 1913 (St. 1913, p. 559, § 5), that portion was amended to provide that taxes levied for municipal purposes should be an additional exception to the clear title passed by such a deed. In 1917 (St. 1917, p. 241) that portion of section 3787 was again amended to include irrigation district taxes as an additional exception and then read as follows:

"Such deed conveys to the state the absolute title to the property described therein, free of all encumbrances, except any lien of taxes levied for municipal or irrigation district purposes and except when the land is owned by the United States or this state. * * *"

Again in 1927 (St. 1927, p. 1666), this section was amended so that that portion thereof reads as follows:

"Such deed conveys to the state the absolute title to the property described therein, free of all encumbrances, except any lien for taxes levied for municipal, or for irrigation,

reclamation, protection, flood control, public utility or other district purposes, or for special assessments which are collected on tax rolls, and except any lien or assessment for other amounts which by law are collected upon tax rolls by or for account of municipalities, and except interest and penalties on the same, and other amounts which would be paid municipalities or for their account in the event of redemption of such property from sales for such taxes, assessments or other amounts, and except when the land is owned by the United States or this state. * * *"

Section 3785b was amended in 1925 (St. 1925, p. 448) to correct the reference therein to section 3771 of the same code. Prior to this change in 1925, section 3785b had authorized a deed whenever a sale had been made to an individual, "in pursuance of section 3771 of this code." But in 1921 (St. 1921, p. 109, § 3), the Legislature had added section 3771a to that Code, and the provision authorizing a sale to an individual, instead of to the state, which had previously been in section 3771, was then placed in the new section 3771a.

After the above-mentioned changes in 1913, the provisions of section 3787 of the Political Code referred to the deed provided for in section 3785b, as well as to that of section 3785. In Bernhard v. Wall, 184 Cal. 612, 194 P. 1040, 1045, the court defines the meaning of the phrase "such deed" as used in these sections, as follows:

"It is proper here to explain that the phrase 'such deed,' with which both sections 3786 and 3787 begin, must, in the present condition of the Code, be understood to refer both to the deed authorized by section 3785 and to that authorized by section 3785b. When the Code was first enacted, and until the year 1909, the three sections, 3785, 3786, and 3787, appeared therein in regular consecutive order, with no intervening sections. The phrase 'such deed' in sections 3786 and 3787 then necessarily referred only to section 3785, it being then the only section authorizing a tax deed. In 1909 section 3785a, and in 1913 section 3785b, were interpolated between section 3785 and section 3786, thus giving rise to some uncertainty as to the particular deed or deeds to which the phrase 'such deed' applied. We are satisfied that it now refers both to section 3785 and section 3785b, and applies to the deeds authorized by both sections."

While the court there mentions only the phrase "such deed" in the first paragraph of the section, it is perfectly apparent that the same reasoning applies to the same phrase in the second paragraph thereof.

Respondent argues that it is a general rule that when one statute by reference incorporates another, the effect is as though the wording of the incorporated statute had been written at length into the incorporating statute, and that no subsequent amendment or repeal of the statute incorporated has any effect upon the incorporating statute. In support of this he cites People v. Whipple, 47 Cal. 592; Spring Valley W. W. v. San Francisco, 22 Cal. 434; Ventura County v. Clay, 112 Cal. 65, 44 P. 488; In re Burke, 190 Cal. 326, 212 P. 193; Vallejo v. Reed, 177 Cal. 249, 170 P. 426; Ramish v. Hartwell, 126 Cal. 446, 58 P. 920, 921. He therefore argues that since the amendment to section 3787, making irrigation district taxes an additional exception to the clear title passed by such deed, was adopted in 1917, and such a provision was not in that section in 1913 when the provisions of said section were by the terms of section 3785b made applicable to the deed therein authorized, this ipso facto gives priority to state taxes over irrigation district taxes. As we have heretofore noted, this depends upon legislative intent. In Ramish v. Hartwell, supra, the court uses the following language:

"It is a rule of statutory construction that the adoption in one statute, for the purpose of carrying its provisions into effect, of the provisions of another statute by reference thereto, does not include subsequent modifications of these provisions in the statute referred to, unless a clear intent to do so is expressed. This rule is subject to a qualified exception in cases of the adoption into a special act of the provisions of law then in force by virtue of general laws. In such cases subsequent modifications of the general law will be deemed to be within the intent of such adoption, so far as they are consistent with the purposes of the particular act. See Kirk v. Rhoads, 46 Cal. 403. A repeal of the adopted statute will not take from the adopting statute the operative force of these provisions so far as they may be necessary to carry the later statute into effect, but these provisions will be regarded as if they had been originally incorporated therein at length. Spring Valley Waterworks v. San Francisco, 22 Cal. 434; People v. Clunie, 70 Cal. 504, 11 P. 775; Collins v. Blake, 79 Me. 218, 9 A. 358; Darmstaetter v. Moloney, 45 Mich. 621, 8 N. W. 574; Suth. St. Const. § 257. Under the same principles, any amendment of these provisions of the statute thus adopted whether it be a particular act or a general law, which so far modifies them as to subvert the purpose of the statute by which they were adopted, will be regarded in the same light as a repeal. The main object of all statutory construction is to ascertain the legislative will, and, as it is to be assumed that the legislature intends its acts to have effective operation, such amendments will not be construed as depriving the adopting statute of all effect, unless there is a clear necessity for such construction."

In the decisions relied upon by respondent the Supreme Court has of course followed the

intention of the legislature. In People v. Whipple, the incorporating statute in creating an office defined the duties thereof by referring to another statute, and the court held that a later repeal of the other statute did not affect the incorporating statute as it, in effect, included the words of the other statute within itself. Ventura County v. Clay, 112 Cal. 65, 44 P. 488, involves a similar state of facts. In Spring Valley W. W. v. San Francisco it was held that the amendments made such a complete change that the sections referred to were entirely insufficient to cover the matter in question without the addition of other sections. In re Burke expressly reserves an opinion on the point now under discussion so far as the facts in that case are concerned. In Vallejo v. Reed, an entirely new section of the number in question had later been adopted, which contained no vestige of the original section. We think that these cases are not controlling in the matter before us, and that the instant case comes rather under both of the exceptions mentioned in Ramish v. Hartwell.

Since sections 3786 and 3787 contained in 1913, and still contain, all of the statutory provisions defining the effect of the deed in question and what title shall pass thereby, including all of the general laws on that particular subject, it would seem to come under one of the exceptions noted. Also, a careful reading of all of the sections involved seems to disclose a clear intent on the part of the Legislature to make amendments of section 3787 apply to section 3785b. Prior to 1913, section 3787 referred to the deed to the state mentioned in section 3785. An entirely new plan for disposing of land upon which taxes had remained unpaid for five years was introduced by the amendments of 1913, and section 3785b was interpolated for the purpose of providing for the giving of a deed in accordance with such new plan. The fact that it made applicable to the new deed therein provided for, all of the statutory provisions covering the title that should be conveyed thereby and the effect thereof, which had applied and which continued to apply to the other and older plan of deed to the state, which provisions were all set forth in sections 3786 and 3787, is a strong indication that it was the intention of the Legislature to make the deed to an individual, in respect to the title conveyed, a counterpart of the deed to the state. No good reason appears why the two deeds should be different, nor why the one to an individual should convey more than the one to the state, and a reading of the code sections indicates that such was not the legislative intent. Having in mind the purpose to be accomplished, and the fact that a new deed was being provided for, that otherwise followed the plan of the older deed, the language used, "The provisions of section 3786 and 3787 of the code are hereby made applicable to the deed herein provided for," lends some support to this view. It must also be borne in mind that the amendment of 1917 made no change in the general purpose of section 3787, but merely included another item of the same general nature. It is also most significant that when in 1925 it became necessary for the Legislature to amend section 3785b, in order to correct a reference therein to section 3771 of the Political Code, as hereinbefore referred to, although section 3787 had in the meantime been amended by the insertion of the clause about irrigation district taxes, the provision now under consideration was not changed. It would therefore seem that it was within the intention of the Legislature in adopting section 3785b in 1913, to include such an amendment to 3787 as followed in 1917.

In the case of Gottstein v. Holmes, 89 Cal. App. 145, 264 P. 310, 311, decided in 1928, in passing upon a tax sale made in 1923 when the law was the same as it was when the sale here in question was made, in 1924, the court said: "The provisions of section 3787 are, by section 3785b, expressly made applicable to deeds executed by the tax collector conveying lands sold to the state to purchasers after the 5-year period of redemption." No exceptions are there noted.

Even if it should be held that the amendment of section 3787 in 1917 did not become a part of section 3785b, through the reference provision therein, still section 3787 as amended in 1917, was in full force and effect at the time respondent's rights arose and applies to his case as a separate law. Aside from section 3787 there is no statute providing what such a deed as is relied on by respondent shall convey to him. In the absence of statutes providing otherwise, respondent's deed would be subject to all existing liens which would include the irrigation district assessment liens here in question. Respondent is forced to rely upon section 3787 to place his title above other incumbrances. He does, in fact, place implicit reliance upon it, insisting, however, that he is entitled to stand upon it as it existed in 1913. If, however, that section applied to his deed in 1924, it applied as it stood in 1924, and his deed was subject to taxes levied for irrigation district purposes. Irrespective of whether this amendment was included in section 3785b by legislative intent, no reason appears why it is not, of itself, an additional qualification of the effect of respondent's deed. There is nothing in section 3785b, as it stood in 1913, including its reference to section 3787, which forbids the adoption of new qualifications of the same deed. Section 3787, as it stood in 1924, applied to the deed relied on by respondent just as much as if the 1917 amendment thereto had been put into section 3785b, or adopted as an additional section of the Code.

The fallacy of such an interpretation of these various statutes as is insisted upon by respondent is seen from the fact that to take the exact language used, without regard to the real meaning and intent of the Legislature, and without allowing for obvious errors in changing certain sections without correcting co-related sections, would necessarily result in the holding that respondent has no deed at all, because he relies upon a deed given in accordance with section 3785b of the Political Code, and insists that he is entitled to rely on that section absolutely as it stood in 1913, unaffected by later amendments of any other sections and governed by the strict language of that section alone. But he acquired his deed under a sale made in 1924. At that time section 3785b provided that when property had been sold to a purchaser at delinquent tax sale, other than the state of California, in pursuance to section 3771 of that Code, a deed should be issued in the form set forth in said section. But at that time section 3771 of this Code did not provide for or authorize or contemplate any deed. In 1921 the law had been changed and the provision authorizing such a deed had been moved from section 3771 to section 3771a of that Code.

[5] In giving effect to the plain intent of the Legislature it is necessary to read the various sections together and in relation to each other. "A statute should always be so construed, if reasonably possible, as to give each part thereof the meaning and effect which, from the act as a whole, appears to have been intended." In re Reineger, 184 Cal. 97, 193 P. 81, 83. There can be no question that the word "taxes" as used in the 1917 amendment to section 3787 refers to the annual assessments of irrigation districts. The word includes both general taxes and special assessments. Los Angeles County F. C. Dist. v. Hamilton, 177 Cal. 119, 169 P. 1028. While an assessment is not in all respects the same as a tax, it has many of the same qualities of a tax and an irrigation district assessment has been specifically given a lien on the real property within the district, and the provisions of section 3787 of the Political Code make such a deed as is relied on by the respondent, subject to irrigation district assessments.

An additional reason why the irrigation district assessment in question has not been wiped out by the tax sale referred to is found in another express provision adopted by the state legislature. In speaking of such assessments, section 46 of the California Irrigation District Act says:

"* * * On filing the certificates (of sale) with such County Recorder the lien of the assessments vests with the purchaser, and is only divested by the payment to him, or to the collector for his use, of the purchase money. * * *"

While, as has been pointed out, the decisions of other states are of little value unless based upon similar statutes, we desire to call attention to a decision from the state of New York. The New York statute provided that a conveyance upon a sale of land for a state tax vested in the grantee an absolute estate in fee, subject, however, to all of the claims which the people of the state had thereupon for taxes or other liens or incumbrances. We take it this statute is not essentially dissimilar from our own in the respect under discussion, since an irrigation district is a public agency deriving its power to tax from the state itself. In Rochester v. Kapell, 86 App. Div. 224, 83 N. Y. S. 640, 641, affirmed in 177 N. Y. 533, 69 N. E. 1121, the court said:

"The tax for the nonpayment of which the sale to appellant was made was a state tax to be collected by the county, and it is claimed that the only tax liens which are preserved under the language of this section are pure state taxes. This, we apprehend, is too narrow a construction of the language of the section. * * * The source of all power to tax within the state, whether by the state, the city, the town, or the county, is the Legislature. The Legislature has the right to provide for the protection of all such taxes. The policy of the law is to insure the collection of all taxes. We must assume the Legislature intended no conflict between the systems of taxation provided by it for the several political divisions above referred to. It could not have intended that a sale for taxes by one division should cut off and nullify sales made by other divisions for their taxes. The more reasonable construction of this section is one that preserves all liens for taxes, whether state, county, town, or city. All these political subdivisions represent the people of the state, and their taxes are all claims of the people of the state. This construction, in effect, results in the principle that no individual can secure a perfect title to real property purchased upon tax sales without paying all taxes thereon imposed by any political subdivision of the state. This is a reasonable and salutary doctrine."

In Webster v. Board of Regents, 163 Cal. 705, 126 P. 974, 976, in referring to a tax sale as against a mortgage held by the state, the court said:

"The rule applicable thereto is thus expressed in People v. Doe, 36 Cal. 222: 'The Constitution and laws upon the subject of taxing property are therefore to be understood as referring to private property and persons, and not including public property of the state, or any subordinate part of the state government.' See, also, People v. McCreery, 34 Cal. 456; Low v. Lewis, 46 Cal. 552; Doyle v. Austin, 47 Cal. 360; Smith v. Santa Monica, 162 Cal. 221, 121 P. 920. The general rule applied in all such cases is that statutes authorizing liens on or forced sales of prop-

erty, generally, will not be held applicable to public property, unless the intention to make them so expressly or plainly appears."

[6, 7] In the absence of statutory provisions to the contrary, the same reasoning would apply to an attempt upon the part of an individual to wipe out a part of the taxes or assessments legally levied under authority of the state government. We think this cannot be done unless that result clearly and expressly appears to be authorized by statute. Any doubt would necessarily have to be resolved in favor of the public institution and against the individual.

In such an action as the one at bar, an individual must stand upon his legal rights and cannot ask for equitable relief against taxes authorized by the state. Couts v. Cornell, 147 Cal. 560, 82 P. 194, 109 Am. St. Rep. 168; Esterbrook v. O'Brien, 98 Cal. 671, 33 P. 765. In Imperial Land Co. v. Imperial Irr. Dist., 173 Cal. 660, 161 P. 113, 116, the court said:

"The complaint contained no offer to pay the amount justly due. 'It is now firmly settled by our decisions that where a property owner applies for equitable relief against the public authorities, as, for example, to restrain proceedings for the collection or enforcement of taxes assessed against it, or to enjoin the execution of a tax deed, or to cancel a lien or charge for taxes, of record against his land, and it appears that all or some part of the tax charged is justly and equitably due from the plaintiff, or chargeable upon the land, he must, as a condition of obtaining such relief, first pay or offer to pay the amount justly due, or he must be required to do so before the relief to which he shows himself entitled is given.' (Citing cases.) The principle has been applied to an action to enjoin a sale of land for delinquent assessments of an irrigation district organized under the Wright Act, in force prior to the enactment of the statute here involved."

[8, 9] It is further urged that the amendment of 1917 to section 3787 of the Political Code providing that irrigation district taxes shall be excepted from the absolute title to be conveyed by the sort of deed here in question, is unconstitutional. The only point raised in addition to those which have been frequently passed upon by our courts, in connection with irrigation district assessments, is the contention that if this amendment were allowed to stand it would give priority to irrigation assessments over state taxes, and thereby be in violation of article 13, § 6, of the Constitution of California. No such priority is thus given. And no power of taxation has been thereby surrendered or suspended by any grant or contract. Any such powers as have been delegated to irrigation districts by the legislature may be at any time changed or withdrawn.

The respondent argues in reference to the two sorts of taxes here involved that a sale under one must of necessity extinguish the other. This does not necessarily follow, and we think that the Legislature intended to protect the interests of each of these agencies of the state government. The question before us is not as to which party would get title if at the same time the land was sold to one for delinquent county taxes, and to another for delinquent irrigation district assessments. The only question here involved is as to whether one who has purchased land at a general tax sale takes the title thereto free from the lien of any irrigation district assessments which have theretofore been levied against it. This being entirely a matter of legislative enactment, under the statutes controlling in this case, we are of the opinion that he does not.

For the reasons given, it follows that the portion of the interlocutory decree appealed from should be reversed, and it is so ordered.

We concur: MARKS, Acting P. J.; BEAUMONT, Justice pro tem.

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106 Cal. App. 464

TOMPKINS v. POWERS.

Civ. 6006.

District Court of Appeal, Second District, Division 2, California.

June 16, 1930.

1. Mortgages ⟹283(1).

Where mortgagor's grantee takes real property subject to mortgage agreeing to pay such indebtedness, he becomes principal debtor of mortgagee, and mortgagor becomes surety.

2. Judgment ⟹878(2).

One of two joint judgment debtors may pay judgment and have it assigned to third person to keep it in full force against the other.

3. Judgment ⟹864(2).

Action to renew judgment for deficiency on foreclosure *held* proper remedy (Code Civ. Proc. § 709).

Original mortgagor had paid deficiency judgment, and, at his request, mortgagee assigned judgment executing release as against original mortgagor but not as against his grantee who assumed indebted-

ness. Plaintiff had two methods of procedure to follow, the remedy under Code Civ. Proc. § 709, or the one which he in fact followed. Either would have been adequate. The remedy given by section 709 is not exclusive.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by Perry T. Tompkins against John R. Powers to renew a judgment for deficiency on foreclosure of mortgage. Judgment for plaintiff, and defendant appeals.

Affirmed.

Catherine A. McKenna and J. Irving McKenna, both of Los Angeles, for appellant.

Russ Avery and Samuel H. French, both of Los Angeles, for respondent.

GATES, Justice pro tem.

This action was commenced by the respondent to renew a judgment for a deficiency on a foreclosure action against appellant, the sole defendant. Judgment was rendered in favor of respondent in the sum of $1,520.28, interest and costs. The undisputed facts are substantially as follows: On April 16, 1913, Russ Avery made his certain promissory note for the sum of $16,000, due five years after date, and on the same day executed a mortgage to secure the indebtedness on lands described in the foreclosure action to one Margaret A. Balcom, payee in the note. On June 11, 1918, Avery conveyed the mortgaged land to John R. Powers, appellant herein, by deed. Powers assumed and agreed to pay the mortgage indebtedness. On June 27, 1922, Mrs. Balcom commenced an action against Avery and Powers to foreclose the mortgage, which had become due. A judgment by default against Powers and Avery was had for the full sum of the note and interest then due. Later the property was sold and a deficiency judgment entered against Avery and Powers. Thereafter personal property of Powers was levied upon and sold, and the deficiency judgment satisfied to the extent of $374.75. Some time in 1922 Avery paid to the judgment creditor a sum equal to the amount of the deficiency judgment, and thereupon Mrs. Balcom, judgment creditor, at Avery's request, assigned the judgment to the Security Trust & Savings Bank, a corporation. Mrs. Balcom at the time of the assignment personally executed a release of the judgment as against Avery only. Later the bank made an assignment of the judgment to respondent, who commenced suit in the superior court to renew the judgment against Powers.

[1] Appellant's first contention is that, as between Avery and Powers, Avery was still the principal debtor and Powers was surety, and the satisfaction of the judgment discharged the whole debt. Appellant's theory is untenable, for the reason that it is well settled that, where a grantee of a mortgagor takes real property subject to a mortgage and agrees to pay such indebtedness, he becomes in law the principal debtor of the mortgagee and the mortgagor his surety. Beach v. Waite, 21 Cal. App. 304, 306, 131 P. 880; Roberts v. Fitzallen, 120 Cal. 482, 484, 52 P. 818; Kreling v. Kreling, 118 Cal. 413, 419, 50 P. 546; Hopkins v. Warner, 109 Cal. 133, 136, 41 P. 868; Tulare Co. Bank v. Madden, 109 Cal. 312, 41 P. 1092; Braun v. Crew, 183 Cal. 728, 192 P. 531; Daniels v. Johnson, 129 Cal. 415, 61 P. 1107, 79 Am. St. Rep. 123; Tuohy v. Woods, 122 Cal. 665, 55 P. 683; Alvord v. Spring Valley Gold Co., 106 Cal. 547, 40 P. 27; Williams v. Naftzger, 103 Cal. 438, 37 P. 411; Robson v. O'Toole, 45 Cal. App. 63, 187 P. 110; Graham v. Durnbaugh, 44 Cal. App. 482, 186 P. 798; Fielding v. Iler, 39 Cal. App. 559, 179 P. 519; Shuey v. Mulcrevy, 34 Cal. App. 218, 166 P. 1019; Davis v. Davis, 19 Cal. App. 797, 127 P. 1051. When appellant Powers became Avery's grantee and assumed the mortgage indebtedness as between the parties, he became in contemplation of law the primary or principal debtor of the mortgagee, Mrs. Balcom, and Avery then assumed the relation of surety. The rule is tersely stated in 18 California Jurisprudence, 57, as follows: "The grantee becomes a principal and controlling party to the obligation, but both are personally liable for the debt, and the mortgagee may treat both as principal debtors and may have a personal decree against both." The doctrines concerning suretyship must control the dealings between them. Herd v. Tuohy, 133 Cal. 55, 65 P. 139; Tuohy v. Woods, supra.

[2] Appellant's next point is that, when Avery took an assignment of the judgment to a third person and procured a satisfaction of the judgment, which was specifically restricted to himself alone, the judgment became completely satisfied as to parties, and Powers' liability thereunder immediately ceased. In support of his contention appellant cites In re Estate of Baby, 87 Cal. 200, 25 P. 405, 22 Am. St. Rep. 239, and Reynolds v. Lincoln, 71 Cal. 183, 9 P. 176, 12 P. 449. These cases do not sustain his theory, for the reason that in each of them the court was dealing with situations different from the one in the instant case. It is well settled in California, as in many other states, that one of two joint judgment debtors may pay the judgment and have it assigned to a third person in order to keep it in full force against the other. The Supreme Court, in Williams v. Riehl, 127 Cal. 365, 59 P. 762, 764, 78 Am. St. Rep. 60, stated the rule as follows: "The payment of the judgment by respondents to plaintiff did not amount to a satisfaction of the same as against their cosureties or the

principal. The rule is that the mere payment of a judgment by one joint debtor does not operate as an accord and satisfaction of the judgment as to other joint judgment debtors, unless it plainly appears that the payment was intended to have such effect. 1 Brandt, Sur. § 275; Brown v. White, 29 N. J. Law, 307, 80 Am. Dec. 226; Coffee v. Tevis, 17 Cal. 239; Freem. Ex'ns, § 444." This rule is recognized in La Fleur v. M. A. Burns Lumber Co., 188 Cal. 321, 205 P. 102; Coffee v. Tevis, supra; Adams v. White Bus Line, 184 Cal. 710, 195 P. 389 (a case wherein the court held that, since the defendants were joint tort-feasors, the payment by one defendant was not full satisfaction); National Bank of California v. Los Angeles Iron & Steel Co., 2 Cal. App. 659, 84 P. 466, 468. The rule enunciated in the last-mentioned case is likewise recognized in other states. 34 C. J. 691, note 73, and cases there cited. In 34 C. J., supra, the principle relating to sureties is correctly stated as follows: "The surety may seek subrogation in equity unless he is a surety for a joint tort-feasor; and in a majority of the states where the surety, on paying the judgment, takes an assignment thereof either to himself or to a third person, he may enforce the judgment against his principal." See Neal v. Nash, 23 Ohio St. 483. It was Avery's intention to have the judgment assigned in order that he might be protected in his payment of the judgment. He adequately accomplished this purpose.

[3] Appellant's third contention, that respondent has mistaken his remedy, is without merit. He insists that respondent should have proceeded under section 709 of the Code of Civil Procedure. This point is disposed of by our Supreme Court in Williams v. Riehl, supra, page 369, of 127 Cal., 59 P. 762, 764, 78 Am. St. Rep. 60, in the following language: "The legislature evidently did not have in mind a case where the parties paying the judgment procured a written assignment of it. The plaintiff, being the owner of the judgment, had the right to assign it to any one upon payment of the amount authorized by the order of the court in which the estate was pending. The fact that the parties paying it were some of the judgment debtors would not prevent them from taking an assignment of it. The section [709, Code Civ. Proc.] is substantially the same and in almost the exact words of section 480 of the Civil Code of Kansas. The supreme court of that state, in Harris v. Frank, 29 Kan. 203, has placed a similar construction upon section 480 of its Code. In the opinion it is said: 'Besides, said section 480 of the Civil Code was not enacted for the purpose of giving assignees of judgments a remedy as assignees. They have a remedy independent of such section, and could enforce their judgment if such section had never been enacted. Said section was really enacted for the benefit of sureties, and for the benefit of joint judgment debtors, without reference to whether any assignment had been made or not.' * * * The payment of the judgment by respondents to plaintiff did not amount to a satisfaction of the same as against their cosureties or the principal." The rule as to respondent's remedy, which rule was announced in Williams v. Riehl, supra, was recognized by the Supreme Court in La Fleur v. M. A. Burns Lumber Co., supra. Avery had two methods of procedure to follow, the remedy under section 709, Code of Civil Procedure, or the one which he in fact followed. Either would have been adequate. The remedy given by section 709 is not exclusive.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

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106 Cal. App. 644

Ex parte WATSON.

Cr. 203.

District Court of Appeal, Fourth District, California.

June 23, 1930.

1. Criminal law ⚷995(2).

Verdict, finding, or judgment determining guilt of defendant is jurisdictional prerequisite to imposition of penalty in sentence of court.

2. Criminal law ⚷1144(17).

Reviewing court cannot infer that decision of trial court as to defendant's guilt was rendered merely because motion for new trial was made and denied (Pen. Code, §§ 1449–1451).

In absence of finding by trial court on fact issue as to guilt, there was nothing upon which new trial could be predicated.

3. Criminal law ⚷1144(17).

Reviewing court could not infer from recitals in commitment that proper judgment had been rendered (Pen. Code § 1455).

The commitment contained a purported copy of a judgment of the court, but no valid judgment had been entered.

Application of Wiley L. Watson for a writ of habeas corpus prayed to be directed to the Sheriff of Imperial County to secure the re-

lease of petitioner from custody on the ground of improper detention.

Writ granted, and petitioner discharged.

Utley & Nuffer, of El Centro, and A. L. Hubbell, of Escondido, for petitioner.

Elmer W. Heald, Dist. Atty., and Edward B. Patterson, Deputy Dist. Atty., both of El Centro, for respondent.

AMES, Justice pro tem.

It appears from the record in this case that petitioner was charged with the criminal offense designated in the docket of the justice of the peace of Calexico township, Imperial county, before whom he was tried, as "theft of labor." He entered a plea of not guilty and the case was tried before the court without the intervention of a jury, and the following entry is the only record in the justice's docket of the proceedings at the trial.

"Mar. 1. Case comes to trial all parties present Testimony taken and all parties put on their evidence. Before sentence is passed Attorneys for Defendants make a motion for new trial on the grounds of all stated in Section 1451 of the Penal Code. Notice of appeal given, after sentence of $100.00 fine or 30 days in County Jail is imposed on both of the defendants. 5 day stay of execution granted."

No other or different judgment was entered in the justice's docket, unless a statement made by the justice upon his denial of petitioner's motion for a new trial on the first day of March, 1930, and which was incorporated in a statement on appeal to the superior court could be construed as a judgment. The record is as follows:

"The Court: And I will deny the motion. Mr. Patterson: Do you waive time for sentence. Mr. Nuffer: Yes. Mr. Hubbell: Yes. The Court: Each defendant pay a fine of $100 or serve thirty days in the county jail. Mr. Hubbell: Yes."

From this purported judgment of the justice's court petitioner here appealed to the superior court of Imperial county, and, after a motion for a new trial had been argued in that court, and denied, the case was remitted to the justice's court for further proceedings. The certified copy of the justice's docket which is incorporated in the record before us discloses the following entry, which was presumably made by the justice on May 28, 1930, as the same appears in the docket:

"The remittitur, copy of opinion & certified copy of Court Order of May 24, and May 26, in the appeal taken to the Superior Court in this case, this day received and filed. Judgment of this, the trial court affirmed. Ordered: Commitment issue. Commitment issued."

The commitment, by virtue of which the sheriff of Imperial county holds the petitioner in custody, after reciting the filing of the complaint with the justice of the peace, the issuance of a warrant of arrest, the trial before the court without a jury, and the petitioner having been found guilty as charged in the complaint, contains a purported copy of a judgment of the court, which the justice certified to be correct. It is as follows:

"Therefore, it is by the court adjudged that the said Wiley L. Watson is guilty of the crime of Petty Theft of Labor and it is adjudged that he be imprisoned in the County jail of the County of Imperial for the term of thirty days or pay a fine of One Hundred Dollars. Done in open court this 28th day of May, 1930 W. H. Lorenz Justice of the Peace of said Township."

[1] Unless the statement contained in the commitment directed to the sheriff of Imperial county is evidence of the rendition of a judgment, it is apparent upon the face of the record that there was neither a verdict of guilty nor a finding or judgment of the court adjudicating the only question of fact before the court, viz., the guilt or innocence of the defendant. We believe that such a determination is a jurisdictional prerequisite to the imposition of a penalty in the sentence of the court. This prerequisite does not appear in the record before us.

While there is no form prescribed in the Penal Code as to what the judgment shall contain (People v. Terrill, 133 Cal. 120, 65 P. 303, People v. Barnnovich, 16 Cal. App. 427, 117 P. 572), yet the decisions clearly indicate that certain prerequisites must exist before jurisdiction has been conferred upon the court to impose its sentence. In the Matter of Edward Ring, 28 Cal. 247, it is said: "The only material parts of a judgment, as we have seen, are the statement of the offense for which the defendant has been convicted, omitting therefrom all that is contained in the previous papers, and therefore not necessary to be repeated, and the sentence of the Court." In Ex parte Raye, 63 Cal. 491, the court says: "The judgment pronounced on the 6th of February was not void. It showed that the defendant had been tried and convicted of an offense known to the law; namely, attempted extortion; and that the sentence passed on him was one which the court had jurisdiction to pronounce." In re Robbins, 27 Cal. App. 677, 151 P. 14, 15, a justice of the peace rendered a purported judgment as follows: "I fine him $150 or 150 days in jail" without having previously made a finding as to the guilt or innocence of the defendant. Referring to this purported judgment, the court says: "Assuming that the judgment as originally attempted to be rendered was expressed in the form and manner as described in the petition, viz., 'I fine him $150 or 150 days in jail,' then it was no judgment at all. The

cause having been tried before the justice without a jury, he or his court became the arbiter of the facts, and, before a penalty could be imposed, obviously a judgment of guilty would have to be by him reached and announced. The 'judgment' thus imposed or rendered was without the necessary predicate to support it, conceding, for the purposes of this case, that it was sufficient in form."

In People v. Camp, 42 Cal. App. 411, 183 P. 845, 850, the court says: "The 'judgment,' involving the pronouncement of sentence in a criminal case, is generally orally rendered and delivered, and is usually in informal language, and the law requires it to be no more than that. Pen. Code, § 1202; People v. Terrill, 133 Cal. 120, 123, 65 P. 303. * * * If the judgment with sufficient clearness shows that it is the pronouncement of sentence by the court upon the verdict as returned, and the penalty imposed by such sentence is authorized by the statute under which the prisoner has been convicted, then the judgment satisfies the demand of the statute in that respect."

The same rule is announced in 16 Corpus Juris, 1301, as follows: "As a general rule, in all criminal cases, except where there is a plea of guilty, or nolo contendere, no sentence can be passed without a verdict of a jury as a basis thereof. Where, however, defendant waives his right to a trial by jury, or where a jury is not required, a finding by the court will answer this purpose."

Among the authorities cited in support of the text is the case of Atwood v. Atwater, 34 Neb. 402, 51 N. W. 1073, 1074. In that case the Supreme Court of Nebraska uses the following language: "It is the duty of the magistrate to hear all the evidence offered by either party, and then find that the charge, if sustained by the proof, shows his guilt. This need not necessarily be in formal language, because all matters of mere form in inferior courts are construed very liberally; but it must appear by the language used that the magistrate considers the charge sustained. * * * In our view, however, a judgment in a criminal case, without a verdict or finding, is absolutely void."

[2] Assuming that we are not limited to the bare recitals in the judgment, but that we may examine the entire record of the justice's court wherein petitioner was tried upon a criminal charge, we are unable to find any determination by the court of the issue tendered by the plea of not guilty. It does appear from the entry in the justice's docket that counsel for defendant made a motion for a new trial "on the grounds of all stated in Section 1451 of the Penal Code." But a motion for a new trial is predicated upon a verdict of guilty, or necessarily a decision or finding by the court if a trial by jury has been waived. Section 1449 of the Penal Code provides that after a plea or verdict of guilty, the court must appoint a time for rendering judgment. Section 1450 provides that, at any time before judgment, defendant may move for a new trial, or an arrest of judgment. In the absence of a finding by the court on the issue of fact involved, there is nothing upon which a new trial could be predicated, and we cannot infer, from the mere fact that such motion was made, and denied, that a decision of the court was rendered, when it does not affirmatively appear in its records.

[3] Nor can we infer from the recitals contained in the commitment that a proper judgment was rendered by the court. Section 1455 of the Penal Code is as follows: "When a judgment of imprisonment is entered, a certified copy thereof must be delivered to the sheriff, marshal, or other officer, which is a sufficient warrant for its execution."

But the commitment in this case did not contain a certified copy of the judgment, because no valid judgment was entered. The purported commitment, which is the only authority under which the sheriff holds the petitioner in his custody, contains a purported copy of the judgment, including a determination of the guilt of the defendant, but that statement in the commitment is entirely foreign to any entry appearing in the record of the justice court, and is not a certified copy of any portion thereof, and does not vest the sheriff with any authority to hold petitioner in his custody.

Petitioner is discharged.

We concur: CARY, P. J.; MARKS, J.

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106 Cal. App. 533

DUPUY v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 7043.

District Court of Appeal, First District, Division 1, California.

June 17, 1930.

Rehearing Denied July 17, 1930. Hearing Denied by Supreme Court Aug. 13, 1930.

1. Schools and school districts ⟹144(5).

Where "school term" is less than year, teacher should receive monthly amount during term bearing same ratio to annual salary as time he teaches bears to term (Pol. Code, §§ 1609, 1670).

Money withheld for period during which teacher is not teaching should be apportioned among payments made during school term, thus, where teacher entitled

to $2,400 per year, or twelve payments of $200 each, teaches for term of ten months, monthly salary during term should be $240. The effect and intent of the statute is that salary is due for idle period with power to withhold it until active service begins. The word "withhold" in the statutes means to refrain from paying that which is due.

[Ed. Note.—For other definitions of "Withhold," see Words and Phrases.]

2. Statutes ⟹205, 260.

All parts of statute should be read together, and meaning given to each consistent with general intent of whole.

3. Statutes ⟹228.

Proviso is used to limit and qualify what immediately precedes it and to expressly negative construction that would prevail in its absence.

4. Mandamus ⟹107.

Mandate *held* proper remedy for enforcing payment of school teacher's salary.

Plaintiff's claim involved no terms of employment or dispute over services. All that was involved was whether or not moneys, conceded to have been earned, were due. All that remained was issuance of warrant, and this was ministerial duty enjoined by law.

5. Limitation of actions ⟹50(2).

Claims for school teacher's salary *held* not barred by limitation.

It was conceded that money rightfully belonged to teacher, but practice was to withhold such money until teacher terminated service permanently when withheld portion was paid. Under such circumstances the statute of limitations would not begin to run until a refusal to pay or a direct repudiation of trust under which money was held.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action for writ of mandate by E. J. Dupuy against the Board of Education of the City and County of San Francisco and others, to enforce payment of school teacher's salary. Judgment for petitioner, and defendants appeal.

Affirmed.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for appellants.

Piccirillo & Wolf, of San Francisco, for respondent.

Sullivan & Barry and Theo. J. Roche, of San Francisco, amici curiæ.

PARKER, Justice pro tem.

Plaintiff brought this action for the issuance of a writ of mandate against the defendants to enforce the payment of a salary demand arising out of services alleged to have been rendered as a teacher in the public schools of the city and county of San Francisco.

The defendants include the board of education of the said city and county, the individual members of the said board, the superintendent of public schools of said city and county, and the auditor.

The plaintiff, in addition to his own demand for services rendered, is the assignee of a large number of others similarly situated, and the entire proceeding admittedly belongs to that class euphoniously referred to as friendly suits. In view of the fact that the controversy involved claims arising at different dates and in different amounts, proof was offered in support of but one or two claims, and it was stipulated that the same proof might be considered as being before the court as to the remaining claims.

The purpose of the suit was to have but one point of law finally determined, and while, perhaps perfunctorily, other claims were advanced, it is conceded that the main point of controversy surrounds a construction of certain sections of the Political Code, to be hereinafter detailed.

As stated hereinbefore, the plaintiff's claim arises out of a salary demand for services rendered as a teacher in the public schools of the city and county of San Francisco, a municipality of the state, operating under a local charter. Likewise the general duties of the various defendants, including the defendant board, are to some extent outlined or circumscribed by the provisions of the said charter. However, both parties to the controversy seem in accord to the effect that the question submitted for decision is in no sense a municipal affair, and that a solution thereof must be through interpretation and construction of the general statutes governing, independent of the local charter. Esberg v. Badaracco, 202 Cal. 110, 259 P. 730.

The facts are practically admitted. Plaintiff, engaged as a teacher as aforesaid, rendered service for the full school year of 1925–1926, which school year commenced on July 1, 1925, and ended on June 30, 1926. Pol. Code, § 1670. The date upon which school opened and the services of plaintiff in teaching commenced was August 16, 1925. On September 1st he received a warrant authorizing and directing payment for the service rendered in August, the half month. For each succeeding month he received his regular com-

pensation up to and including June, 1926, when the school year ended. The warrant received at the end of each of said months represented and was payment for the services of that particular month. The result was that for the year 1925–1926 plaintiff had been paid for ten and one-half months' actual teaching, but had received no compensation for the first month and one-half of the school year, namely the month of July and one-half of August. It is for this period of time that the present suit was brought. The controversy, as indicated, is to be determined by a construction of section 1609 of the Political Code. Such is conceded by both sides, in so far as this phase of the case may be involved. Section 1609 of the Political Code, as far as it is necessary to be considered here, reads as follows:

"[Pay] Any board of trustees, or city, or city and county board of education may arrange to pay the teachers or principals so employed by them in ten or eleven or twelve equal payments instead of by the school month; provided, however, that where the board of trustees or city or city and county board of education arranges to pay the teachers or principals so employed by them in twelve equal payments for the year, they shall begin such payments on the first day of the calendar month following the opening of schools for the current year in all cases where school is opened during the month of July, and in all cases where school is not opened during the month of July, the board of trustees or city boards or city and county boards of education may withhold such warrant or warrants which may have fallen due prior to the opening of school until the teachers or principals so employed by them shall have returned to the employment for which they were engaged by the board of school trustees or the city or city and county board of education and shall have resumed their respective duties, and then such payments shall be continued from month to month on the first day of each calendar month thereafter until said teachers have been paid the full amount due to them for that fiscal year; provided, that a teacher who serves less than a full school year is entitled to receive as salary only an amount that bears the same ratio to the established annual salary for such position as the time he teaches bears to the annual school term."

It is conceded that the plaintiff, as well as the assignors upon whose claims he sues, comes within the provisions of this section. The able briefs of respective counsel, and the brief of amici curiæ filed herein, cite us to no authority assuming to construe this section. The briefs are purely argumentative, each party advancing his views concerning what was the legislative intent. No purpose can be served by cataloging the various contentions, because when each argument is reviewed the net result would be a mere reiteration of possible construction, and could not serve as authority upon which could rest the ultimate finding of this court. Therefore we must be guided, at the outset, by such general rules of construction as are universally used in solving similar questions.

[1, 2] From a reading of the section it is apparent that there is no ambiguity therein. The wording is plain, and by giving the words employed their usual and ordinary meaning the section readily discloses the legislative intent, and with that disclosed the task is practically concluded. Likewise, we are mindful of the rule that all parts of a statute are to be read together and meaning given to each, consistent with the general intent of the whole. Before proceeding further, it might here be noted that it is an admitted fact that the plaintiff and all other teachers whose claims are involved were employed at an annual salary rate. Returning then to the code section under examination, we find there outlined a complete plan of payment, covering all possible situations. The section expressly provides for the division of the annual salary into twelve, ten, or eleven *equal* payments. It is manifest that these equal parts, whether it be twelve, eleven, or ten, must exhaust the whole. The section quoted further provides as follows: "Whenever the first day of the month falls upon a holiday, payment of the teachers salary shall be paid on the following day." From this it follows that the plan of payment contemplated was at monthly intervals, and a reasonable, almost necessary, construction of the statute would be that these monthly payments must be consecutive. Therefore, a board of education, after determining the school term, may then determine the mode of payment of the teacher's salary. Let us take an arbitrary standard of salary, merely for purposes of illustration and construction. The teacher's salary is fixed at $2,400 per year. The board determines that this amount shall be paid in twelve equal payments, which would be at the rate of $200 each payment. The school year starts in July. On the 1st of August there would be due the teacher the sum of $200, and a like amount on the first of each succeeding month. Yet, the school term has been designated so that actual teaching does not begin until August 16th. Therefore, it has been provided that the board may withhold such warrants as may have become due prior to the date of opening. The language of this provision clearly indicates the legislative intent to be that, irrespective of the delay in the opening of the school term, the money for the first six weeks is due the teacher. Otherwise, the words "which may have fallen due" would be without meaning. The term "withhold" further illustrates the same intent. "Withhold," indicating the usual meaning, namely, to refrain from paying that which is due. The

power and right to withhold is limited by the terms of the statute to the time when the teacher resumes service, that is, to the time the school term commences. This limitation, however, is controlled by the provision that any teacher who serves less than a full school year is entitled to receive as salary only an amount that bears the same ratio to the established annual salary for such position as the time he teaches bears to the annual school term.

[3] As a matter of generally accepted statutory construction, a proviso is used to limit and qualify what immediately precedes it, and to expressly negative a construction that would prevail in the absence of the said proviso. It is likewise a general rule that what is expected by the proviso would, in the absence thereof, be included in the general words of the statute. Therefore, it seems manifest that in the absence of the restriction of the proviso, the general wording of the statute authorized and directed the salary payments in such a manner that a teacher would receive payment for time not given to teaching. The effect and intent of the statute, as a whole, limited as noted, is that the salary is due for the idle period with the power in the board to withhold the same until active service begins. Under this general wording the day that the school term begins the teacher is entitled to the withheld salary, payable on the first day of the succeeding month. But, restricted by the proviso, no more can be paid than will be in the ratio indicated. The wording of the proviso is significant as illustrating the intent. It is provided that the teacher shall not *receive* any amount excepting such an amount bearing the same ratio to the established *annual* salary as the time he teaches bears to the annual school *term*. As a matter of common understanding, the word "term" in school affairs is easily distinguishable from the word "year." For further purposes of concrete illustration, let us assume that the school term is fixed at ten months. A teacher who teaches one month has taught one-tenth of the school term. Accordingly, he would be entitled to one-tenth of the annual salary. Further illustrating: Where the annual salary was $2,400, the payments would be divided into twelve payments of $200 each. If the school term were fixed at ten months commencing on September 1, the teacher upon resuming or rather commencing his actual service would be entitled to the two months already passed, namely, the sum of $400, in the absence of the proviso. In any event, the money would be due him, but withheld until his teaching period had reached the ratio required. But at the end of each month he would be entitled to all that was then due him, and there would be due him the salary for that month plus the proportion of the withheld amount. Therefore, on his first salary date he would be entitled, in the case illustrated, to receive the sum of $240, being the salary plus one-tenth of the withheld money. These payments continuing throughout the ten months' school term would equal the entire yearly salary, and would be in accord with both the letter and the spirit of the statute. Whatever may be the fixed term, or whatever may be the amount of annual salary, this construction will apply. An objection to this construction lies in the language of the section to the end that the payments, whether twelve, eleven, or ten, shall be equal. Giving effect to the proviso, this result cannot be accomplished unless through some change in the law, whereby a school term is enlarged to embrace the entire year. As long as the term remains less than the entire year, and the language of the proviso restricts the amount a teacher may receive, as it does, there cannot be twelve equal payments. However, if the school term is fixed at eleven or at ten months, there can be eleven or ten equal payments.

The construction given avoids the complaint that teachers may have received in advance moneys they may not retain, and therefore the question asked as to how the county might recover back the advanced money needs no answer. In any event, by a not too close construction, every part of the section could be given meaning by holding that, while the money is not paid directly to the teacher in twelve equal payments, nevertheless there are, as a matter of account, twelve equal payments, because the money subsequently paid, as the term progresses, represents withheld money, chargeable to the payments due as of the months embraced in the preterm period. With this construction it follows that the judgment of the court below must be affirmed in this particular.

[4] Other grounds are urged by appellant, which need further comment. It is urged, that conceding the correctness of the lower court's ruling mandate is not the proper remedy. It will be noted that the claim of plaintiff involves no terms of employment or dispute over services rendered. All that is involved is whether or not moneys, conceded to have been earned, are now due. All that remains is the issuance of the warrant and this is a ministerial duty enjoined by law. In such a case mandate will lie. Goldsmith v. Board of Education, 63 Cal. App. 142, 218 P. 296. See, also, cases therein cited. 16 Cal. Jur. 792.

[5] Appellants next urge that the claim of plaintiff, and the claims assigned to him, cannot be enforced by reason of the statute limiting the time within which actions may be brought. In other words, the claims are outlawed.

This claim is based upon the disclosed and admitted fact that some of the teachers whose claims are involved were employed many years before action commenced. The appel-

lant argues that if the moneys should have been paid them at the end of the first year and were not paid then, the statute began to run. The fact is that at all times it was and is conceded that the money rightfully belonged to these claimants, and the practice is that this money is withheld until a teacher dies or otherwise terminates his service permanently, when the withheld portion is then paid. In other words, the moneys accruing, whether the earlier years or the last is credited to the teacher's account and paid at the cessation of service, being at all times an acknowledged debt withheld. It has all of the characteristics of a trust fund, and after apportionment or acknowledgment the fund is no longer a portion of the county or city and county funds, but held subject to the claim of the teacher. The statute would not begin to run until a refusal to pay or a direct repudiation of the trust.

It is conceded that the employment of the teachers was a continuous employment with salary payable and paid monthly over the entire period of employment. By its system of accounting and by written resolution of the board of education, the city and county has continuously admitted the obligation, and, in effect, has told each and all of the teachers that the balance accrued was being held in the treasury to be paid upon a permanent withdrawal from the service. Under this state of the record, the plea of the statute of limitations cannot avail when the action is commenced within the legal period after a repudiation of the obligation. In this connection it might be further noted that the defendant, even now, does not repudiate the obligation, but in the court below and here it affirmed and affirms its willingness and its duty to pay, in the manner most convenient to its system of accounting. Indeed, it seems throughout, that the issue here is between law and expediency.

Lastly, appellant contends that whatever may be the construction of the statute, the plaintiff bases his claim upon services rendered during the months of July and August, 1926, and that he has received payment for the services rendered during that period. This seems a begging of the question. Under a system of disbursement it might be shown that certain cashed warrants indicated that the money paid covered portions of the periods here in dispute. But the fact is admitted that such payments did not cover, nor were they intended to cover the amounts herein claimed. It is not questioned but that a municipality or other public agency is entitled to and should, in legitimate defense, avail itself of every defense authorized by the law. However, in the discharge of its obligations, and particularly in dealing with a class, such as here, whose service is so essential to the very existence of any form of civilized government, resort should not be had to finesse or palpable evasion of liability.

Throughout this entire proceeding the appellant has admitted the withholding of the money claimed, and it would ill comport with the accepted theory of the case to attempt now to build up a holding of payment in the present state of the record.

The trial court found that payment had not been made, and there is abundant evidence to sustain that finding. The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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106 Cal. App. 551

GRIGGS v. COOK.

Civ. 7244.

District Court of Appeal, First District, Division 2, California.

June 19, 1930.

1. Landlord and tenant ⚷164(1).

Absent fraud, concealment, or covenant in lease, landlord is not liable for injuries to tenant due to defective condition of premises.

2. Landlord and tenant ⚷168(1).

Where tenant had full knowledge of defective condition of premises and brought about injury by her own negligence, landlord was not liable.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Minnie Griggs against George Cook for damages for personal injuries. From a judgment for defendant, plaintiff appeals.

Affirmed.

R. B. Tappan, of Alameda, for appellant.

Snook, Snook & Chase, of Oakland (Samuel H. Wagener, of Oakland, of counsel), for respondent.

NOURSE, P. J.

Plaintiff sued for damages as the result of a fall upon premises leased by plaintiff from the defendant. The cause was tried by the court without a jury. Findings and judgment were entered for the defendant, and the plaintiff appeals on typewritten transcripts.

Some time after plaintiff had leased the premises, and while she was residing thereon, the city of Oakland graded and paved the street in front of the premises, and constructed a sidewalk. In doing this work the

grade of the street and sidewalk was lowered so that an embankment was left from twelve to fourteen inches high along the front of the premises, where the property line abutted the sidewalk. This condition remained for about two months, during which time plaintiff and her family passed in and out of the premises, daily crossing this embankment at the driveway. On March 31, 1927, while plaintiff was leaving the premises, she stepped upon this embankment at the property line. The embankment had become unstable and disintegrated from winter rains and gave way to plaintiff's weight, causing the injuries complained of.

[1] The only point raised on the appeal is that the trial court should have given a different judgment. The finding that respondent did not obligate himself to repair the conditions is fully supported by the evidence. The rule of law that, in the absence of fraud, concealment, or covenant in the lease, a landlord is not liable in damages to a tenant for injuries due to the defective condition of the premises is clearly stated in 15 California Jurisprudence, 704 and 706, where cases are cited.

[2] But the appellant argues that this case should be treated as an exception to this general rule, and cites some authorities from foreign jurisdictions wherein liability was imposed upon the landlord. Whatever exceptions there may be in these cases, we have found none holding that where, as here, the trial court has found that the plaintiff had full knowledge of the defective conditions and brought about the injury by her own carelessness and negligence, the landlord may be held for damages. A recent decision on this point is Nelson v. Myers, 94 Cal. App. 66, 270 P. 719, 722, where it is said: "The contributory negligence of a tenant will bar his recovery for injuries sustained from defects of which he has knowledge," citing 16 R. C. L. 1049.

The appellant does not attack the trial court's finding of her contributory negligence, and this finding is sufficient to support the judgment.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

106 Cal. App. 433

PEOPLE v. HERNANDEZ.

Cr. 1581.

District Court of Appeal, First District, Division 2, California.

June 13, 1930.

Criminal law ⟹1144(17).

Judgment of conviction, being presumed correct, is affirmed, where reviewing court's attention is not called to any error.

No briefs were on file, and defendant's counsel did not appear at time set for hearing argument. An order was made giving defendant 10 days to file brief, and, on default of such filing, cause stood submitted.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Eular Hernandez, alias Eular Tanzer, was convicted of grand theft, and he appeals.

Affirmed.

Leo A. Sullivan, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Lionel Brown, Deputy Atty. Gen., for the People.

STURTEVANT, J.

The defendant appealed from a judgment of conviction for grand theft. The transcript was filed in this court, and the cause was on the calendar May 12, 1930, for the purpose of hearing argument. At that time it transpired that there were no briefs on file, and the defendant's counsel did not appear. An order was made giving the defendant 10 days to file her brief, and, if said brief was not filed within that time, then the cause should stand submitted. On default of said filing, said cause stood submitted May 27, 1930.

As the judgment appealed from is presumed to be correct, and as our attention is not called to any error said judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

110 Cal. App. (Supp.) 765

ANNANDALE GOLF CLUB v. SMITH.

Civ. 7.

Appellate Department, Superior Court, Los Angeles County, California.

July 3, 1930.

1. Clubs ⟹7.

Member of golf club *held* required to pay dues during period of suspension for nonpayment of dues (Civ. Code, §§ 653t–653zd, 653u).

2. Clubs ⟹7.

Golf club *held* not estopped to collect dues from suspended member because of alleged unreasonable rule respecting transfer of membership (Civ. Code, §§ 653u, 653w).

There was no evidence in the record that the club member complied with the provisions of the by-laws and rules and regulations of the board of directors of the golf club in negotiating a sale of his membership.

Appeal from Municipal Court of Los Angeles; Charles B. MacCoy, Judge.

Action by the Annandale Golf Club against Bertram E. Smith. Judgment for plaintiff, and defendant appeals.

Affirmed.

Freston & Files and C. M. Hanson, all of Los Angeles, for appellant.

O'Melveny, Tuller & Myers and Graham L. Sterling, Jr., all of Los Angeles, and C. E. Christopher, of Alhambra, for respondent.

McLUCAS, P. J.

[1] This is an action brought to recover the payment of club dues from a suspended member. Judgment was granted to plaintiff in the sum of $566.75 and interest. Defendant appeals from the judgment.

The facts are not in dispute. It was stipulated that the amount of the claim was unpaid and correct, if defendant be liable; that plaintiff club was a corporation organized November 29, 1916, under title 22 of part 4 of division 1 of the Civil Code (sections 653t–653zd), as a nonprofit organization; that defendant was a regular member of the plaintiff club under a membership purchased by him January 11, 1921; that he was suspended August 31, 1926, by reason of nonpayment of dues; that defendant never resigned from membership; that on November 11, 1928, defendant tendered to plaintiff the sum of $57.49 to cover indebtedness to plaintiff up to August 31, 1926, and interest. The tender was made on the condition that the defendant would not be held liable for dues accruing between September 1, 1926, and November 10, 1928. This conditional tender was refused by the club, and action was brought in December, 1928. Defendant paid no dues subsequent to June 1, 1926, and testified that he ceased to use the facilities of the club on July 1, 1926, and thereafter enjoyed none of its privileges.

The plaintiff club was organized under the provisions of title 22 of the Civil Code relating to nonprofit co-operative corporations, which give such a corporation a wide power of control over the membership and rights of the members. By the terms of section 653u of the Civil Code, such corporations shall not issue capital stock, but shall issue a membership certificate to each member. Any person "may become a member of such corporation upon such terms and conditions as to

the membership, and subject to such rules and regulations as to their, and each of their, contract and other rights and liabilities between it and the member, as the said corporation shall prescribe in its by-laws." The by-laws of the club, which were received in evidence, provide that there shall be two classes of membership, regular and special; that regular members shall be those persons named as incorporators, together with those who shall be duly elected regular members and shall own a club membership; that certificates of membership shall be issued upon the payment of the membership fee "*and shall be subject to all the by-laws then in force, or thereafter adopted, and such by-laws * * * shall be considered as an essential part of the contract of membership between the club and such member*" (italics ours); that a certificate of membership shall be sold and transferred by an indorsement to any candidate for membership who has been elected by the board of directors, and paid a transfer fee of $250, assumed the annual dues, and paid all other obligations of the assignor to the club; that no resignation of a member shall be effective until accepted by the board of directors, nor shall the same be accepted while such member is in any wise indebted to the club nor until he has assigned and delivered to the club his certificate of membership; that each regular member, becoming such subsequent to September 20, 1920, shall pay a membership entrance fee of $1,000; that each regular member shall pay regularly yearly dues of $180 payable in monthly installments on the 1st day of each and every month; that on or before the 10th day of each month a statement shall be mailed to each member, showing the amount of all indebtedness to the club, and including a statement of all dues payable; that the name of any member failing to pay his account before the first day of the next succeeding month shall be posted in the club house; that "*any member * * * failing to pay his account in thirty days after his name has been posted as aforesaid, shall automatically be suspended until such indebtedness is paid*" (italics ours); that the board of directors shall have power by two-thirds vote to expel a member and forfeit the membership of any member for conduct liable to injure the welfare or character of the club, or in violation of the by-laws or established rules of the club, or when the dues are not paid; that such forfeiture shall be effective only in the event that to such members shall be paid the amount of the appraisal of such member's property interest in the corporation after deducting any indebtedness of the member to the club; that no member of the club shall advertise his membership for sale, "but any member desiring to offer his membership * * * for sale may receive from the secretary the names of applicants for membership, with whom he may negotiate a sale and transfer of his membership, subject to the by-laws and rules and regulations enacted by the board of directors."

It thus appears from the by-laws that the only means by which the club membership of the defendant could cease was either by (1) sale and transfer; (2) resignation accepted by the board of directors; (3) expulsion. There was no sale of defendant's membership, defendant did not resign, nor was he expelled. Under the by-laws defendant was automatically suspended until the payment of his indebtedness for nonpayment of dues. The dues were never paid. Defendant might also have been expelled for nonpayment of dues and payment made by the club for defendant's property interest, but such action was never taken, and defendant still retained his membership, though suspended, subject to all the obligations thereof, including the payment of dues, unless such suspension relieved defendant from all obligation to pay dues. The by-laws do not provide that a member shall cease to pay dues upon suspension for nonpayment. The language in the by-laws providing that any member failing to pay his account "shall automatically be suspended until such indebtedness is paid" necessarily implies reinstatement of the member upon payment of dues. Meanwhile the member enjoys all the privileges and possesses all the rights of membership, except social privileges. Social clubs use dues for operating expenses, for maintaining the club property, and for capital investment, such as payment of the funded debt, making improvements, and acquiring additional property. The property rights which the defendant continued to have after suspension were continually being preserved and probably being enhanced with money paid as dues by other members. The defendant could not relieve himself from the obligation to pay dues without surrendering these property rights.

In so far as we are able to learn, this is a case of first impression in California, but cases in other jurisdictions recognize the validity of by-laws requiring the payment of dues during suspension. In the case of Palmetto Lodge v. Hubbell, 2 Strob. (S. C.) 457, 49 Am. Dec. 604, the court upheld as valid and reasonable a by-law providing that a member whose dues remain unpaid for a specified period should be suspended, and that on reinstatement he should "pay the amount standing against him at the time of his suspension, together with the whole sum to which he would have been subjected had he not been suspended."

The court said among other things (2 Strob. [S. C.] 462, 49 Am. Dec. page 605): "By suspension one does not cease to be a member;

and while a member, by law, and his express undertaking, the defendant continues liable to pay the contributions which the by-laws may require."

In 25 Ruling Case Law, 56, the following statements of law appear: "The distinction between suspension and expulsion is frequently recognized in the by-laws of societies and clubs. Suspension is usually a temporary privation of rights and benefits; expulsion on the contrary is a disfranchisement, severing the connection between the expelled member and the organization. Ordinarily a suspended member may be reinstated on paying the amount charged against him but an expelled member can be readmitted only on the terms and conditions of a new member. By suspension one does not cease to be a member."

Boston Club v. Potter, 212 Mass. 23, 98 N. E. 614, 615, Ann. Cas. 1913C, 397, involved the suit of a club against a member for dues. The member claimed that he had resigned prior to the period for which the dues in question were charged, but the court held that the resignation was inoperative because of the fact that the member was indebted to the club at the time the resignation was received; the by-laws providing that only members not indebted to the club might resign. The member further claimed that his membership had ceased ipso facto because of his failure to pay the dues for a period of two months, thus relieving him from further liability for such dues, but the court said: "He could not by his own failure terminate the responsibility which he had assumed, though the club might have done so."

See, also, 19 Ruling Case Law, pp. 1240, 1258, and 1270.

The foregoing authorities establish clearly as a matter of law that a suspended member of a club continues to be liable for dues; suspension merely having the effect of temporarily suspending the member's social privileges as a penalty to compel him to fulfil his obligations to the club. This is not only law, but it is just and equitable. There is no reason why a suspended member, who retains all his property rights, should not contribute his share toward maintaining the value of those property rights. Furthermore, by express provision in the by-laws, the member is obliged to pay dues so long as he remains a member, and the by-laws indicate, and appellant, Smith, admits, that the suspension did not terminate his membership.

Appellant relies upon Westchester Golf Club v. Pinkney, 43 Misc. Rep. 338, 87 N. Y. S. 153, 156. The by-laws in that case provided that, upon nonpayment of dues, the name of the member be dropped from the roll of the members, "unless his indebtedness should be paid within thirty days after notice in writing by the treasurer of the amount of the indebtedness in arrears for fifteen days after notice in writing by the treasurer, and posting thereof."

It was held that, "though the defendant's membership, and consequent rights and liabilities, would not cease by the mere fact of his being in arrears, without more, but, on the contrary, some act on the part of the plaintiff was necessary to accomplish that result, still we think the act of the club in sending the defendant notice that he would be dropped, unless he paid the dues before the date named, was a sufficient indication of its election, and warranted him in assuming that the intention so declared had been followed by the proper resolution of the board of governors."

We think this case is to be distinguished from the case at bar, in that dropping from the roll of members is not synonymous with suspension. Moreover, it appears that affirmative action was taken by the club in sending the defendant notice that he would be dropped, unless he paid his dues before the date named, while in the case at bar there was no notice of suspension given or required to be given by the club. It was further stated in Westchester Golf Club v. Pinkney, supra: "Under the terms of the contract between the parties, as set forth in the above provisions of the by-laws, the defendant, of his own act, independent of any act of the club, could sever his membership, and escape liability for further dues, only by paying his entire indebtedness to date, and by presenting his resignation. Until he should do these two things, the club could hold him for the regular dues, whether he availed himself of its privileges or not."

In the present case, appellant neither resigned nor paid his entire indebtedness to date of resignation.

[2] As a further defense, the defendant alleged that plaintiff was estopped to collect any dues from and after September 1, 1926, for the reason that in the month of May, 1926, the board of directors of plaintiff corporation adopted an arbitrary, unreasonable, and improper rule that none of the memberships could be transferred for less than $1,500, that at the time said rule was adopted the board of directors well knew that the market value of each membership was only $500, and that during the months of June and July, 1926, the defendant had consummated negotiations for the sale of his membership, and had the same actually sold when the prospective purchaser discovered the arbitrary rule made by the board of directors, and refused to proceed with his purchase, and that said arbitrary rule prevented the defendant from disposing of his membership. It was stipulated that such resolution was adopted

by the board of directors on May 24, 1926, and was rescinded in October 1926, that on June 1, 1926, defendant listed for sale his membership at $1,500, less a transfer fee of $250 and a war tax of $25, and that on December 9, 1926, defendant listed for sale his membership at the price of $625, plus transfer tax, less his house account, and that between June 1, 1926, and December 9, 1926, defendant made no demand upon plaintiff club for the transfer of his membership.

In view of the fact that the by-laws provide that subsequent to September 20, 1920, a regular member shall pay an entrance fee of $1,000, it cannot well be said as a matter of law that the rule is arbitrary and unreasonable which requires a transfer fee of $1,500. Appellant acquiesced in this action of the board of directors by listing his membership for sale at $1,500 with the club on June 1, 1926. We find no evidence in the record to support the allegation that the market value of memberships was only $500 at the time said resolution was adopted, on May 24, 1926, nor is there evidence that such was the market value in October, 1926, although we do find evidence that memberships were listed as low as $500 in December, 1926. No proof of the actual value of memberships appears in the record. Neither do we find any provision in the by-laws for sale of a membership to one who is already a member of the club, as attempted by appellant. Section 11 of article II of the by-laws authorizes sale of memberships only to those who are candidates for membership and elected by the board of directors. Section 2 of article VI of the by-laws provides that any member desiring to offer his membership for sale "may receive from the secretary the names of applicants for membership with whom he may negotiate a sale and transfer of his membership, subject to the by-laws and rules and regulations enacted by the board of directors." The by-laws authorized the board of directors to amend the by-laws at any meeting of the board. The resolution of May 24, 1926, increasing the transfer fee to $1,500, was a rule or regulation enacted by the board.

We find no evidence in the record that appellant complied with the provisions of the by-laws and the rules and regulations of the board as authorized by sections 653u and 653w of the Civil Code in negotiating a sale of his membership, and therefore conclude that respondent is not estopped to collect dues from appellant from and after September 1, 1926. It also should be noted that the answer fails to allege facts sufficient to constitute a plea in estoppel.

The judgment is ordered affirmed.

We concur: SHAW, J.; BISHOP, J.

209 Cal. 557

POWERS v. SOULE-MARTIN LUMBER CO. et al.

L. A. 10341.

Supreme Court of California.

June 16, 1930.

1. Mechanics' liens ⟹170.

Where building was constructed by owner under separate contracts, lien of materialman, as regards priority, dated from time he commenced to deliver materials (Code Civ. Proc. § 1186).

The question involved was the priority of a materialman's lien over a trust deed recorded before the materials were delivered and after contract had been entered into for removing fence, which contract the lien claimant asserted marked the commencement of the building. Code Civ. Proc. § 1186, provides that a lien under the mechanics' lien law is preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building was commenced, work done, or the materials commenced to be furnished.

2. Mechanics' liens ⟹166.

As regards commencement of materialman's lien, there was no general construction contract where building was constructed by owner under trade-name.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Clifford H. Powers against the Soule-Martin Lumber Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

F. A. Waters, of Los Angeles, for appellant.

Henry O. Wackerbarth and Henry E. Carter, both of Los Angeles (Joseph A. Adair, of Los Angeles, of counsel), for respondent.

CURTIS, J.

On August 27, 1925, J. Edward Kirker was the owner of the two parcels of land involved in this action. On that day he agreed to sell them to Carl D. Hall. This agreement was consummated by Kirker conveying said parcels of land to Hall. In consideration of this conveyance, Hall executed and delivered to Kirker two promissory notes for $3,750 each. These notes were dated August 27, 1925, and one of said notes was secured by a trust deed upon one of said parcels of land, and the other was secured by a trust deed against the other of said parcels. Said trust deeds were executed by Hall, and one was recorded on

September 10 and the other on September 11, 1925, in the office of the county recorder of the county in which said parcels of land were situated. On September 10, 1925, there was also recorded in the office of said county recorder a mortgage upon said parcels of land. This mortgage was executed by Hall in favor of a building and loan association to secure a promissory note in favor of said association and executed by Hall. It was agreed by all of said parties, including Kirker, that said mortgage should be prior and superior to the two trust deeds executed to secure the indebtedness from Hall to Kirker. Hall was in the contracting and construction business under the name of Hall Construction Company, and his purpose in acquiring said parcels of land was to construct a building thereon from the funds secured from said building and loan association by means of said mortgage. To all of this Kirker agreed. The building was constructed and the money secured on said mortgage was applied in payment of the labor and materials used in the construction of said building. The money, however, was not sufficient to pay all persons furnishing such labor and materials, including the appellant, the Soule-Martin Lumber Company. This company, having furnished lumber and other building materials used in the construction of said building for which it had not been paid, filed a lien for such materials against said building in the office of said county recorder. It is conceded that this claim of lien in form and substance is in all respects valid and legal. In the meantime, however, Hall failed to pay his indebtedness to Kirker as it became due. The latter, for this failure on the part of Hall, foreclosed his two trust deeds, and at the foreclosure sales purchased said two parcels of land. Kirker thereafter conveyed said lands to the plaintiff, who instituted this action to quiet his title to the same and has made, among others, the Soule-Martin Lumber Company, the appellant, a party thereto. The plaintiff claimed to be the owner in fee of said parcels of land, and that the defendants had no estate, right, title, or interest therein. The appellant, the Soule-Martin Lumber Company, appeared and by its answer set up its said claim of lien and asserted that its lien for the materials used in the construction of said building was superior and prior to whatever right or title the plaintiff had in said land. The trial court found in favor of the plaintiff and entered a judgment quieting his title to said parcels of land as against the claims of all the defendants. The Soule-Martin Lumber Company alone appeals.

The appellant bases its contention that its lien for materials used in the construction of said building is prior and superior to the title of plaintiff acquired from Kirker, after the foreclosure of said trust deeds by Kirker, upon the following additional facts: On September 9, 1925, which was one day before either of said trust deeds was recorded, the said Carl D. Hall, the purchaser of said parcels of land from Kirker, entered into a contract with O. C. Pocklington by the terms of which the latter was "to put in the foundations (for the building constructed upon said land) and tear down old fence" on said real property, and that said Pocklington on said 9th day of September, 1925, pursuant to said contract, tore down the fence situated on said premises consisting of four posts on which were strung several strands of barbed wire. Pocklington did no further work on said premises until September 16, 1925, when he commenced to lay the foundations for said building. On September 11, 1925, the date on which the last of said trust deeds was recorded, Hall entered into two contracts with the Soule-Martin Lumber Company to furnish the lumber and plumbing materials for said building. Pursuant to these contracts, the lumber company made its first delivery of lumber on said premises on September 14, 1925. These two contracts, as well as the one with Pocklington, were entered into by Hall under the name of the Hall Construction Company, a designation under which Hall was doing business, he having duly filed for record a certificate showing that he was the sole proprietor and operator of such business under such name.

[1] Appellant takes the position that, under the state of facts just related, the building for the construction of which it furnished lumber and plumbing materials was commenced on the 9th day of September, 1925, the date Pocklington tore down the fence on said premises, which date was one day before either of the trust deeds, under which the plaintiff deraigns title, was filed for record in the office of the county recorder. Appellant, therefore, contends that under the terms of section 1186 of the Code of Civil Procedure its claim of lien for said materials is preferred and superior to the liens of Kirker under said trust deeds. This section of the Code provides that a lien under the mechanic's lien law of this state is "preferred to any lien, mortgage, or other encumbrance which may have attached subsequent to the time when the building * * * was commenced, work done, or the materials were commenced to be furnished." Appellant does not contend that it furnished any materials for the building before the Kirker trust deeds were recorded, but that the building having been commenced prior to the recordation of said trust deeds, a lien for any materials furnished thereafter for the construction of said building would relate back to the commencement of said building and would take priority over any liens which might subsequently attach to said premises. Were this the first occasion on which this question was before us, we might give to appellant's contention more extended

consideration than we deem it necessary to give at the present time.

The building in question was not constructed under a general contract for its erection, but was built by the owner, Hall, who purchased the materials and employed the labor used in its construction. Every person furnishing material for the building did so under a separate and distinct contract made with Hall, the owner. His lien, therefore, dated from the time he commenced to deliver the materials used in the building and not from the commencement of the building. On the other hand, had the building materials been furnished and the building constructed under a general contract, then materialmen furnishing material to the contractor, and laborers performing labor, would have liens under the contract and these liens would relate back to the time the building was commenced by the general contractor. This was expressly decided in the case of McClain v. Hutton, 131 Cal. 132, 61 P. 273, 276, 63 P. 182, 622. In that action, while the parties had entered into a purported contract for the construction of the building there involved, the contract was declared void by the court, which further held that the labor and materials which went into its construction were deemed to have been done and furnished at the instance of the owner. A controversy arose as to the priority of their respective rights between a mortgagee, whose mortgage had been recorded after the commencement of the building, and certain mechanic's lienholders. The court, after referring to section 1186 of the Code of Civil Procedure, made the following announcement as to the construction to be given to its meaning: "The provision is that building liens are preferred to liens 'which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished,' etc. Under this provision the cases must be divided into two categories, distinguished by the existence or nonexistence of a valid contract. In the former case the priority of the liens is to be determined by the date of the commencement of the building; in the latter by the time the work was done, or the materials commenced to be furnished." (Citing authorities.) The lien of appellant herein undoubtedly falls within the second of these categories above mentioned—the nonexistence of a contract under which the building was being constructed. Its priority must therefore be determined by the date the materials were commenced to be delivered. This date, as we have seen, was subsequent to the recordation of each of the two Kirker trust deeds. Under this state of facts the trust deeds were prior and superior to the lien of appellant.

[2] There is no merit in the argument of appellant that Carl D. Hall and the Hall Construction Company are two separate and distinct entities, and that the building was constructed under a contract entered into by Carl D. Hall with the Hall Construction Company. The Hall Construction Company was simply a name or designation under which Carl D. Hall carried on his business as a contractor and builder, and it did not represent a different entity or person from Carl D. Hall. The two designations, one the real name of Carl D. Hall and the other an assumed name under which Hall carried on his business, represented one and the same person. There was, therefore, no contract for the construction of the building as a person cannot make a contract with himself.

These views render it unnecessary for us to pass upon the question as to whether the work done by Pocklington under his contract with Hall in removing the old fence on the rear of said land, which work was done prior to the recordation of the two Kirker trust deeds, constituted a commencement of the building. Conceding that this work of Pocklington in removing said fence constituted in a legal sense a commencement of the building, appellant furnished no materials under the Pocklington contract, but under a separate and distinct contract, or rather under two such contracts, made by it with Hall, and no materials were commenced to be furnished by appellant under its contracts until after the two Kirker trust deeds had been recorded.

In our opinion the trial court correctly held that appellant had no right or interest in said two parcels of land.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

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209 Cal. 696

MORGAN ADAMS, Inc., v. COUNTY OF LOS ANGELES.

L. A. 10201.

Supreme Court of California.

June 30, 1930.

Taxation ⚷200.

Property used exclusively in telephone business by telephone company is exempt from local taxation, whether owned or merely leased by it (Const. art. 13, § 14; Pol. Code, §§ 3607, 3665a, subd. 1).

Const. art. 13, § 14, provides that gross receipts tax of telephone companies is in lieu of all other state, county, and municipal taxes on their property used exclusively in operation of their business in state. Pol. Code, § 3665a, subd. 1, author-

izes state board of equalization to authorize company claiming double taxation of its property in violation of section 3607 to deduct from its gross receipts amount which would produce such double taxation.

In Bank.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Morgan Adams, Inc., against the County of Los Angeles. Judgment for plaintiff, and defendant appeals.

Affirmed.

Everett W. Mattoon, County Counsel, and W. Sumner Holbrook, Jr., and Gordon Boller, all of Los Angeles, for appellant.

Pillsbury, Madison & Sutro, of San Francisco, Lawler & Degnan, of Los Angeles, and Alfred Sutro and Eugene M. Prince, both of San Francisco, for respondent.

PRESTON, J.

Appeal by defendant, county of Los Angeles, from a judgment rendered against it upon its declination to answer plaintiff's complaint, following the overruling of demurrer thereto.

The action was one to recover under Political Code, § 3819, a certain item of $19,416.91, paid under protest as taxes levied by said defendant for the year 1926 upon a certain piece of real property in said county upon which was located a ten-story class A concrete building of the assessed value of $501,730. Said building, together with the ground thereunder necessary for its use, was at the time in question leased by plaintiff to the Southern California Telephone Company, a public utility corporation, and was used exclusively by the latter corporation for office quarters for its various departments. It is conceded that the said building and ground thereunder were at all times legitimately used by said telephone company as a part of its operative property. Respondent states the sole question involved in the following language:

"The case involves the question whether property leased by a telephone company and used exclusively in its telephone business in this state is subject to local taxation merely because it is leased and not owned by the operating company, despite the provision of section 14 of article XIII of the Constitution that the gross receipts tax of telephone companies is 'in lieu of all other taxes and licenses, state, county and municipal' upon 'their franchises, * * * poles, wires * * * rights of way and other property, or any part thereof, used exclusively in the operation of their business in this state,' and despite the fact, hereafter shown, that the rates of the gross receipts tax were specifically fixed to make that tax the equivalent of a fair tax on all property used by public service corporations in their business, whether leased, owned or howsoever held."

This identical question, involving this same telephone company, has, since the institution of this present action, been passed upon and determined by the Supreme Court of the United States, and its conclusion was in accord with the previous decision of the Circuit Court of Appeals of the Ninth Circuit. We refer to the case of Hopkins v. Southern California Telephone Co., 275 U. S. 393, 48 S. Ct. 180, 72 L. Ed. 329, decided January 3, 1928. In the opinion written by Mr. Justice McReynolds, the question is stated, authorities cited, and reasoning applied, as follows:

"The argument against exemption of leased property from local taxation rests chiefly upon literal and narrow interpretation of words in § 14, Article XIII, California Constitution—'* * * all telegraph and telephone companies * * * shall annually pay to the State a tax upon *their* franchises, * * * poles, wires, pipes, canals, conduits, rights of way, and other property * * * used exclusively in the operation of their business'; and 'such taxes shall be in lieu of all other taxes and licenses, State, county and municipal, upon the *property* above enumerated of *such* companies.'

"But the Constitution plainly directs, 'taxes levied, assessed and collected as hereinafter provided upon * * * telephone companies * * * shall be entirely and exclusively for State purposes' and such companies 'shall annually pay to the State a tax upon their poles, * * * and other property, or any part thereof, used exclusively in the operation of their business.' And the Political Code provides (Sec. 3664) that 'taxes levied, assessed and collected as hereinafter provided upon telephone companies shall be entirely and exclusively for State purposes and shall be assessed and levied by the State Board of Equalization'; (Sec. 3664a) that 'all * * * telegraph and telephone companies * * * shall annually pay to the State a tax upon their * * * poles, wires, * * * and any other property or any part thereof, used exclusively in the operation of their business * * *;' (Sec. 3664a-4) 'such taxes shall be in lieu of all other taxes and licenses, state, county, and municipal, upon the property above enumerated of such companies except * * *;' (Sec. 3665a) 'the term "gross receipts from operation" as used in Sec. 3664a of this Code is hereby defined to include all sums received from business done within this State;' (Sec. 3666) if an assessor finds reported as operative property in his county any which he regards as nonoperative, he shall notify the Board of Equalization within thirty days; and (Sec. 3607)

'nothing in this Code shall be construed to require or permit double taxation.'

"Sec. 14, Article XIII (adopted 1910), was proposed by a Commission which gave the matter much consideration and made an elaborate report. It is the result of an earnest effort to provide for enforcement of adequate contributions from public service and some other corporations while avoiding double and unjust taxation. Payment of specified percentages (subject to change by the Legislature) of gross receipts was directed upon the theory that the value of operative property could be fairly measured by considering receipts therefrom. Also, that by paying to the State a portion of these, the corporation would, in effect, contribute for its operative property the substantial equivalent of all taxes laid upon other property. The Commission (Rep. 1910, p. 19) said—'In explanation of the above rates it may be stated that they are fixed on the theory that these proportions of the gross receipts will in each case equal the average burden of taxation on other classes of property. The method of arriving at the different rates is explained in detail in the 1906 report of this commission.'

"The Supreme Court of the State has declared the gross receipts tax is essentially one on property, Pullman Company v. Richardson, 185 Cal. 484, 487 [197 P. 346]; and it apparently approves the view that 'a fair tax upon gross earnings bore such a relation to the values of these properties under their unity of use as to justify such a tax upon revenue as being a legal and commutated or substituted tax for other taxes which were or might have been levied.' Pacific Gas & Electric Co. v. Roberts, 168 Cal. 420, 425 [143 P. 700]. See Southern Pacific Co. v. Levee District No. 1, 172 Cal. 345 [156 P. 502]; Great Western Power Co. v. City of Oakland, 189 Cal. 649 [209 P. 553].

"The State received from respondents a sum equal to five and one-half per centum of the gross revenues derived from all operative property under their control—leased as well as owned. These did not depend upon ownership; and rent paid out was not considered.

"If payment of the prescribed part of the gross receipts only relieves from local taxation property actually owned and leaves all held under lease subject thereto, inequalities with possible confiscation, would certainly result. Under that theory a corporation with title to half (in value) of its operative property, the remainder being leased, would really pay on account of the portion owned at twice the rate required of another corporation operating the same amount of property and having equal receipts, but holding nothing by lease. And if the ratio between property owned and leased were less, the difference in rate would be still greater. A telephone company which leased everything it used would release no property from taxation by paying the gross receipts tax, while a competitor with equal receipts, by paying the same amount, might absolve from local assessments property of very large value.

"These difficulties can not be avoided by saying the lessee will not pay assessments against the lessor and therefore can not complain. Leases are commonly made with reference to taxation. When the lessor discharges the tax the lessee pays rent accordingly. And the Fourteenth Amendment protects those within the same class against unequal taxation; all are entitled to like treatment.

"Here respondents have surrendered out of gross receipts the equivalent of the burden imposed upon other property not less valuable than all the operating property in their systems; and now, unless more is paid, disruption is threatened through seizure and sale of essential instrumentalities actually employed to produce those receipts.

"We think the purpose of the 1910 Amendment is to tax all operating property of a telephone company by ascertaining the gross receipts and taking therefrom the specified percentage. Thus, the imposition becomes approximately equal to what other property bears. Unless the gross receipts tax be so treated, some very serious questions under the Federal Constitution are almost certain to arise. Without an authoritative holding by the State Supreme Court to the contrary, we must conclude the leased speaking sets are not subject to local taxation."

In the face of the above clear and convincing holding, it is difficult to do more than elaborate upon certain of the views therein set forth. However, we think that from another standpoint it is demonstrable that the gross earnings tax is based, not only upon the value of all leased and owned operative property, but also upon the added intangible values covered by such words as "franchise" or "going concern" values created by the unity of use and operation of all such properties.

The oft-quoted report of the commission on revenue and taxation, 1906, which commission recommended the constitutional amendment here involved in practically the identical form in which it now appears, sets forth, after an exhaustive study of the subject, the method by which the rate of taxation on the gross earnings was arrived at, showing it to be in fact an effort to arrive at a substitute for the ad valorem tax upon all the properties involved in the operation of the business of the utility. After assuming the net annual receipts of the utility to be 36 per cent. of the gross receipts, the proper gross receipts tax is shown by the following illustration (p. 95): "In order to compute what rate of taxation on gross earnings is the equivalent of

a given rate of taxation on the property, we have simply to divide the percentage of net earnings by the assumed rate of capitalization and multiply the result by whatever tax rate on the property we wish to compare the gross earnings rate with. Thus, for example, if we wish to impose, in the form of a gross earnings tax, a burden which shall be the equivalent of a tax of 1½ per cent. on the property, then in the case of a railroad, taking the figures assessed above, we divide 36 by 6 or 8, whichever shall be determined upon as a fair rate at which to capitalize railroad earnings, and multiply the result by 1½, obtaining, at 6 per cent., 9 per cent. as an equivalent rate on gross earnings, or at 8 per cent. as a basis of capitalization, 6¾ per cent. If the tax rate on property or capital were fixed at 1 per cent., the above rates would become 6 per cent. and 4½ per cent."

From this quotation it is clear that the tax is arrived at by capitalization at a fair rate of the net earnings of the utility, and a calculation upon this sum of a rate of taxation comparable with the average full-value tax in operation upon other property in the state. It is further to be noted that net earnings as applied to the rate-fixing plan include all items paid for rent as well as interest paid upon bonded indebtedness, and also items paid to cities for franchise privileges, as these several items are not deducted from the gross earnings. Referring to the exclusion of the rental charges from operating expenses, the commission used the following language (p. 96 of said report): "Some corporation officers have argued before the Commission that rent is an operating expense and should be deducted before the net earnings are computed. This rests on a fundamental misconception of the purpose of ascertaining net income. If net income is to be used to determine the rate of a tax on gross earnings, such tax to be *in lieu of all taxes on property used in operation* by a corporation, all net income accruing to that property or from its use must be included."

It follows, therefore, that any local assessment of taxes upon operative property is double taxation of such property, whether it be leased or owned by the utility. If the utility owned no property and leased all its operative property, in such case there would be a complete double taxation, and such taxation is not only forbidden by the Political Code, § 3607, but, in order to avoid it, a special provision was also inserted (subdivision 1 of section 3665a of said Code), to the effect that any company claiming that the levy of the percentage fixed results in double taxation of its property, may make application to the state board of equalization for a hearing on the matter and said board shall have the power to take evidence and determine the facts with respect to such claim and in the event the board sustains the claim of such company, said board may authorize the company to deduct from its gross receipts that amount of such receipts which, if included, would produce such double taxation.

We cannot accord weight to the argument advanced, that the owner of the property and not the utility pays the tax; therefore, the utility is not concerned with the question of whether there is double taxation. If both lessor and lessee pay a full tax upon the property used by the utility, either directly or indirectly, the utility will suffer. In such a situation, if it pays the tax it will be forced to pay the same rental as a third party and thereby get no advantage from the previous tax paid upon said building by the gross receipts method. If the rental were deducted from the gross receipts, and if the net earnings were thereby correspondingly reduced, the argument would have more force, but, inasmuch as the question of leased or owned property does not figure in the matter of gross receipts, the tax is paid upon the property by the utility, which is the equivalent of an ad valorem tax assessed against the owner.

The Supreme Court of Wisconsin, in the case of Merrill Railway, etc., Co. v. City of Merrill, 119 Wis. 249, 96 N. W. 686, 687, in discussing this question, used the following language: "In this view it is difficult to see why leased property should not fall within the purpose of the exemption as readily as that owned absolutely, while actually used for the purposes of the enterprise. What difference would it make that his power plant had been purchased? Such fact would neither enhance nor diminish the gross earnings of the entire plant, nor the contribution thereto of this particular property. Why should the legislators care whether the dynamos in the power house or the motors on the cars were owned or leased? In either case they contribute equally to produce the revenue on which the license fee is graded."

Neither can we accord importance to the contention that in making up the rate base by which the service charge to be allowed the utility is fixed, the railroad commission of the state refers rentals to operating expense and deducts them from the gross to arrive at the net revenues. An examination of the references to the action of this body discloses that in some instances this is done, but that, in other and perhaps more frequent instances, the commission allows the full value of the leased property to enter the rate base and then allows a return thereon. Whatever the method, a just return to the property is the basis of action. Where the rental is a just return upon the property involved, it may be allowed and deducted as an operating expense, or the leased property may be valued and used as a part of the property upon which a fair return should be allowed, in

which latter case no deduction for rent is made.

The state taxing systems forbid double taxation and evidence a solicitude for the taxpayers in preventing unreasonable discrimination against any class of them. It therefore seems unnecessary to discuss the contention that the construction appellant offers for said amendment would contravene the guaranties found in the Fourteenth Amendment to the Federal Constitution. We are mindful also of the consequences to counties in the deprivation of revenues from sources heretofore taxed by them, but this loss, even if serious, is but a result of the system put in operation by the Constitution, which we are powerless to change.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.

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209 Cal. 612

COON v. SHRY.

Sac. 4335.

Supreme Court of California.

June 18, 1930.

1. Gifts ⟹10.

Gift of donor's own note is not enforceable by donee against donor or his estate, in absence of estoppel.

This is true for the reason that note only amounts to a promise to make a gift in the future.

2. Gifts ⟹10.

Donor's own note could not be enforced as gift against donor's estate notwithstanding execution, recordation, and delivery of mortgage as security for note.

3. Mortgages ⟹1.

Mortgage or mortgage lien is mere incident of debt or obligation which it is given to secure (Civ. Code, § 2909).

In Bank.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Victoria M. Coon against William M. Shry, executor of the last will and testament of Vincie Boucher, deceased. Judgment for defendant, and plaintiff appeals.

Affirmed.

G. W. Zartman, of Tulare, for appellant.

Ugene U. Blalock, of Los Angeles, for respondent.

PER CURIAM.

On September 22, 1927, Vincie Boucher executed a promissory note in the sum of $2,500 in favor of appellant. At the same time she executed a mortgage on certain real property belonging to her as security for said note. The evidence is uncontradicted that these instruments were executed for two reasons. In the first place, appellant was an old friend of Dr. and Mrs. Boucher, who for many years had been very kind to them, and the Bouchers, to show their appreciation, were desirous of making a gift of the note and mortgage to appellant. In the second place, an action was then pending against Dr. Boucher, the husband of Vincie, and they desired to prevent a possible judgment creditor from reaching the land in question, which had been conveyed some time before by Dr. Boucher to his wife. This last motive we deem immaterial on this appeal, for the reason that the rights of third persons are not concerned; this being an action by the donee against the estate of the donor, and for the further reason that the evidence conclusively shows an intent to make a gift of the note and mortgage to appellant. It is candidly admitted that no consideration of any kind or nature moved from appellant.

The mortgage was recorded at the request of the Bouchers and, together with the note, was delivered to appellant some time in November, 1927. Until that time appellant had no knowledge of the execution of the note and mortgage. The doctor, shortly thereafter, won the damage suit pending against him. Several times thereafter and until their respective deaths, the Bouchers recognized the gift. Some time after receiving the note and mortgage, the appellant partially executed a release and satisfaction of the mortgage and deposited it with the attorney who had drawn the note and mortgage, with instructions to deliver the same to the Bouchers, in the event that they sold the property, so that they could give clear title to the same. This release was never accepted by the Bouchers, they in fact repudiating the same, and it was destroyed by appellant before Mrs. Boucher's death. Early in 1928 both Dr. and Mrs. Boucher died, both having recognized the gift a short time prior thereto. Appellant filed a claim against the estate of Mrs. Boucher, which claim was rejected. Thereupon this action was commenced to foreclose the mortgage. The trial court decided in favor of the estate on two grounds: (1) That the note and mortgage were without consideration, and therefore unenforceable, being no more than an incomplete gift; (2) that the mortgage was entirely satisfied by reason of the release mentioned above. It must be conceded that the findings in support of this second ground of the decision are wholly without support in the evidence, the uncontradicted evidence be-

ing to the effect that the release was only to be delivered to the mortgagor on condition that the property was sold. This condition never occurred. Moreover, the mortgagor repudiated the release and refused to accept the same. The release was secured by appellant and destroyed prior to Mrs. Boucher's death, and not subsequent thereto, as found by the trial court. These inaccuracies in the trial court's decision can avail appellant of but little on this appeal, the first ground of the decision being in accordance with well settled legal doctrine.

[1] First let us consider the attempted gift of the promissory note. The law is well settled in every American jurisdiction that a gift of the donor's own note is not enforceable by the donee against the donor or his estate, in the absence of an estoppel, for the reason that it only amounts to a promise to make a gift in the future, and is no more enforceable than any other promise to make a gift. One of the leading cases in California is Tracy v. Alvord, 118 Cal. 654, 50 P. 757. In that case, it is true, there were grave doubts as to whether a delivery of the note had taken place, but the court held that immaterial, stating at page 655 of 118 Cal., 50 P. 757: "For, if it were conceded that delivery was proved, yet, as between the donee and the donor, or his estate, the gift of the donor's own promissory note created no enforceable obligation. Being a mere promise, without consideration, to give a sum of money in the future, it was of no legal consequence." This case was followed by that of Wisler v. Tomb, 169 Cal. 382, 146 P. 876, where the donor executed a note in favor of his nephew, a minor, and delivered it in trust to a third person. The donor made several payments of interest on the note, and then died. The court held that the note could not be enforced against the estate, stating at page 385 of 169 Cal., 146 P. 876, 877: "Upon the authority of Tracy v. Alvord * * * the judgment must be affirmed. In that case it was held that the gift of the donor's own promissory note, either inter vivos or causa mortis, does not create an enforceable obligation in favor of the donee against the donor or his estate. Being a mere promise without consideration to give a sum of money in the future, such a note is of no legal consequence." And again at page 386 of 169 Cal., 146 P. 876, 878, it is stated: "A note intended as a mere gift, with no other consideration than natural affection, cannot form the basis of an action at law. The gift is always revocable until it is executed, and a promissory note intended as a gift is but a promise to make a gift in the future. The gift is not executed until the note is paid." See also, to the same effect, Hironymous v. Hiatt, 52 Cal. App. 727, 199 P. 850, 853; Walker v. Rockwood, 26 Cal. App. 624, 147 P. 992; Lefrooth v. Prentice, 202 Cal. 215, 226, 259 P. 947. The overwhelming weight of authority in other jurisdictions is in accord. See notes in 27 L. R. A. (N. S.) 308; L. R. A. 1918C, 340; 26 L. R. A. 305. We must take it as settled that in this case the purported note constituted a mere unexecuted voluntary promise, unsupported by consideration, to make a gift of money in the future, and, as was said in Hironymous v. Hiatt, supra, at page 736 of 52 Cal. App., 199 P. 850, 853, "is a nudum pactum, imposing upon the maker no legal or enforceable obligation whatever."

[2, 3] The question next presented is whether the execution, recordation, and delivery of the mortgage as security for the note in any way affects the above rule. The briefs of counsel furnish no assistance on this point. The situation seems to be a point of first impression, not only in this jurisdiction, but in any other, no case having been found directly in point, where a mortgage was given as security for such a gift. However, we have no hesitancy in holding, in accordance with well-settled principles, that the mortgage must stand or fall with the note. It is well settled in California that a mortgage or mortgage lien is a mere incident of the debt or obligation which it is given to secure. California Civil Code, § 2909; 17 Cal. Jur. 710, § 27, and cases cited in footnote 11. There cannot be a mortgage if there is no debt or other obligation to be secured. Holmes v. Warren, 145 Cal. 457, 463, 78 P. 954; Todd v. Todd, 164 Cal. 255, 258, 128 P. 413; Ahern v. McCarthy, 107 Cal. 382, 386, 40 P. 482. A mortgage in California has no existence independent of the thing secured by it. Estate of Fair, 128 Cal. 607, 613, 61 P. 184; People v. Eastman, 25 Cal. 601, 603. As distinguished from the debt, the mortgage has no determinate value. Nagle v. Macy, 9 Cal. 426.

From the above analysis it necessarily follows that since the note, evidencing the debt, is void, being a mere unenforceable promise to make a gift in the future, the mortgage must fall with the note, and must be declared to be void.

The judgment appealed from is affirmed.

209 Cal. 610

GRAMSON v. GENIELLA et al.

L. A. 10345.

Supreme Court of California.

June 18, 1930.

1. Taxation ⟹770.

Noncompliance with statute as to notice of sale *held* not cured by statute making deed conclusive evidence (Pol. Code, §§ 3764, 3787).

Pol. Code, § 3764, requires collector, when publication of delinquent list and notice of sale has been made, to file copy with county recorder and county clerk with affidavit attached that publication was made. Section 3787 makes tax deed duly acknowledged or proved except as against actual fraud conclusive evidence of regularity of all other proceedings from assessment to execution of deed.

2. Taxation ⟹832.

Holder of void tax deed is not entitled to reimbursement for payment of assessment for street improvements (Pol. Code, § 3898, subd. 5).

Pol. Code, § 3898, subd. 5, provides that, when in any action at law it shall be determined that sale and conveyance are void, no decree shall be given declaring forfeiture until former owner or other party in interest shall have repaid to purchaser the full amount of taxes, penalties, and costs paid and expended by him.

In Bank.

Appeal from Superior Court, Los Angeles County; J. R. Hughes, Judge.

Action by C. P. Gramson against John Geniella and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

James W. Bell, of Los Angeles, for appellant.

Charles Lantz and Winslow P. Hyatt, both of Los Angeles, for respondents.

LANGDON, J.

This is an appeal by the plaintiff from a judgment against him in an action to quiet title to real property in the county of Los Angeles, state of California. The trial court found that the defendant F. O. Huber was the owner of said property in fee, and that the plaintiff had no right, title, nor interest therein, except an equity for repayment to him of the sum expended by him for the payment of taxes, penalties, and costs in pursuit of the state's title to the said property. Said defendant paid the amount found by the court to be due to plaintiff.

[1] The plaintiff claimed title under a purported tax deed to said property, but the court found said deed to be void "by reason of the fact, among other things, that notice of sale of said property was not given by the tax collector prior to the said purported sale, as required by law."

Appellant contends that if such a defect existed in the tax deed, due to a failure to comply with section 3764 of the Political Code, nevertheless, it was cured by the provisions of section 3787 of the Political Code.

The case of Bussenius v. Warden, 71 Cal. App. 717, 236 P. 371, has settled that point against the contention of appellant, and, as suggested by appellant, this case was probably the basis of the ruling of the trial court in the instant case.

[2] It is also maintained by appellant that if the tax deed to him was void and conveyed no title, nevertheless he was entitled to reimbursement for a payment he had made of an assessment against the property for street improvements. That matter is directly decided, contrary to the contention of appellant, in the case of Numitor Gold Mining Co. v. Katzer, 83 Cal. App. 161, 256 P. 464, 467, wherein it is said:

"Subdivision 5 of section 3898 of the Political Code provides that in an action at law, before a conveyance of real property made upon a sale for delinquent taxes can be set aside as void, the holder of such deed must first be repaid 'the full amount of taxes, penalties and costs paid out and expended by him. * * *'

"This statutory provision appears to embrace all classes of expenditures, the repayment of which the Legislature intended to make a prerequisite to the entry of a decree declaring a tax deed void on account of irregularities, and it does not pretend to include expenditures for betterments or improvements. Nor can the term 'costs,' as it is used in this section, be construed to include improvements. Evidently the Legislature, in the use of this term, was considering only the costs which might be incurred on the sale of the property for delinquent taxes."

To the same effect are the cases of Coleman v. County of Los Angeles, 180 Cal. 714, 182 P. 440; McPhail v. Nunes, 48 Cal. App. 383, 192 P. 95; Smith v. Golden State Syndicate, 43 Cal. App. 346, 185 P. 209.

The judgment appealed from is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.

209 Cal. 677

BARTON v. STATE BAR OF CALIFORNIA.

S. F. 13822.

Supreme Court of California.

June 30, 1930.

1. Attorney and client ⚷48.

Attorney, charged with unprofessional conduct, appearing at hearing without objecting to notice, and voluntarily testifying, waived defect, if any, in notice.

Attorney was charged with violating rules of professional conduct by local administrative committee, and notice thereof stated that on certain date, and for some time prior thereto, attorney violated rule 2 setting out copy of rule, but no specific act of attorney was stated in notice. Attorney appeared in response to notice at time and place specified, and did not object to notice nor to proceeding with hearing, but voluntarily gave testimony at hearing, and otherwise participated therein, and was fully cognizant of precise charge against him.

2. Attorney and client ⚷36(1).

Rules of conduct by governors of bar approved by Supreme Court become its rules within its power to discipline "attorneys" who are officers of court.

[Ed. Note.—For other definitions of "Attorney," see Words and Phrases.]

3. Constitutional law ⚷61.

Power of governors of state bar to formulate rules of professional conduct by approval of Supreme Court *held* not unconstitutional delegation of power (Const. art. 3, § 1).

4. Attorney and client ⚷38.

Rule prohibiting attorney from soliciting professional employment by advertisement except for professional cards or conventional listings *held* reasonable.

5. Attorney and client ⚷38.

Advertisement consisting of name and address of attorney and words "advice free" violated rule against advertisement, requiring reprimand of attorney.

In Bank.

Application by Daniel Barton to review order of Board of Governors of the State Bar of California recommending suspension for violation of rules of professional conduct prohibiting advertising.

Order modified.

C. H. Fish, William F. Herron, and Daniel Barton, all of San Francisco, for petitioner.

O. K. Cushing, of San Francisco, for respondent.

PER CURIAM.

The petitioner was charged by the state bar of California with a violation of rule 2 of the Rules of Professional Conduct of the State Bar, approved by the Supreme Court of the state on May 24, 1928. Said rule reads as follows: "A member of The State Bar shall not solicit professional employment by advertisement or otherwise. This rule shall not apply to the publication or use of ordinary professional cards, or to conventional listings in legal directories." 204 Cal. xci.

In response to an order to show cause issued by the state bar and served upon petitioner, a hearing on said charge was had before local administrative committee No. 4 of the city and county of San Francisco. Said hearing resulted in a finding of said committee that petitioner had violated said rule 2, in that petitioner for a period of six months immediately prior to the filing of said charge against him, and thereafter continuously up to the time of said hearing, had published and caused to be published in a daily newspaper printed and published in the city of San Francisco and in the advertising section of said newspaper an advertisement reading as follows: "D. Barton. Advice free, all cases, all courts. Open eves. Room 907, 704 Market Street, phone Douglas 0932." For the violation of said rule the local administrative committee recommended that the accused be reprimanded. The finding of the local administrative committee No. 4 was reported to, and approved by, the board of governors of the state bar of California. The latter body, however, recommended to this court as a penalty to be imposed for his violation of said rule that petitioner be suspended from the practice of law for a period of three months. The matter is now before us upon the application of petitioner to have this court review the action of the board of bar governors and of said local administrative committee No. 4 as set forth herein pursuant to the provisions of section 38 of the State Bar Act (St. 1927, p. 38).

It is first contended by petitioner that the notice of the hearing of the charge against petitioner before said local administrative committee No. 4 was insufficient, and gave said committee no power or authority to hold said hearing. The notice states that petitioner "on the 7th day of July, 1929, and for some time prior thereto" has violated said rule 2, and sets out in full a copy of said rule. No specific act of petitioner was stated in said notice, nor was he informed in what manner he was charged with violating said rule, whether by personally soliciting business or by improperly advertising therefor.

[1] We question the sufficiency of said notice, but we think petitioner has waived any defect therein by his appearance in response thereto before said committee at the time and place stated in said notice and by the fact that he neither made said or any objection to said notice nor to proceeding with said hearing thereon. He voluntarily gave testimony at said hearing, and otherwise participated in the proceedings taken before said committee. He appeared to be fully cognizant of the precise charge against him, as shown by his testimony given at said hearing. At the close of said hearing in response to a ruling made by said committee he stated, "That is fair enough. As I say, I don't believe I have violated the rule referred to. I am willing, gentlemen, to test it; to take it to the Supreme Court on my constitutional rights in a friendly way." The proceedings before the committee were closed with this statement of the petitioner.

Petitioner places no great emphasis upon the contention that he was not accorded due notice. Neither does he claim that the evidence was not sufficient to support the findings of the local administrative committee No. 4, for he admitted quite frankly before said committee that he had published said advertisement, and that he had continued to publish said advertisement after he had been requested by the office of the state bar at San Francisco to discontinue the same. The gravamen of his complaint is that the board of governors of the state bar is without power to suspend an attorney for the violation of the Rules of Professional Conduct formulated by said board of governors, and approved by the Supreme Court, and particularly rule 2 thereof.

The contentions of petitioner in this regard are three: (1) The Legislature by reason of the inhibitions of section 1 of article 3 of the state Constitution cannot delegate the power to formulate and enforce rules of professional conduct; (2) rule 2 of the Rules of Professional Conduct is an unreasonable rule; and (3) the advertisement by the petitioner does not come within the prohibition of rule 2.

[2, 3] There is no merit in the first contention. As we view it, there is no delegation of power. The Rules of Professional Conduct formulated by the board of governors of the state bar, by the approval of the Supreme Court, thereby became the rules of that court, and the power of the court to make reasonable rules and regulations is not open to question. This power is a power inherent in the courts, and needs neither lengthy discussion nor extended citations of authorities to support it. No decision has been called to our attention which goes so far as to hold that the Supreme Court has deprived itself of its inherent power of disciplinary supervision over the conduct of attorneys who are officers of the court. On the contrary, in the recent case of Brydonjack v. State Bar (Cal. Sup.) 281 P. 1018, 1020, the possession by the courts of such inherent and implied powers as it is necessary for them to possess in order "to properly and effectively function as a separate department in the scheme of our state government" was expressly affirmed.

Petitioner earnestly argues that rule 2 which prohibits the solicitation of professional employment by advertisement is an unreasonable regulation. He argues that, inasmuch as advertising is universally regarded as a legitimate activity, an activity indispensable to the success of business concerns, it follows that a rule prohibiting the solicitation of professional employment by advertising is unreasonable. In support of his contention he states that "no amount of preaching can alter the cold, indisputable fact that the law has ceased to be a sacrosanct profession and has become a highly competitive business." It is admitted, of course, that the rule is not arbitrary and discriminatory with reference to the members of the legal profession, for it applies to each and every member with equal force. The point made, therefore, is that the rule is discriminatory against the legal profession as a whole, in that the members are prohibited from doing that which others in commercial occupations and in business are permitted to do as a matter of course.

In the consideration of the reasonableness of this rule, it should be borne in mind that it is a rule proposed and promulgated by the members of the profession itself, and is not a rule forced upon the profession by a lawmaking body not in sympathy, perhaps, with the problems of the legal profession. The State Bar Act was passed as the result of an insistent demand for a more effective maintenance of proper professional standards. By said act the State Bar, consisting of all members of the legal profession entitled to practice law in this state, was charged with the duty of keeping its own house in order—with responsibility for the qualifications, conduct, and discipline of its members. 15 Cal. Law Review, 313. It should also be borne in mind that this rule is not a "hang-over" from the sixteenth and seventeenth century, "when (to quote from petitioner's brief) social and economic conditions were entirely different from those which prevail in the twentieth century in the United States." It was approved by the Supreme Court on May 24, 1928, and, having been adopted by the representatives of the state bar may be presumed to represent the ideas and attitude of the legal profession as a whole. It is perhaps by virtue of the fact that the profession of the law has come to be considered by some attorneys solely as "a highly competitive business" that it became necessary to give legal sanction to a rule which had theretofore been enforced merely by public opinion.

It is obvious, we think, that the legal profession does stand in a peculiar relation to the public, and that there exists between the members of the profession and those who seek its services a relationship which can in no wise be regarded as analogous to the relationship of a merchant to his customer. For instance, it may be pointed out that, if a customer discovers that one merchant is unworthy of his patronage and trust, he does not thereby brand all merchants as dishonest and unethical, whereas, if a client becomes convinced that the attorney to whom he has intrusted the protection of his interests is unworthy of the trust reposed in him, he is very apt indeed to classify attorneys as a class as unworthy of trust and to feel that they are all scoundrels. For this reason alone it is important to the legal profession as a whole that nothing shall be done by any member which may tend to lessen in any degree the confidence of the public in the fidelity, honesty, and integrity of the profession. And it is by reason of the confidential relationship existing between attorneys and clients that certain rules and regulations are applicable to the profession which are not applicable to a business. In Re Galusha, 184 Cal. 697, 698, 195 P. 406, it was said: "The adequate protection of public interests, as well as inherent and inseparable peculiarities pertaining to the practice of law, require a more detailed supervision by the state over the conduct of this profession than in the case of almost any other profession or business." And in State Bar v. Superior Court (Cal. Sup.) 278 P. 432, 435, the court said: "The profession and practice of the law * * * is essentially and more largely a matter of public interest and concern, not only from the viewpoint of its relation to the administration of civil and criminal law, but also from that of the contacts of its membership with the constituent membership of society at large, whose interest it is to be safeguarded against the ignorances or evil dispositions of those who may be masquerading beneath the cloak of the legal and supposedly learned and upright profession."

[4] Notwithstanding the declaration of the petitioner, we do not believe that the profession of the law is, or ought to be, merely "a highly competitive business." And because it is not, and because it is necessary that the public should not be given the idea that it is so considered by the members of the profession, the rule against the solicitation of business by advertisement is a reasonable regulation. As was said in People ex rel. Attorney-General v. MacCabe, 18 Colo. 186, 32 P. 280, 19 L. R. A. 231, 36 Am. St. Rep. 270: "The ethics of the legal profession forbid that an attorney should advertise his talents or his skill, as a shopkeeper advertises his wares." And as was said in canon 27 of the Canons of Ethics of the American Bar Association: "The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust."

Rule 2 expressly excepts the publication or use of ordinary professional cards, and the conventional listings in legal directories. It therefore, permits the practitioner to keep his name before the public in the form and to the extent designated in the rule. Inasmuch as all the members of the profession are alike forbidden to do more than this, this should be sufficient. It can readily be understood how unfavorably the public would react toward the profession as a whole if there were published large full-page advertisements extolling the learning, ability, and capacity of an attorney "to get results." It would be hard to draw the line as to what was improper and what was proper in advertising, and the regulation by the state bar which prohibits all advertising except professional cards and conventional listings is, we think, a reasonable one.

[5] However, it may be conceded that the advertisement inserted by the petitioner is not as to its main content a particularly serious violation of rule 2, and that, had it not been for the fact that petitioner persisted in running the advertisement in the foregoing form after he had been requested to discontinue it, it is doubtful if any action would have been taken by the board of governors of the state bar. It is admitted the only serious infraction of the rule is the insertion of the words "Advice free," and that, had these words been omitted, the insertion of his name, his business address, his phone number, and that he was engaged in the general practice of the law, would not have merited any disciplinary action.

We cannot, however, follow the argument of the petitioner that these objectionable words are not a solicitation for employment. Obviously, they could have no other purpose than to induce prospective clients to come to his office with the hope of getting them to disclose their affairs and to seek his advice upon matters which would lead to his employment as their attorney. They were "the syrup with which to entice the fly." And it is equally obvious that, if the words did not have the effect of bringing clients to his office who would ultimately become paying clients, no purpose could be subserved by inserting them. It will suffice to say, without further argument on this phase of the case, that in our opinion the petitioner by the insertion of the words "Advice free" in the advertisement was guilty of an infraction of the rule forbidding solicitation of professional employment by advertisement.

We are, however, of the opinion that the board of governors, in recommending as a penalty for the infraction of said rule suspen-

sion from the practice of the law for a period of three months, was too severe, and we therefore accept, in lieu of said recommendation, the recommendation of local administrative committee No. 4 that he be reprimanded, and this opinion shall constitute such reprimand.

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209 Cal. 726

LASHER v. FAW et al.

S. F. 13000.

Supreme Court of California.

July 8, 1930.

Rehearing Denied Aug. 7, 1930.

1. Appeal and error ⟹1071(1).

Judgment may not be set aside for conflict in findings, unless conflict is clear and findings are incapable of being harmoniously construed.

2. Exchange of property ⟹4.

Contract for exchange of land for assignment of lease on personal property, involving consideration for lessor's consent, was entire and not severable.

3. Exchange of property ⟹5.

Failure of any one of parties to exchange agreement to perform constituted failure of consideration, within statute authorizing rescission of entire transaction (Civ. Code, § 1689).

Contract was for the exchange of certain property, in consideration of assignment of lease and conveyance of certain personal property, involving payment to lessor for consent to assignment of lease.

4. Trusts ⟹94.

Lessor failing to consent to assignment of lease held property conveyed to it as consideration therefor, subject to implied trust in favor of grantor (Civ. Code, §§ 852, 1971).

5. Appeal and error ⟹877(2).

Appellant was limited to portion of decree which affected its rights and directed judgment against it.

6. Exchange of property ⟹7.

Owner, on failure of parties to complete exchange agreement, was entitled to recover market value of land theretofore conveyed.

In Bank.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by George A. Lasher against A. C. Faw, Cross Investment Company, and others. Judgment for plaintiff, and defendant last named appeals.

Affirmed.

Cross & Brandt, of San Francisco, for appellant.

M. S. Hamilton, James H. Boyer, and Mark Averill, all of Oakland, for respondent.

PRESTON, J.

The judgment is affirmed.

This action was brought by plaintiff for the purpose of rescinding a certain agreement of exchange entered into between himself and defendant Faw, and to obtain in connection therewith such incidental relief as might be equitable, to wit: Reconveyances to him of certain real property; cancellation of certain notes; a money judgment against defendant Murray, and all other proper equitable relief. The court made findings and judgment was entered thereon in his favor, from which defendant Cross Investment Company, a corporation, has alone appealed. The facts are virtually undisputed, and such as are necessary for the purposes of this opinion will now be set forth:

Appellant owned certain real property in Oakland, Cal., upon which a garage building was erected. By written agreement it leased this property to defendant Faw for a period of twenty years from January 25, 1922. Among other things, said agreement provided that neither the lease nor any part thereof could be assigned without the written consent of the lessor first had and obtained. It also required that defendant Faw give a guarantee for faithful performance on his part of the terms thereof. Pursuant to this requirement a guarantee agreement was duly executed by defendant Lyon. Later, and on January 23, 1923, by the express consent of said lessor, a second guarantee agreement was duly executed whereby defendant Murray was substituted as guarantor in the place and stead of said other defendant. It appears that Faw was indebted to Murray in the sum of $10,300, evidenced by notes and partly secured by a chattel mortgage on the equipment of said garage. Therefore, on January 25, 1923, a further agreement was entered into between Faw and Murray, whereby Faw assigned said lease to Murray and agreed to pay him a certain sum monthly on said indebtedness, and Faw was to keep said garage business so long as said payments to Murray were faithfully met; upon full and faithful performance of the terms of the agreement by Faw, Murray was to reassign the lease to him. Consent of the lessor to this assignment was obtained, but it was expressly provided that such consent should not be construed as a waiver of the provisions in said lease against further assignment thereof without its written con-

sent. In the event the assignment of the lease to Murray should become absolute, he agreed to notify appellant lessor, and he would thereupon be deemed the lessee bound by the terms of said lease.

The above is a brief recital of the transaction respecting said garage business up to the point of plaintiff's entrance upon the scene. Plaintiff was the owner of a ranch in Sonoma county of 640 acres, subject to an incumbrance of $15,000, also of another Sonoma county ranch of 40 acres, and of certain lots in Berkeley, Cal. On November 7, 1923, he entered into a written agreement of exchange with defendant Faw, whereby the latter agreed to exchange his said lease, the said garage business, and equipment, subject to an incumbrance of $8,450, for the properties of plaintiff above mentioned. In other words, in exchange for plaintiff's said 640-acre ranch, subject to said incumbrance, his 40-acre ranch clear, and said Berkeley lots clear, defendant Faw agreed to have said lease assigned to plaintiff and to convey to him the stock, tools, equipment, and business being carried on on the premises, subject to his (Faw's) indebtedness to Murray, as security for which Murray was holding said chattel mortgage on the tools and equipment and the assignment of said lease.

Prior to execution of said agreement of exchange, however, Faw had consulted with appellant lessor and knew that it would demand $5,000 for its consent to an assignment of said lease to plaintiff, but plaintiff had no knowledge of this fact. Plaintiff, therefore, proceeded to partly perform said agreement of exchange. As security until he could clear his 40-acre ranch he delivered to Faw his note for $4,000 on December 3, 1923; on February 18, 1924, he delivered to him a note for $1,000, secured by deed of trust on said Berkeley lots, and on February 19th another note for $1,000, secured by a similar deed of trust. These notes, the court found, were then indorsed by Faw to defendants Lyon and Murray, who took them in due course and for value. The judgment rendered herein, therefore, did not order their cancellation.

During this period Faw had continued his negotiations with appellant, but plaintiff was still without his assignment of lease, and he knew that Faw was having difficulty in procuring it. Plaintiff and Faw, therefore, on February 5, 1924, entered into a second agreement by which Faw undertook once more to secure appellant's consent to assignment, as partial consideration for which plaintiff had theretofore delivered said two promissory notes, secured by deed of trust, and plaintiff agreed to deliver Faw a deed to his 40-acre ranch, upon which there was a mortgage of $6,000, and a deed to said four Berkeley lots. Faw agreed that if he failed to procure said consent, he would redeliver the promissory notes to plaintiff or their equivalent in value.

At this juncture, appellant, having completed its inquiries, finally stated to Faw that for $5,000 it would consent to said assignment of lease to plaintiff. Faw, of course, was unable to pay that sum and advised appellant fully of the state of the transaction between himself and plaintiff. Therefore, on March 6, 1924, appellant addressed a letter to Faw setting forth definitely and precisely the terms upon which it would consent to said assignment, to wit: First, that within five days $2,500 cash be paid to it or instead that said four Berkeley lots, clear, owned by plaintiff be conveyed to it; second, that prior to March 20, 1924, a balance of $296.66 due R. H. Cross on a certain note be paid; third, that an additional payment of $2,500 cash be made on or prior to March 20th, or in lieu thereof $1,000 cash and a 30-day promissory note for $1,500, secured by deed of trust on plaintiff's ranch; fourth, that the written consent of said Murray to said asignment be delivered to it; fifth, that a guaranty of faithful performance by plaintiff of all the terms and provisions of the lease be delivered to it, and, sixth, that prior to March 20th a written agreement signed by plaintiff, in form satisfactory to appellant, assuming and agreeing to perform said lease and all the terms and conditions of the agreement between Murray and appellant, be delivered to it. It will be noted that the above letter was addressed to Faw, not to plaintiff, for appellant steadfastly refused to recognize plaintiff in the negotiations.

Faw, however, showed the letter to plaintiff and he thereupon handed to Faw for immediate delivery to appellant, a direct bargain and sale deed to it of said Berkeley lots, free and clear. Thereafter, appellant, from time to time, granted several extensions for the performance of the other conditions set forth in said letter, but they were never performed. Neither did appellant ever give its consent to the assignment of said lease to plaintiff, nor did it offer to return said property to plaintiff. On the contrary, in April, 1924, it entered into and consummated an agreement for the sale of said property to a third person for the sum of $2,000. In August plaintiff, having parted with his property and being still without his assignment of lease, vacated and abandoned the garage premises and surrendered possession to Murray. Faw defaulted on his obligation to Murray, and some time later Murray brought an action and foreclosed on said assignment of lease which he held as additional security. The decree in said action was entered on January 12, 1925, and the sale thereunder was had on February 9, 1925, at which Murray became the purchaser of the lease and entered into and took possession of the premises. The court specifically found that said assignment had been made by Faw to Murray as security only, and not otherwise, and prior to purchase at the foreclosure sale, Murray was not

the owner of the lease; further, that plaintiff had full knowledge that Murray held the lease as security only and had full knowledge of all proceedings by which it finally, on foreclosure, became vested in Murray.

In February, 1925, plaintiff brought this action, seeking to recover everything with which he had parted, in reliance upon the promises and agreement of Faw, including the property so conveyed by him to appellant. As above stated, the court found for plaintiff, and as a conclusion of law held that the due assignment and transfer from Faw to plaintiff of said lease was a material part of the consideration for the contract of exchange between them; that the failure of Faw to procure appellant's consent thereto constituted a material substantial failure of consideration, and plaintiff was therefore entitled to rescind said contract of exchange on that ground, and to have restored to him all of said real and personal property, subject to the liens existing thereon, to secure the payments to defendants Murray and Lyon of the promissory notes held and acquired by them in due course for value without notice of any equities therein claimed by plaintiff. The court then decreed that plaintiff's said 40-acre ranch be restored to him, and that he have and recover from appellant said Berkeley lots so deeded to it, or, in lieu thereof, a money judgment for $4,000, the reasonable value thereof. Defendant Cross Investment Company alone appealed from said judgment.

[1] Appellant complains of an alleged contradiction in the findings in that the court found to be true the allegations of the complaint, which alleged as the sole ground for recovery of said property the fact that plaintiff conveyed it to appellant, and appellant took it with full knowledge on its part that it was one of the pieces of real property, the subject of said agreement of exchange, and as a part of the consideration thereof to be paid on the part of plaintiff, and that it was procured by appellant from plaintiff with such knowledge; and plaintiff received no consideration from appellant for the conveyance of said property to it as aforesaid; and the court further found as follows: That plaintiff, the owner of said lots, conveyed them to appellant upon an understanding and agreement that in consideration therefor, together with the payment of a further sum of $2,500, an assignment of said lease should be forthwith transferred to plaintiff; that said lease was never assigned or transferred to plaintiff, and that the consideration for which said lots were conveyed to appellant wholly failed, and appellant, therefore, took and held possession of said lots without consideration, the reasonable market value thereof being $4,000. The alleged contradiction, if in fact there is one, is in our opinion unworthy of mention, and certainly may not be considered as a ground for the reversal of this judgment. The rule is so well settled that it requires no citation of authority to support it that a judgment may not be set aside unless the conflict in the findings is clear and the findings are incapable of being harmoniously construed.

There is likewise no merit in appellant's contention that its demurrer to the complaint should have been sustained. We have examined the pleading, and its sufficiency as against demurrer is plain. The point does not warrant detailed discussion.

Appellant further claims that it is apparent that the theory of both plaintiff in his complaint and of the court in rendering its judgment was that a voluntary and deliberate conveyance of real property, made without fraud, mistake, or undue accident, can be rescinded for failure of consideration, which conclusion is contrary to law, as the remedy in such cases is at most an action for damages. In other words, appellant claims that the second agreement of February 5, 1924, between plaintiff and Faw, wherein plaintiff agreed to immediately deliver a deed to said property to appellant, the assignment of lease and consent of appellant thereto to be later secured by Faw, entirely superseded the first contract; that, as there is absolutely nothing in the deed or in said agreement which could in any way constitute a condition subsequent, and as plaintiff freely and voluntarily made the conveyance to appellant, he has no right to complain, or to seek rescission, being at most entitled to bring an action for damages. Hartman v. Reed, 50 Cal. 485; Lawrence v. Gayetty, 78 Cal. 126, 20 P. 382, 12 Am. St. Rep. 29; Tillaux v. Tillaux, 115 Cal. 663, 47 P. 691; Schott v. Schott, 168 Cal. 342, 143 P. 595, and other cases.

[2, 3] The rule contended for by appellant and set forth in the authorities just cited is sound, but it is not applicable to a case of this character. The contract of exchange between plaintiff and Faw we must hold to be entire and not severable (Wooten v. Walters, 110 N. C. 251, 14 S. E. 734, 736, as approved in Sterling v. Gregory, 149 Cal. 117, 120, 85 P. 305); it was an executory contract wherein the several obligations of the parties constituted to each, reciprocally, the consideration thereof, and the failure to perform constituted a failure of consideration within the meaning of section 1689 of the Civil Code, entitling plaintiff to rescind the entire transaction, of which the transaction with appellant was a vital part. See Richter v. Union Land, etc., Co., 129 Cal. 367, 372, 373, 62 P. 39, 40, wherein the following language is used and the cases of Hartman v. Reed, supra, and Lawrence v. Gayetty, supra, are properly distinguished:

"The position of the plaintiff that the failure of one of the parties to a contract to perform does not in any case constitute a

failure of consideration, and that the only remedy of the injured party is to recover damages, cannot be sustained. In all executory contracts the several obligations of the parties constitute to each, reciprocally, the consideration of the contract; and a failure to perform constitutes a failure of consideration, either partial or total, as the case may be, within the meaning of section 1689 of the Civil Code. In the case of an executed contract, as, e. g. a deed of land of which the consideration is a promise to pay the purchase money, this is not always true, because in such cases, or generally in such cases, 'the vendor has waived actual performance upon the part of the vendee, relying upon his mere promise to perform.' Lawrence v. Gayetty, 78 Cal. 126, 134, 20 P. 382, 12 Am. St. Rep. 29; Hartman v. Reed, 50 Cal. 485; Schultz v. McLean, 93 Cal. 358, 28 P. 1053. Which is but to say that the actual inducement to the vendor to enter into the contract, or, in other words, the sole and sufficient consideration contemplated by him, is the mere obligation of the vendee to pay without regard to the contingency of its performance; for in such cases, almost universally, the payment of the purchase money is secured by a lien on the land sold, and the reliance of the vendor is upon his ability to enforce the payment of the vendee, in invitum. But the rule, even if it could be regarded as universal, applies only to the rescission of executed contracts, and not to executory contracts, as in the case here." See to the same effect Smith v. Blandin, 133 Cal. 441, 444, 65 P. 894; Bray v. Lowery, 163 Cal. 256, 124 P. 1004; Grotheer v. Panama-Pac. Land Co., 41 Cal. App. 19, 181 P. 667; Campbell v. Kennedy, 177 Cal. 430, 170 P. 1107.

[4] In other words, it is clear from the pleadings and findings that the trial was had upon the theory that plaintiff was seeking to rescind said executory contract of exchange upon the ground of failure of defendant Faw, the other party thereto, to perform; that as an incident of the exchange, looking to performance by plaintiff, appellant, with full knowledge of the situation, accepted the deed to said property, a subject of said exchange, and likewise, with full knowledge of all said facts, conveyed it to a third party. That appellant was fully aware of all the facts and circumstances connected with the entire transaction is established beyond doubt by the unquestionable evidence, including testimony of appellant's president and general manager, which supports the findings of the court in this behalf. Appellant having thereafter failed to give its consent to the assignment of said lease to plaintiff, held said property subject to an implied trust by operation of law in favor of the grantor (Civ. Code, § 852; Code Civ. Proc., § 1971), and was in duty bound to return it to him, or the reasonable value thereof.

In other words, having taken said property with full notice of the equities of plaintiff, appellant stood in no better position with respect to said rescission than defendant Faw would have stood, had the deed been made by plaintiff direct to him. The justice of this position is obvious. Plaintiff received nothing whatsoever from appellant for said deed; appellant parted with nothing in accepting it. Appellant does contend that, as it was not required to consent to an assignment of the lease, by its letter to Faw stating the conditions upon which it would assign, and by accepting said deed, it changed its position to its detriment and prejudice, but this is merely begging the question. A bare statement of the facts shows that appellant studiously refrained from prejudicing itself in any way; that, in fact, it absolutely refrained from recognizing any direct dealing with plaintiff, but insisted on negotiating with Faw to secure said sum, should it give its consent to the transfer.

[5, 6] Appellant also attacks the judgment upon the ground that it does not purport to rescind the agreement between plaintiff and Faw, or to quiet title against Faw to the property, but only announces a money judgment against it. Appellant, however, is the sole defendant to prosecute an appeal, and its concern is, therefore, limited to that portion of the decree which affects its rights and directs a judgment against it. In an action of this character, it was within the power of the court to do exact justice between all the parties, to settle all issues, and, if necessary and appropriate, to make the decree in the form of a personal monetary judgment. 4 Cal. Jur. 797. It was also proper to decree that plaintiff was entitled to receive from appellant $4,000, the reasonable value of the said lots as found by the court, rather than $2,000, the amount which appellant claims to have received from the sale thereof. The measure of plaintiff's loss was the reasonable market value of the property, and the finding that such value was the sum of $4,000 has ample support in the evidence. Blahnik v. Small Farms Improvement Co., 181 Cal. 379, 184 P. 661, 663.

The case just cited, Blahnik v. Small Farms Improvement Co., is directly in point, and is authority for the ruling which we have announced on many of the matters considered herein. We shall therefore close this discussion with a brief résumé of the holding there made. The object of that action was to recover $2,556.94, alleged to have been paid by the plaintiffs to defendant as a part of the purchase price of certain lands which defendant had contracted to sell them, which contract, it is alleged, was rescinded by plaintiffs because of defendant's failure to perform the covenants therein contained. The court held that defendant's failure to construct certain roads, as provided in the contract of sale, constituted a failure of a ma-

terial part of the consideration, entitling plaintiffs to rescind. It then appeared that by the recitals in the contract the defendant acknowledged receipt of $2,300 upon the purchase price, but upon the trial it was shown that this sum was not paid in money, but that the real transaction was an exchange of certain real property conveyed by plaintiffs to defendant, and taken by defendant at the sum of $2,300, which amount was credited upon said contract price. Under the evidence, at the highest value given said property by any witness, it would have been worth at the time the contract was executed at least $300 less than the amount for which it was credited on said contract of sale to plaintiffs. The court below apparently disregarded this evidence and allowed plaintiffs the full sum of $2,300 as a payment made upon the contract, which they were entitled to recover. The appellate court in this behalf said: "It also appeared at the trial that after the contract of sale was made, but before the offer to rescind, the defendant had conveyed the property received in exchange to other parties and was not able to restore that part of the consideration. The court apparently, proceeded upon the theory that the plaintiffs were entitled to treat the amount for which said property was taken in exchange as a payment in money upon the price of the property sold to the plaintiffs by defendant and to recover said amount upon a rescission. In this the court erred. If the defendant had retained the title to the property, the most that the plaintiffs could have demanded upon the rescission would have been a reconveyance thereof to them. The defendant having parted with the title thereto, and being unable to restore the plaintiffs to the position in which they were at the time the contract was made, the rule in equity is that they must compensate the plaintiffs for the loss thereby sustained. This would not be the price at which the property had been accepted upon the contract of sale, *but would be its value at that time*, and it was therefore necessary for the court to determine such value. 'Where the grantee has conveyed the property, or part of it, to another, or for other reason cannot restore it, the plaintiff is entitled to a money judgment for the value of the land, the restoration of which is thus impossible; such relief being given on the principle that the court having obtained jurisdiction will retain the case for the purpose of giving complete relief.' 6 Cyc. 340. Equity does not measure the damage by the price at which the property may have been taken in the exchange between the parties, but allows only the value of the property at the time the exchange was made. 9 Cor. Jur. 1263, § 211; Forrest v. Wardman, 40 App. D. C. 531; Sedgwick on Damages (9th Ed.) § 655b."

We are satisfied with the equitable disposition made of this cause by the court below; hence our affirmance of the judgment first herein announced.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

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209 Cal. 671

SHIPP v. SUPERIOR COURT IN AND FOR SAN BERNARDINO COUNTY et al.

S. F. 13925.

Supreme Court of California.

June 30, 1930.

1. Justices of the peace ⟹31.

Jurisdiction of justices' courts depends upon fact of population and not upon any report or proclamation to that effect (Const. art. 6, § 11a; Code Civ. Proc. § 112, as amended by St. 1929, p. 834).

Applicant for mandamus to compel superior court to assume jurisdiction of certain action contended that justice's court had no jurisdiction, inasmuch as Code Civ. Proc. § 112, as amended by St. 1929, p. 834, did not provide method of ascertaining population of townships to determine jurisdiction, and inasmuch as no proceedings had been taken to ascertain population under Pol. Code, § 4055, census of 1920 would govern and judicial knowledge of that census disclosed San Bernardino township had population of less than 30,000, giving superior court jurisdiction in action involving sum greater than $300.

2. Justices of the peace ⟹42.

Township of San Bernardino, under 1930 census and previous determination in another action, *held* to have population exceeding 30,000, giving justice's court jurisdiction of action involving $689.21 (Const. art. 6, § 11a; Code Civ. Proc. § 112, as amended by St. 1929, p. 834).

3. Statutes ⟹98(3).

Statute fixing jurisdiction of justices' courts on basis of population *held* not invalid as local or special law (Const. art. 1, §§ 11, 21, art. 4, § 25, and art. 6, § 11a; Code Civ. Proc. § 112, as amended by St. 1929, p. 834).

4. Justices of the peace ⟹32.

Fact that certain county contains both major and minor townships with different justice's jurisdiction *held* insufficient basis for nullifying statute basing jurisdiction on pop-

ulation (Const. art. 6, § 11a; Code Civ. Proc. § 112, as amended by St. 1929, p. 834).

Under such circumstances, appeal in one case would go to superior court and in other to Supreme and appellate courts.

5. Justices of the peace ⟹32.

Fact that board of supervisors may arbitrarily change township lines, thereby raising or lowering justice court jurisdiction, *held* insufficient to nullify statute basing jurisdiction on population (Const. art. 6, § 11a; Code Civ. Proc. § 112, as amended by St. 1929, p. 834).

It was contended that board of supervisors, by gerrymandering of township lines, may so raise or lower jurisdiction of justice's court, causing court to lose jurisdiction of pending causes.

6. Justices of the peace ⟹32.

General legislative power to confer jurisdiction on justice's court based on population *held* not in conflict with special constitutional power of municipalities to provide for justices' courts in freeholders' charters (Const. art. 6, § 11a; Code Civ. Proc. § 112, as amended by St. 1929, p. 834).

7. Courts ⟹472(7).

Jurisdiction of justice court, if it has jurisdiction, is exclusive (Const. art. 6, §§ 5, 11a; Code Civ. Proc. § 112, as amended by St. 1929, p. 834).

8. Courts ⟹24.

Consent of parties will not alone confer jurisdiction of cause within exclusive jurisdiction of another court.

In Bank.

Application by J. R. Shipp for writ of mandate prayed to be directed to the Superior Court in and for San Bernardino County, and Hon. F. A. Leonard, Judge thereof, to require said court to assume jurisdiction of a certain action at law.

Writ denied.

N. C. Peters, of San Bernardino (Swing & Wilson, of San Bernardino, of counsel), for petitioner.

PER CURIAM.

This is a proceeding in mandate begun on April 26, 1930. The court denied the application on May 8, 1930. Petitioner urges a rehearing in said matter, to which application we submit the following:

In an action at law pending in the superior court of the county of San Bernardino, involving the sum of $689.21, where the plaintiff and the defendant were residents of San Bernardino township therein, the court and Hon. F. A. Leonard, the judge thereof, sua sponte, declined to assume jurisdiction of said cause, assigning as a reason that the justice's court of San Bernardino township, a township where the population was in excess of 30,000, had exclusive jurisdiction thereof. The object of the present proceeding is to compel said court and said judge to assume jurisdiction of said cause.

By amendment to section 112 of the Code of Civil Procedure, the Legislature in 1929 (St. 1929, p. 834) undertook to enlarge and subdivide the jurisdiction of the justices' courts of the state in civil actions. Likewise, at the same time, by amendment to the Penal Code, § 1425 (St. 1929, p. 861), it made applicable a similar plan as to the jurisdiction of these courts over certain criminal offenses. The sole basis for the classification in both civil and criminal jurisdictions was the population. The classes created were two: The larger or superior jurisdiction was given to justices' courts in cities and counties, towns, and townships having a population of 30,000 or more. The lesser or inferior jurisdiction was given to said courts in locations where the population is less than 30,000. For instance, in the former locations the jurisdiction in actions at law reaches to any cause where the value of the property in controversy is $1,000 or less; in the latter, where the value is $300 or less. The Legislature as a part of the same plan also provided at the same time that the justices of the peace, presiding over courts in locations of the major classification, should be regularly licenced attorneys at law. Pol. Code, § 4185a.

The authority for this division of jurisdiction is supposed to be found in section 11a of article 6 of the Constitution, adopted as a new section at the November election of 1928. This section reads as follows: "The legislature shall determine, according to population, the number and jurisdiction of each of the inferior courts in incorporated cities or towns wherein there is no municipal court, and in townships, counties or cities and counties, and the number of judges or justices thereof and their qualifications and compensation, and shall fix by law the powers, duties and responsibilities of each of such courts and of the judges or justices thereof; and may provide that the jurisdiction of such courts shall be exclusive."

[1, 2] Petitioner contends that this section of the Constitution should not be so construed as to authorize legislation of the character found in section 112 of the Code of Civil Procedure. Before discussing this question, however, we shall advert to a preliminary objection made by him, to wit, that, inasmuch as the legislation in question did not provide the method of ascertaining the population of any township and inasmuch as

no proceeding has been taken to ascertain it under section 4055 of the Political Code, the census of 1920 governs and judicial knowledge of that census discloses the fact that in the said San Bernardino township less than 30,000 population existed at that time; hence jurisdiction lies in the superior court. But, we have already held in Los Angeles v. Justice's Court, 281 P. 611, that jurisdiction under the section in question depends upon the facts as to population and not upon any report or proclamation to that effect. See, also, People v. Wong Wang, 92 Cal. 277, 28 P. 270. Moreover, there is no allegation in the petitions that the required population for the enlarged jurisdiction did not exist at the time the amendment in question took effect. In fact, the 1930 census has been announced as of April 2, 1930, showing a population in said township largely in excess of the required number to confer the larger jurisdiction. The amendment in question took effect 91 days subsequent to May 15, 1929, only a short time prior to said census; hence there is no basis for the claim that the larger population did not exist at all times herein to be considered. In fact, in People v. Justice's Court of San Bernardino Tp., San Bernardino County (Cal. App.) 283 p. 854, a referee was appointed, who on December 17, 1929, submitted a report as of December 1, 1929, showing the population of said township to be in excess of 40,000.

[3] Returning to the question of the validity of said section, petitioner urges that the classification made by it runs counter to various subdivisions of section 25, art. 4, of the Constitution, prohibiting local or special laws, as well as sections 11 and 21 of article 1 thereof, enacted to accomplish a similar purpose. But, as we construe section 11a, it was designed especially to permit the doing of just what section 112 purports to do and to permit this to be done notwithstanding the earlier provisions of the Constitution next above referred to. The presence of the word "jurisdiction" is entirely superfluous unless such meaning be given it, for it has always been the holding that the Legislature could by general law create separate classes of inferior courts, such as police and justices' courts. The claim, therefore, that this word indicates merely the power to make a classification of genera as distinguished from a classification of the species itself cannot be adopted.

The Legislature doubtless had in mind to make a decisive effort to relieve the congested condition of the calendars in both trial and appellate courts by creating municipal courts, extending their jurisdiction in many cases throughout the county of their location, and by enlarging the jurisdiction of the justices' courts and providing an intermediate court of appeal beyond which causes in these latter courts might not go. It may be admitted that the putting into operation of this plan may work some inequalities and possibly some injustices, but the importance of the object to be attained seems to override these difficulties. In fact, we see no difficulties that may arise under this plan as to justices' courts that have not already arisen or may hereafter arise as to municipal courts. This class of legislation as to municipal courts has been uniformly sustained, and said section of the Constitution must clearly be held as the latest expression of the law-making power and to authorize classification of townships by population for the purpose of fixing jurisdiction. This is true even though it be granted that the statute would otherwise be invalid by reason of other provisions of the organic law.

[4, 5] The fact that certain causes arising within a county where there are both major and minor townships, where the appeal in the one would go to the superior court and in the other to the Supreme and appellate courts, cannot of itself be the basis of nullifying the plain provisions of this section. Neither can we nullify it because of the contention that the board of supervisors may, by a gerrymandering of township lines, raise or lower the jurisdiction of a justice's court of a township or cause in this same manner a court to lose jurisdiction of pending causes. In fact, we are unwilling to accord any such effect to the action of a board of supervisors or to the ebb and flow of population, and certainly not as to pending causes. In re Mitchell, 120 Cal. 384, 392, 52 P. 799; Ex parte Fedderwitz, 130 Cal. xviii, 62 P. 935; Williams v. Board of Trustees, 157 Cal. 711, 719, 109 P. 482.

[6] Neither do we discern insuperable difficulties because of the power granted in other provisions of the Constitution to cities, counties, or cities and counties, to adopt freeholders' charters, which may provide for the number of justices in a township, the manner of their election or appointment, and their compensation. Section 11a is but a re-enactment of the old section 11 as to all subjects to which freeholders' charters may apply. The matter of fixing jurisdiction by the classification of justices' courts inter se on the basis of population is the only new subject introduced by the new section 11a. We do not see how the harmony that heretofore existed between the exercise of general power under the Constitution and the exercise of the special power arising from these provisions respecting freeholders' charters will be disturbed.

[7, 8] Petitioner makes the further point that, inasmuch as the parties have submitted to the jurisdiction of the superior court, where the pleadings do not disclose lack of jurisdiction, it is not within the province of said court to refuse to entertain jurisdiction of the cause. But this question is settled by the fact that either the superior court has

or has not jurisdiction and either the justice's court has or has not jurisdiction. If the justice's court has jurisdiction, that jurisdiction is exclusive. Const. § 5, art. 6; Green v. Superior Court, 78 Cal. 556, 21 P. 307, 541; Application of Westenberg, 167 Cal. 309, 139 P. 674; In re Luna, 201 Cal. 405, 409, 257 P. 76. Consent of the parties, of course, will not alone confer jurisdiction of a cause belonging exclusively in another court.

We appreciate the ability and earnestness with which counsel have urged their views upon the court, but we are unable to accord them controlling weight in the face of the plain language of the constitutional amendment.

Rehearing denied.

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209 Cal. 600

FORCE v. HART.

L. A. 10355.

Supreme Court of California.

June 18, 1930.

1. Contracts ⟹214.

Contractor *held* not entitled to demand cash payment upon completion of plans as condition precedent to obtaining loans and constructing building.

All transactions were had with express understanding that defendant had no money to put into building scheme, and that entire cost of construction, including any charge for plans and specifications, should be paid from funds to be procured by loans, for which contractor agreed to arrange.

2. Contracts ⟹247.

Parties to building contract *held* presumed to have continued dealing on original basis where plans were changed.

Defendant changed her plans for remodeling old building and constructing cottage to building of three-story apartment house.

3. Contracts ⟹350(1).

In contractor's action for damages for breach of contract and for money expended, defendant's testimony *held* not so inherently improbable as to authorize reversal of finding in her favor.

Defendant denied that she had promised or offered to pay any sum whatever in cash and gave other testimony at variance from that of plaintiff.

4. Contracts ⟹247.

Evidence respecting negotiations between contractor and owner before decision to change plans *held* admissible because necessary to understanding of transaction with regard to building finally decided on.

In the change of plans the parties decided to build a three-story apartment house, instead of remodeling the building then on the property and erecting in addition a new cottage.

5. Contracts ⟹233.

Contractor *held* not entitled to recover money expended in obtaining building permit, under circumstances.

Contractor was warned by owner against incurring such cost upon contractor's demand for cash advances which owner refused to make.

6. Licenses ⟹39.

Contract for architectural services to be performed in violation of statute is void (St. 1901, p. 641).

St. 1901, p. 641, requires architect to obtain certificate, but does not prevent any person from furnishing plans for buildings for other persons, provided person so furnishing such plans should fully inform person for whom plans were furnished that he was not certified architect.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action for damages for breach of contract and for money expended, brought by James A. Force against Lillie Hart. Judgment for defendant, and plaintiff appeals.

Affirmed.

See also 205 Cal. 670, 272 P. 583.

Henry Trowbridge, of Los Angeles, for appellant.

H. G. Bittleston and L. W. Jaycox, both of Los Angeles, for respondent.

SEAWELL, J.

Plaintiff, James A. Force, a general contractor, appeals from a judgment entered in favor of defendant, Lillie Hart. Plaintiff sought to recover judgment for the reasonable value of certain building plans and specifications alleged to have been prepared at defendant's request, the reasonable value of which was alleged to be $4,110, and to recover damages in the sum of $5,700 on account of defendant's repudiation of an alleged contract employing him to construct the building for which he had prepared plans. Plaintiff also asked judgment for $71.50, which sum was paid out by him in procuring a building permit from the city of Los Angeles for the construction of said building. The court granted

a nonsuit as to the cause of action for damages for breach of contract and rendered judgment for defendant upon the other two counts of the complaint.

It is not disputed that plaintiff caused plans and specifications to be prepared by a noncertified architect for a three-story brick apartment house to be constructed upon property in the city of Los Angeles owned by defendant, and that defendant gave her written approval to the building plans as prepared by plaintiff's noncertified architect. The reasonable value of said plans, alleged in the complaint to be $4,110, was found by the court to be $2,877. Said plans were prepared with the expectation and intention of both plaintiff and defendant that plaintiff, as a building contractor, should construct a building for defendant in accordance therewith. No written building contract was ever entered into. Plaintiff refused to proceed with the construction of said building unless defendant made an advance payment of $2,000 on account of the architect's and engineer's fees. This demand being refused, plaintiff claimed that defendant had repudiated her contract; hence this action.

[1] The court below was of the view that the parties contemplated a written building contract, including plans and specifications, and did not intend to rest their engagements in various oral negotiations, and that there was no separate, independent binding contract for the preparation of the plans and specifications, but whatever contract they had in contemplation was intended to be indivisible. The court was further of the view, as indicated by its findings, which are supported by evidence, that all transactions were had with the express understanding that defendant had no money to put into the building scheme, and that the entire cost of construction, including any charge for plans and specifications, should be paid from funds to be procured by loans, for which plaintiff agreed to arrange, upon the security of said real property, which was clear of incumbrances, and the building to be erected thereon. Irrespective of any question as to the necessity of a written contract, plaintiff was therefore without right to demand a cash payment from defendant upon the completion of the plans as a condition precedent to the matter of obtaining loans and constructing the building, and upon her refusal to meet such demands to sue for the reasonable value of the plans and for breach of a contract employing him to build.

The trial court found, upon evidence which supports its conclusion, that the price of $68,500 for which plaintiff offered to construct the building, was to cover the charge for plans and specifications. Plaintiff does not claim that any definite amount was ever agreed upon as a charge for the plans and specifications separate from the figure for the total cost of construction. His testimony was that at the commencement of their negotiations, defendant stated that she had $5,000 in cash to apply upon the building, and that he offered to arrange for loans to cover the balance of the cost of construction; that said $5,000 was to be paid upon completion of the plans and specifications and was intended to pay for said plans and specifications and to apply on the balance of the price for construction; that when it was decided to build a three-story apartment house instead of remodeling the structure then on defendant's premises and building a new cottage, as originally contemplated, defendant stated that the change in plans made it necessary that she use all but $2,000 for other purposes; and that upon the completion of the plans and defendant's approval thereof, he demanded payment of said $2,000 and, upon defendant's refusal to pay any sum in excess of $500 or $600, he brought this action.

[2] Defendant emphatically denied that she had promised or offered to pay any sum whatsoever in cash. She testified that no claim was ever made as to the payment of any sum upon completion of the plans until plaintiff demanded a payment before proceeding further at the time she gave her approval to said plans in April. She fixed the amount demanded at $1,900, of which sum $900 was to be paid to plaintiff, and $500 each to the draftsman and engineer who had drafted the plans. She testified unequivocally that at their first meeting she told plaintiff—and he fully understood the agreement—that she had no cash available, and unless loans could be obtained upon the security of the property, which was then clear, and upon the building to be constructed, there was no use in preparing plans or considering the proposition further. Plaintiff expressed his ability to fully finance the project. The evidence is sufficient to sustain the finding that any charge for plans and specifications was intended to be included in the costs of construction. Nothing to the contrary having been said when defendant changed her plans from remodeling the old building and constructing the cottage to the building of a three-story apartment house, the parties must be presumed to have continued their dealings on the original basis. Defendant's testimony is corroborated by that of her sister and one Hurst, who introduced plaintiff to defendant.

[3] The conflict between plaintiff's and defendant's accounts of what actually took place was resolved by the court below in defendant's favor. There is nothing inherently improbable in defendant's version which would permit this court, as an appellate tribunal, to reject her testimony and the finding in her favor based thereon.

[4] Evidence as to negotiations between the parties before the decision to build the three-story apartment house, instead of remodeling the building then on the property and erecting, in addition, a new cottage, was admissible

because necessary to an understanding of the transaction with regard to the said apartment house. The arrangement contemplated under the incomplete written instrument of January 18, reciting a hiring of the plaintiff to draw plans for remodeling and building a new cottage, but fixing no price for such services, as explained by the evidence upon the trial, does not appear to differ from that under which the plans for the three-story apartment house were later drawn.

[5] What we have said also requires an affirmance of that portion of the judgment denying plaintiff's recovery upon the second count of the complaint, wherein he sued for the sum of $71.50 expended by him in obtaining a building permit from the city of Los Angeles. Appellant was warned by defendant against incurring this cost upon his demand for cash advances which defendant refused to make.

The allegations and denials of the answer were broad enough to permit defendant to show that plaintiff was to look to funds to be obtained through loans to compensate him, although it is nowhere specifically alleged in the answer that such an understanding existed. Any claimed inconsistency in the findings disappears when they are read as a whole in the light of the proofs.

[6] Although the defendant and respondent does not make the point in her brief, it is nevertheless true that upon the trial the provisions of the act regulating the practice of architecture (St. 1901, p. 641) were called to the attention of the court by counsel. Neither plaintiff nor Davis, who was employed by him to draw the plans and specifications, was certified as required by said act. The act provides that it shall be a misdemeanor for any person to practice architecture without first having obtained a certificate to so practice, "provided, that nothing in this act shall prevent any person from * * * furnishing plans or other data for buildings for other persons, provided the person so furnishing such plans or data shall fully inform the person for whom such plans or data are furnished, that he, the person furnishing such plans, is not a certificated architect." Section 5. There is no evidence in the record that defendant was informed that the plans were to be prepared by an unlicensed architect. A contract for architectural services to be performed in violation of the terms of the statute is void. Binford v. Boyd, 178 Cal. 458, 174 P. 56; People v. Allied Architects Ass'n, 201 Cal. 428, 257 P. 511; Payne v. De Vaughn, 77 Cal. App. 399, 246 P. 1069; Jones v. Wickstrom, 92 Cal. App. 292, 268 P. 449. If the contract could be interpreted to be severable as appellant insists it should be, the foregoing statute would bar him from recovering an architect's fee.

We find no ground which would justify a reversal.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; RICHARDS, J.; CURTIS, J.

PEOPLE v. HOWARD. *

Cr. 3284.

Supreme Court of California.

June 30, 1930.

Rehearing Granted July 28, 1930.

1. Jury ⟹10.

Constitution secures essential features of trial by jury as known at common law to all those entitled to trial by jury at common law (Const. art. 1, § 7).

Const. art. 1, § 7, provides that right of trial by jury shall be secured to all, and shall remain inviolate.

2. Jury ⟹149.

Substitution of alternate for juror who neither died nor became seriously ill *held* unauthorized (Const. art. 1, § 7; Pen. Code, § 1089, as amended by St. 1927, p. 1063, § 2).

Pen. Code, § 1089, as amended by St. 1927, p. 1063, § 2, provides that in felony cases court may direct calling of not more than two alternates, and that if, before final submission, juror dies or becomes ill, so as to be unable to perform his duty, the court may order him discharged and draw name of alternate, who shall take his place in jury box. Juror was discharged and alternate substituted, because regular juror disclosed to judge that she knew and was prejudiced against two of defendant's important witnesses.

3. Jury ⟹29(6).

Defendant's personal consent to substitution of alternate juror in case not permitted by statute was necessary, and consent of counsel was insufficient (Const. art. 1, § 7, as amended in 1928; Pen. Code, § 1089, as amended by St. 1927, p. 1063, § 2).

Const. art. 1, § 7, as amended in 1928, provides that trial by jury may be waived in criminal cases by consent of both parties, expressed in open court by defendand and his counsel.

4. Criminal law ⟹1186(4).

Substitution of alternate in case not authorized by statute resulting in denial of trial by common law jury was miscarriage of jus-

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing granted 295 P. 333.

tice (Const. art. 6, § 4½; Pen. Code, § 1089, as amended by St. 1927, p. 1063, § 2).

Const. art. 6, § 4½, prohibits reversal, except where error results in miscarriage of justice.

WASTE, C. J., and CURTIS, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

John Lee Howard was convicted of murder in the first degree, and he appeals.

Reversed and remanded.

John A. Deweese and Josiah Coombs, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and W. R. Augustine and Wm. F. Cleary, Dep. Attys. Gen., for the People.

RICHARDS, J.

This appeal is by the defendant from a judgment of conviction of murder in the first degree, without recommendation. Several grounds are urged for a reversal by appellant, but the conclusion we have reached with reference to those certain irregularities which are hereinafter to be considered, and which, in our opinion, compel a reversal, renders unnecessary a consideration of those alleged grounds of reversal which are not treated herein. The facts which compel a reversal of this cause may be briefly stated as follows: After a plea of not guilty to the offense charged the trial of the cause began on June 17, 1929, the defendant being represented by two counsel. A jury was duly selected with two alternates, also duly selected as provided by law, and thereafter the trial of the cause proceeded with the introduction of evidence on behalf of the prosecution and defense. At the conclusion of the evidence, but before oral argument, one of the women jurors sought the judge in chambers and disclosed to him that she personally knew two of the important witnesses who testified on behalf of the defendant in the cause, and that on account of certain facts which she personally knew concerning these witnesses, and which she disclosed to the judge, she was prejudiced against each of these two witnesses and their testimony. The judge thereupon called the attorneys for the prosecution and for the defense, and also the defendant, into his chambers and fully and fairly disclosed the above situation to them. The defendant asked one or two questions, but cannot be held thereby to have personally agreed to the procedure which was ultimately adopted by the court and counsel for the relief of the above situation. One of defendant's counsel suggested that there must be a mistrial, but it was finally agreed by respective counsel and the judge that the aforesaid juror should be dismissed, and that one of the alternates should be chosen by lot to sit in her place. A stipulation to this effect was entered into in open court by the respective counsel, but the defendant himself in no way personally participated therein. Accordingly, the regular juror was dismissed, and one of the alternates, chosen by lot, took her place in the jury box; whereupon the cause proceeded to argument and submission to the jury, which returned a verdict to the effect that the defendant was guilty of murder in the first degree, without recommendation. It is the contention of the defendant that the substitution of the alternate juror for the regular juror under the foregoing circumstances amounted to reversible error.

[1, 2] Section 7 of article 1 of our state Constitution provides, in part, that "the right of trial by jury shall be secured to all, and remain inviolate." The value and importance of the right thus guaranteed cannot be over-emphasized. It has always been considered as one of the principal bulwarks of liberty under both the English and American systems of government and constitutional law. While the origin of this institution may be uncertain, it has been so long and so deeply rooted in the institutions of the English people that neither conquest nor change of sovereignty ever operated to either abolish it or even to work its material modification. We find in Blackstone, not only the most correct estimate of this institution, but also its greatest encomium, when he states: "The trial by jury has ever been and I trust ever will be looked upon as the glory of the English law. * * * It is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty or his person, but by the unanimous consent of twelve of his neighbors and equals." The learned author refers to a celebrated French writer (Montesquieu, Spirit of Laws, XI, 6), who concludes that those who assert because Rome, Sparta, and Carthage have lost their liberties, therefore, those of England in time must perish, should have recollected that Rome, Sparta, and Carthage, at the time when their liberties were lost, were strangers to the trial by jury. Blackstone (Jones) vol. 2, pp. 1989, 1991. In his great work on "Laws and Jurisprudence of England and America," at page 121, Judge Dillon states: "I consider the trial by jury an essential part of our judicial system. It has a cherished tradition. Its roots strike down deep into the experience, the life, and the nature of the people who have developed and perfected it. It gives an individuality to our legal system. It is vital part of it." The fundamental privilege thus developed under English institutions has been secured to every person in our own country charged with

crime, by the Constitution of the United States and of each individual state. The language of the Constitution of this state has been in part above quoted, and the courts of this state have uniformly held that the cardinal principle therein enunciated is to be considered as meaning that the essential features of trial by jury as known to the common law must be preserved and its benefits secured to all those who were entitled under the common law to the right of trial by jury. People v. Powell, 87 Cal. 348, 25 P. 481, 11 L. R. A. 75; People v. Peete, 54 Cal. App. 333, 365, 202 P. 51; People v. Kelly, 203 Cal. 128, 133, 263 P. 226; 15 Cal. Jur., p. 325, § 5. Under the common law there was no provision for alternate jurors, and the rule was well settled that, if during a trial a juror became incapacitated or was for any reason discharged, a new juror either had to be sworn and the trial begun anew, or the jury had to be dismissed and a new jury impaneled. This is still the law in those jurisdictions where there are no alternates, or where the alternate jurors have in the course of the trial become regular jurors. It is so stated in section 1123 of our Penal Code, which in part provides that: "If, after all alternate jurors have been made regular jurors, a juror becomes so sick as to be unable to perform his duties and has been discharged by the court, a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or afterwards impaneled." It has, however, been held that the Legislature has power to provide for alternate jurors, and our state Legislature has so provided from a time as far back as 1895, when section 1089 was added to our Penal Code (Stats. 1895, p. 279), which section provides for the selection of alternate jurors in the discretion of the court, and their substitution in place of the regular jurors in certain situations. This section of the Penal Code was amended in 1927 (St. 1927, p. 1063, § 2), so as to provide that the court may in felony cases direct the calling of not more than two alternates, who may sit as regular jurors under the conditions expressly provided for in the section as thus amended, which, in so far as these are pertinent to the situation before us, reads as follows: "If, before the final submission of the case, a juror die, or become ill, so as to be unable to perform his duty, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors." The constitutionality of the foregoing provisions of the Penal Code were fully considered and upheld in the case of People v. Peete, supra, wherein a rehearing was denied by this court, and which decision meets with our full approval, and it may be taken to be settled law that the Legislature has the power to provide for alternate jurors in a proper case. The Legislature, as we have seen, has so provided in sections 1089 and 1123 of the Penal Code, but in so doing has expressly limited the right of the trial court in any criminal case to substitute alternate jurors for any one or more of the regular jurors impaneled to try such cause to cases, where, "before the final submission of the case, a juror die, or become ill, so as to be unable to perform his duty." This express limitation upon the power of the trial court to substitute alternate jurors for regular jurors renders the conclusion irresistible that in no other instance than that of the death or serious illness of a regular juror is the court given any power whatever to make such substitution. It would seem to follow as a necessary conclusion that the substituted alternate juror in the instant case, having been called to replace a regular juror who had neither died nor become ill so as to be unable to perform his duty, had no more right to sit or act in the case than any other person who might have been selected under like circumstances by any method not authorized by the express provisions of the foregoing sections of the Penal Code. This conclusion brings us to a consideration of the next question involved in this appeal, which is as to whether under the provisions of our Constitution and laws a defendant can waive his aforesaid constitutional right to trial by a common law jury.

[3] Prior to the amendment of the state Constitution in 1928 it was well settled by the decisions of this court and of the appellate court of this state that neither the defendant nor his counsel could waive the right to a jury trial in a felony case. People v. Deegan, 88 Cal. 602, 26 P. 500; People v. Metropolitan Surety Co., 164 Cal. 174, 128 P. 324, Ann. Cas. 1914B, 1181; People v. Nakis, 184 Cal. 105, 193 P. 92; Amos v. Superior Court, 196 Cal. 677, 239 P. 317; Ex parte Bracklis, 52 Cal. App. 274, 198 P. 659; People v. Garcia (Cal. App.) 277 P. 747; People v. Spinato (Cal. App.) 280 P. 691. In the year 1928, however, section 7 of article 1 of the state Constitution was amended so as to read in part as follows: "The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three-fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court, by the defendant and his counsel." In the case of People v. Garcia, supra, it was held that under the foregoing provision of the Constitution as thus amended the defendant in felony cases must personally and expressly consent to the waiver of trial by jury, and that the consent of the defendant's counsel, even though expressed in his presence, was not sufficient

to constitute such a waiver. In the case of People v. Spinato, supra, the case of People v. Garcia, supra, was cited with approval, in the face of the strenuous insistence on behalf of the people that under the decisions of federal and other state courts an express waiver of this constitutional right by counsel in the presence of the defendant should be held an implied waiver, sufficient to satisfy the constitutional and statutory provisions touching the right of trial by jury. The cases thus cited were analyzed by the appellate court, and were held to have no application to the situation in California created by the aforesaid recent amendment to its Constitution, expressly providing that, in order to accomplish a waiver of the right to jury trial in felony cases, the "consent of both parties expressed in open court by the defendant and his counsel" must concur in order to accomplish such waiver. The Supreme Court of the United States has had occasion in a recent and very well reasoned decision (Patton v. United States, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. ——) to pass upon the right of a defendant to a common-law jury of twelve persons, wherein it was held that this right on the part of a defendant was of such importance that he alone could personally stipulate it away by his express agreement in open court to be tried by less than twelve jurors. It would seem to be axiomatic that, if a defendant may only by his personal and express agreement in open court waive the right to trial by a common law jury of twelve persons, he cannot, without such express waiver and consent, be put upon his trial before any less number than twelve jurors, since, as was held by the Supreme Court of the United States in Patton v. United States, supra, no distinction can be drawn between the effect of a complete waiver of a jury and consent to be tried by a less number than twelve, but that both forms of waiver amount, in substance, to the same thing. In the light of the foregoing decisions and of the admitted facts of the instant case we are constrained to hold that, in the absence of an express agreement on the part of the defendant himself, consenting to the substitution of an alternate juror in the place and stead of one of the regular jurors impaneled to try the cause, and who was shown to be neither dead nor ill so as to be unable to proceed with the trial, it was prejudicial error on the part of the trial court to undertake to make such substitution and thereafter to proceed with such trial before eleven regular jurors and one alternate juror, with the result of the defendant's conviction.

[4] It is, however, contended by the prosecution that the foregoing error of the trial court was merely an error in procedure for which the case should not be reversed, under the provisions of section 4½ of article 6 of the state Constitution, in the absence of a showing that such error has resulted in a miscarriage of justice. We are, however, of the opinion that there is no merit in this contention, and that the denial of the right of trial by a common-law jury to a party so entitled amounts in itself to a miscarriage of justice, and that to such a situation section 4½ of article 6 of the Constitution can be given no application. People v. Hall, 199 Cal. 451, 458, 249 P. 859, and cases cited; People v. O'Connor, 81 Cal. App. 506, 254 P. 630; People v. Young (Cal. App.) 279 P. 824.

It follows that the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

We concur: SEAWELL, J.; SHENK, J.; PRESTON, J.; LANGDON, J.

WASTE, C. J.

I dissent. I cannot subscribe to the majority opinion wherein it is held that it was prejudicial error on the part of the trial court to undertake to make substitution of an alternate juror, after both sides had rested, and to thereafter proceed with the argument. In my opinion, the situation is not one in which a waiver of the right to a jury trial in a felony case enters into the consideration. After the discussion in the judge's chambers of the situation brought about by the attitude of the juror, Mrs. Doud, who felt she could not conscientiously continue to sit in the cause, and in which the defendant himself participated, the following proceedings were had in open court: "The Court: Let the record show the presence of the defendant with his counsel and the jurors in the box and the alternates in their places. * * * I understand, this matter having been taken up in chambers, that counsel on both sides, both counsel for the defendant and counsel for the prosecution, will stipulate that the juror may be excused and one of the alternates take her place.

"Mr. Coombs (counsel for the defense): Yes, your Honor, we will so stipulate.

"Mr. Jordan (counsel for the People): Whatever your Honor says is all right with us."

Mrs. Doud was then excused from further consideration of the case, and, under the direction of the court, the clerk put the names of the two alternate jurors in the box and drew out one of the names, Robert L. Shields. The record continues:

"The Court: Mr. Shields, you will take the thrid seat. Both sides stipulate as to the regularity of this proceeding?

"Mr. Coombs: Yes, your Honor, we so stipulate.

"Mr. Jordan: So stipulated."

On such a record, I am unable to see how there was any invasion of the common-law right of a jury trial. The courts of this state long ago decided that the provisions of section 1089 of the Penal Code, providing for alternate jurors, do not impair any of the essential attributes of a trial by jury guaranteed by the Constitution. People v. Peete, 54 Cal. App. 333, 202 P. 51. The first essential of a common-law jury in criminal causes is a jury of twelve citizens, no more, no less, drawn from the locality, duly examined and sworn to try the cause. No objection was offered to the panel in this case. The second requirement is that the jurors must be impartial. No claim is made that juror Shields was not in fact a fair and impartial person to act as a juror. While the record brought here does not contain the examination of the jurors on the voir dire, it does indicate that the same proceedings were had in the selection of the alternate jurors as in the case of the first twelve who took their places in the box. We may assume that the defendant was satisfied that the alternate jurors thus selected would give him the fair and impartial trial to which he was entitled. The third essential is that the verdict shall be unanimous, and that was so in this case, for the record shows that the twelve jurors agreed and returned a unanimous verdict as to the guilt of the defendant.

The most that can be said of the situation, in my opinion, is that only an irregularity resulted from the proceeding, which in no way substantially affected the right of the defendant. It is not claimed here that the verdict would have been any different had the juror Shields not participated in the deliberations of the jury. He was subject to the same challenge and took the same oath as the other jurors. We should assume that in all respects he obeyed his oath, and that he well and truly tried all the matters in issue and rendered a true and impartial verdict in the cause.

No case has arisen in this state, and perhaps elsewhere, precisely like the case at bar in its facts. Earlier cases, in which disqualification of a juror has been raised after verdict in criminal causes, are reviewed in People v. Duncan, 8 Cal. App. 186, 96 P. 414. In that case, one Bernard Sherry appeared at the trial and substituted himself as a juror in place of John H. Sherry, whose name was upon the jury list, and who had been regularly subpœnaed to attend court as a trial juror. Upon the impanelment of the jury the name of the rightful juror was drawn, and in answer thereto the other Sherry took his place in the box, and, after due examination as to his qualifications, was accepted and sworn as a juror and acted throughout the trial of the cause. The jury returned a verdict of guilty of murder in the second degree. On appeal, it was contended that Bernard Sherry never became a juror because he was not selected and returned as required, and that therefore the verdict was the verdict of but eleven jurors. The court swept aside the contention saying that it begged the question. The judgment of conviction was affirmed, and the petition to have the cause heard in the Supreme Court was denied.

The cause now before us should not be reversed for the irregularity complained of.

I concur: CURTIS, J.

PETERSON et al. v. BALL et al. *

L. A. 10957.

Supreme Court of California.

June 17, 1930.

Rehearing Granted July 17, 1930.

1. Corporations ⟹346.

Amendment of statute, eliminating liability of directors for excessive debts, did not abate pending proceedings (Civ. Code, §§ 309, 404; St. 1929, p. 1266; Civ. Code, § 309, subd. 2, as amended by St. 1917, p. 657, and section 283, as amended by St. 1929, p. 1261).

Civ. Code, § 309, prior to amendment in 1929, made directors jointly and severally liable for debts created in excess of subscribed capital stock. St. 1929, p. 1266, amended such section by eliminating this liability and also eliminating saving clause, contained in subdivision 2, as amended by St. 1917, p. 657. Civ. Code, § 404, provides that amendment or repeal of that part of the Civil Code or any section, etc., thereof, shall not take away or impair remedy against any such corporation, its stockholders or officers, for any liability previously incurred. Section 283, as amended by St. 1929, p. 1261, provides that that title applies to every private corporation, unless there be special provision inconsistent therewith.

2. Corporations ⟹337.

Liability imposed on directors for debts in excess of capital stock is punitive so far as directors are concerned (Civ. Code, § 309, prior to amendment by St. 1929, p. 1266).

3. Assignments for benefit of creditors ⟹180.

Voluntary assignment for creditors of all property of every kind and nature, specifical-

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing granted 296 P. 291.

ly mentioning choses in action, covered causes of action.

4. Assignments ⚷24(1).

Corporation's right of action against directors for creating debts in excess of capital stock is not assignable.

5. Assignments for benefit of creditors ⚷176 (1).

Voluntary assignment for creditors, even though having same effect as statutory assignment, covered only property which assignor could legally convey or assign (Civ. Code, §§ 3449-3473).

6. Assignments for benefit of creditors ⚷180.

Assignee, under corporation's voluntary assignment for creditors, does not represent creditors so as to enforce director's statutory liability (Civ. Code, § 309).

In Bank.

Appeal from Superior Court, Los Angeles County; W. D. McConnell, Judge.

Action by Fred E. Peterson and others, trustees by assignment for benefit of creditors of the Bartlett Music Company, against W. F. Ball and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Hugh M. Foster, of Los Angeles, for appellants.

Overton, Lyman & Plumb, Irving H. Prince, Lawler & Degnan, Barry Brannen, Pacht, Pelton & Warne, and A. B. Nathanson, all of Los Angeles, for respondents.

CURTIS, J.

This action was brought by plaintiffs as trustees by assignment for the benefit of creditors of the Bartlett Music Company, against the defendants as directors of said company, based upon the provisions of section 309 of the Civil Code making directors jointly and severally liable for the full amount of debts created in excess of the subscribed capital stock of the corporation during their administration. The complaint consisted of ten counts, each count of which alleged that the defendants were directors of the Bartlett Music Company, a corporation, and as such directors created an indebtedness in a certain amount which was in excess of the subscribed capital stock. At the trial the defendants moved for judgment on the pleadings, which motion was granted by the court, and judgment was entered for the defendants. From this judgment plaintiffs have appealed.

[1] After the rendition of judgment and the filing of notice of appeal by plaintiffs, section 309 of the Civil Code was amended (Stats. 1929, p. 1266). By said amendment the liability on the part of the directors of a corporation for the creation of debts in excess of subscribed capital stock was completely eliminated therefrom. Defendants, thereupon, filed their motion to dismiss the appeal upon the ground that as the liability of directors under this section was penal and statutory in character, the amendment operated to abate all proceedings pending thereunder. This motion was argued and submitted with the understanding that it would be considered and passed upon at the time of the determination of the case upon its merits. We will first direct our attention to the motion to dismiss.

The case of Moss v. Smith, 171 Cal. 777, 155 P. 90, involves a very similar question. In that case the court held, Justice Henshaw writing the opinion, that the Public Utilities Act (Stats. Ex. Sess. 1911, p. 18) repealed section 309 of the Civil Code in so far as it had application to directors of public utility corporations, and that as the Public Utilities Act contained no clause saving pending litigation or imperfect or inchoate rights the effect of the repeal was to destroy the right of a creditor to further prosecute a pending action to enforce the liability of the directors under section 309 of the Civil Code for such excess indebtedness. This case is quoted with approval in Freeman v. Glenn County Telephone Co., 184 Cal. 508, 194 P. 705, which involved the question of whether or not the amendment of 1917 to section 309 of the Civil Code operated to cut off the right to enforce the liability of directors under that section for the distribution of the capital stock of the corporation in contravention of the provisions of section 309 prior to 1917. The court in that case, relying upon the authority of Moss v. Smith, supra, held that the amendment operated as a repeal of the statutory liability formerly existing with the result that the repeal operated to destroy the right of action if it occurred at any time prior to final judgment.

An order dismissing the appeal based upon the authority of these two cases, therefore, might well be made, were it not for the fact that there appears to be a general saving clause of actions involving corporations incorporated in the part of the Civil Code dealing with corporations. This is section 404 of the Civil Code, which provides that, "The legislature may at any time amend or repeal this part, or any title, chapter, article, or section thereof, and dissolve all corporations created thereunder; but such amendment or repeal does not, nor does the dissolution of any such corporation, take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which has been previously incurred."

This section has been in the Code since 1905 and was, therefore, in the Code at the time of the decision of Moss v. Smith, in 1916, and

Freeman v. Glenn County Telephone Co., in 1920. Respondents argue that inasmuch as that section did not control in those two cases, it should not control here. The records show, however, that this section was not drawn to the attention of the court in either of these actions. However, had the section been drawn to the attention of the court, it is quite probable that the same result would have been reached in the two cases for the reason that in each case there were present other and controlling factors not present in the instant case. For instance, in Moss v. Smith, it was held by the court that the Public Utilities Act absolutely governed and controlled, as the corporation therein involved was a public utility corporation. Inasmuch as the Public Utilities Act, which, as the court held, contained no clause saving pending litigation, was the sole controlling statute, it follows that section 404 would have no application. In the case of Freeman v. Glenn County Telephone Co., the peculiar phrasing of the saving clause of section 309, as amended in 1917, which expressly excluded from the effects of the saving clause the particular liability of directors upon which that action was based, excluded section 404 from application to that action. Subdivision 2 of section 309, as amended in 1917 (St. 1917, p. 657), reads as follows: "No right, cause of action, or liability now existing or any action or proceeding now pending, shall be affected by this act and such right, cause of action or liability may be enforced and such action or proceeding may be prosecuted in the same manner and with the same effect as if this act had not been passed; excepting only the liability of a director of a corporation *heretofore incurred* shall not exist in any case where, all of the debts and liabilities of the corporation to creditors having been paid, the capital stock divided, withdrawn, or paid out constituted all of the capital stock of the corporation and the same was paid out, withdrawn, or divided with the consent of all of the stockholders to or among themselves." It is obvious that this is a special provision governing "liabilities heretofore incurred" under special conditions such as existed in that case, and that therefore the general provisions of section 404 were not applicable.

We find no merit in defendants' contention that section 404 is a general provision and that inasmuch as the 1929 Legislature expressly deleted from section 309, as it existed in 1917, the clause saving pending litigation, it affirmatively expressed its intention that pending litigation should be abated. The Legislature in 1929 made drastic and far-reaching changes in title 1 of part 4 of division 1 of the Civil Code, which deals with corporations in general. Some thirty-six sections were amended, twenty-one sections repealed, and five new sections added to this particular division of the Code. In our opinion, it appears reasonable that in the reframing of the Code applicable to corporations, the superfluity of the saving clause in section 309 was noted and the Legislature deeming it no longer necessary, entirely eliminated it. No other explanation appears to us plausible in view of the provisions of section 283 of the Civil Code, as amended in 1929 (St. 1929, p. 1261), which provides that, "The provisions of this title are applicable to every private corporation, unless there be a special provision in relation thereto inconsistent with some provisions of this title, in which case the special provision prevails."

The motion for a dismissal is therefore denied.

The trial court based its order granting judgment on the pleadings in favor of the defendants upon two propositions of law: First, the liability of directors created by section 309 of the Civil Code for creating debts beyond the subscribed capital stock of the corporation is penal in character, and, second, a right of action to enforce this liability is not assignable. If these two propositions are well founded in law, then plaintiffs' complaint failed to state facts sufficient to constitute a cause of action against the defendants, and the motion for judgment on the pleadings in favor of the defendants was properly granted.

[2] Section 309 of the Civil Code was before this court in the case of Moss v. Smith, 171 Cal. 777, 155 P. 90. In that case, after an exhaustive review of the authorities not only in this state but in other jurisdictions, this court concludes (page 786 of 171 Cal., 155 P. 90, 94): "In all of these jurisdictions it is held that a creditors' bill is the proper method to establish rights under like statutes, and in all of them the statutes themselves are declared to be penal in their nature. Indeed, the whole matter may be summed up in the statement that, even if section 309 be remedial so far as the creditor is concerned, it is highly punitive so far as the directors are concerned." The case of Moss v. Smith followed Irvine v. McKeon, 23 Cal. 472, and Moore v. Lent, 81 Cal. 502, 22 P. 875, and in turn has been followed by this court in Talcott Land Co. v. Hershiser, 184 Cal. 748, 761, 195 P. 653. In the state of Montana, where section 309 of the Civil Code of this state has been adopted without change by the Legislature as section 3837 of the Revised Codes of 1907, it was held in the case of Continental Oil Co. v. Montana Concrete Co., 63 Mont. 223, 207 P. 116, 118, "that the liability imposed by section 3837 is purely statutory and is in the nature of a penalty for failure to obey the mandate of the law, and this is in harmony with the decided weight of authority," citing Moss v. Smith, supra, and many other authorities. While the case from the Supreme Court of Montana states that the above rule is in harmony with the weight of authority, we have not been cited to a single authority supporting a contrary rule. We conclude, therefore, that the liabil-

ity imposed by section 309 against directors who have suffered debts to be created in excess of the subscribed capital stock of the corporation, and which is the basis of the cause of action set out in plaintiffs' complaint, is "highly punitive so far as the directors are concerned."

[3] The next question with which we are concerned is whether a claim, or cause of action arising out of said section 309 in favor of the corporation or in favor of the creditors against the directors, is assignable. The only authority under which the plaintiffs claim the right to institute this action against the defendants is under the assignment made to them by the corporation, the Bartlett Music Company. This assignment is not a statutory assignment for the benefit of creditors for which the Civil Code provides (section 3449), but is one which was executed by the Bartlett Music Company, as party of the first part, to five persons designated as trustees and as parties of the second part, and a number of the creditors of said corporation referred to therein as parties of the third part, and who assented in writing to said assignment. By this assignment, the corporation assigned to said trustees, "All of its property of every kind and nature, wherever situated, both real and personal, including all that stock of merchandise, store furniture and fixtures, book accounts, books, bills receivable, cash in hand, choses in action, insurance policies, and all other personal property of every kind and nature situated in or pertaining to, the stores now owned and conducted by said party of the first part in the City of Los Angeles, California, including any leases and leasehold interest."

The trustees named in said assignment are the plaintiffs herein with the exception of C. W. Jacks and W. C. Lannin, who were selected to take the places of C. H. Mayer and W. H. Munson, named in said assignment as two of said trustees, but who subsequently and before the commencement of this action resigned. It will thus be seen that the plaintiffs take whatever rights they have in the property of the Bartlett Music Company by a voluntary assignment executed in their favor by the corporation and assented to by certain of the creditors. That such an assignment is binding upon the corporation and the creditors assenting thereto is not questioned. Jarvis v. Webber, 196 Cal. 86, 236 P. 138. By this assignment, and as to the corporation and the creditors whose consent was given thereto, the plaintiffs took and thereafter held under the terms of said written assignment, all property of the corporation, which the latter could transfer or assign. We cannot agree with the contention of the defendants that the assignment is not broad enough to cover causes of action. By reference to the language of the assignment, it will be noted that it purports to assign "all property of every kind and nature" belonging to the corporation, including "choses in action." This latter term is sufficiently comprehensive to cover causes of action.

[4] This brings us to the question as to whether the right of action against the directors for creating debts in excess of the subscribed capital stock of the corporation is assignable. If it is, then the plaintiffs acquired such right and may maintain this action for the purpose of enforcing it against the directors. If it is not assignable, then as already indicated this action must fail.

In a recent case before this court we held that the right given by the Usury Act to recover treble interest paid on a usurious note or obligation was not assignable. Primo Degli Esposti v. Rivers Bros. Inc., et al. (Cal. Sup.) 279 P. 423, 424. In that case we said: "The second answer is that the right which the original maker of a usurious note and mortgage is given under section 3 of the Usury Act to recover such interest and to treble the same is in the nature of a statutory penalty, and, under the authorities from other jurisdictions, which we hereby approve, is not assignable. In the case of Pardoe v. Iowa State Bank, 106 Iowa, 345, 76 N. W. 800, a statute containing the same language as that of the usury law of this state was so construed with a quite abundant reference to authorities. A similar ruling was made by the Supreme Court of Kansas upon the terms of a similar statute in the case of Lloyd v. First Nat. Bank, 5 Kan. App. 512, 47 P. 575. See, also, Robinson v. St. Marie's Lumber Co., 34 Idaho, 707, 204 P. 671, 21 R. C. L., p. 2117, § 6; Wilson v. Shrader, 73 W. Va. 105, 79 S. E. 1083, Ann. Cas. 1916D, 886, 893 and notes; Allen v. Petty, 58 S. C. 240, 36 S. E. 586; First State Bank, etc., v. Bank of Jefferson, 112 Okl. 177, 240 P. 311."

In Wilson v. Shrader, 73 W. Va. 105, 79 S. E. 1083, 1084, Ann. Cas. 1916D, 886, the court phrased the question presented on appeal as follows: "If the rights of action for the penalty are not assignable, the declarations are wholly and essentially bad. They set forth no causes of action, the benefit of which the assignee can take. A vital inquiry therefore, is whether penalties under the statute here involved are assignable." The action of Wilson v. Shrader, supra, was instituted for the recovery of a penalty given by section 7 of chapter 79 of the Code of West Virginia against a coterminous landowner for mining coal within five feet of the land of the adjacent owner without his consent in writing. The statute provided for a forfeiture or penalty of $500 in favor of the adjacent owner for each violation of said statute. The declarations set forth three separate and distinct violations of the statute and judgment was asked for $1,500 based upon the facts so alleged. At the time of the alleged violations, one Samuel V. Woods was the owner of the adjacent estate. Before the commencement

of the action, he sold the same to the plaintiff, and in his deed to the plaintiff he endeavored to assign his right to recover the amount of the three penalties given under said statute. The opinion of the Supreme Court of West Virginia contains a most thorough citation of authorities upon the question of the assignability of rights of action based upon statutory penalties, and concludes that rights so given by statutes cannot be assigned. The court in that case points out (73 W. Va. 105, 79 S. E. 1086) that: "The reasons that preclude the assignability of mere personal rights, such as actions for slander, assault, and battery, and other pure torts, obviously apply here. Assignability of such claims encourages litigation and strife. The same principle of public policy forbids the conversion of penalties into commodities or assets."

[5] The only answer the plaintiffs make to the contention of the defendants, which appears to be well supported by the authorities just cited, is that the assignment made to them by the corporation and assented to by certain of the creditors, is as valid and binding as if made in compliance with the provisions of sections 3449 to 3473 of the Civil Code, and that such an assignment is valid against the assignor and all creditors assenting to it and serves to vest the assignor's title to all the property absolutely in the assignee, which title can be voided only by a creditor not having assented to the assignment or by a purchaser or encumbrancer in good faith and for value. We may concede that the assignment made by the Bartlett Music Company to the five persons therein named as trustees is as valid and has the same legal effect as an assignment for the benefit of creditors made under the provisions of sections 3449 to 3473 of the Civil Code. In either case, the assignee takes only such property of the assignor as the latter may legally convey or assign. We have pointed out that the right of the corporation to sue the directors for creating debts in excess of the subscribed capital stock is not assignable. Therefore, under the assignment the plaintiffs have no standing in the action.

[6] Appellants make the further contention, however, that the appellants as trustees under such assignment for the benefit of creditors occupy a dual position. They not only succeed to all of the property of the corporation by virtue of the assignment, but they represent and stand in the shoes of the creditors as well, and in this latter capacity they are authorized to maintain this action on behalf of the creditors to recover from the directors upon their liability under section 309 of the Civil Code. It will be noted under the provisions of this Code section as they were previous to the amendment of said section in 1929, that the directors assenting to an excessive indebtedness are made "jointly and severally liable to the corporation, and to the creditors thereof," etc. There is undoubtedly a dual liability created by this section of the Code against the directors, one in behalf of the corporation, and the other in behalf of the creditors. If we understand appellants' position, it is that if they are not able to maintain this action to recover on behalf of the corporation by virtue of said assignment, they are, at least, entitled to institute and prosecute the same to judgment as representatives of the creditors under the terms of said section of the Code making the directors liable to the creditors as well as to the corporation. Unfortunately for the appellants, this court has on two occasions held that the assignee even under a statutory assignment for the benefit of creditors "is merely the representative of his assignor, and does not represent the creditors." Francisco v. Aguirre, 94 Cal. 180, 182, 29 P. 495, 496, First National Bank v. Menke, 128 Cal. 103, 106, 60 P. 675. These cases further hold that an assignee for the benefit of creditors under a statutory assignment from his assignor is not a person upon whom the estate of the assignor devolves by operation of law, but that he takes title to whatever estate he possesses by the voluntary act of the previous owner. In other words, the assignee holds solely under the assignment made by the assignor for the benefit of his creditors. We do not think it can be successfully contended that the appellants, who are made trustees under a nonstatutory assignment, are possessed of any greater powers, or stand in any more favorable position regarding the property of the assignor, than an assignee under a statutory assignment. The latter has some semblance of reason for contending that he holds his position and exercises the powers of his office under a procedure provided by law, while the former has not. His rights depend entirely upon the voluntary acts of the persons who are parties to the assignment.

The appellants appear to lay great stress upon the case of Hornor v. Henning, 93 U. S. 228, 23 L. Ed. 879. In this case the court had under consideration the Act of Congress of May 5, 1870 (16 Stats. at L. 98), one of the provisions of which made the trustees or directors of any corporation organized under the act liable to the creditors for corporate debts created in excess of the capital stock. The court in that case held that an action at law by an individual creditor to recover the amount due him would not lie against the directors, but that the liability of the directors represented a trust fund for the benefit of all the creditors of the corporation so far as it might be necessary to pay their debts. It is pointed out in that case that while the action as brought could not be maintained, the proper proceeding would be one brought in equity by all of the creditors, or by one or more in behalf of all, for the purpose of subjecting this trust fund to the payment of all of the creditors in proportion to the amount of their debts. The same ruling was made in

Moss v. Smith, supra. We confess we are unable to discern how this ruling in any way helps the case of appellants. It may, however, indicate a procedure under which the creditors of a corporation may avail themselves in establishing their rights under the provisions of section 309 of the Civil Code prior to its amendment in 1929. But it cannot have any determining effect upon the action now before us.

Our conclusion in this matter is that the plaintiffs have no right to maintain this action and that the trial court acted properly and legally in granting the motion of defendants for judgment on the pleadings.

Judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

Fred E. PETERSON, A. Getty, W. C. Lannin, H. Jackson, C. W. Jack, Trustees by Assignment for Benefit of Creditors of Bartlett Music Company (a Corporation), Plaintiffs and Appellants, v. W. F. BALL, E. E. Searles, J. F. Faulkner, E. J. Salyer, Defendants and Respondents.

L. A. 10958.

Supreme Court of California.
June 17, 1930.

Rehearing Granted July 17, 1930.

In Bank.

Appeal from Superior Court, Los Angeles County; W. D. McConnell, Judge.

Hugh M. Foster, of Los Angeles, for appellants.

Overton, Lyman & Plumb, Irving H. Prince, Lawler & Degnan, Barry Brannen, Pacht, Pelton & Warne, and A. B. Nathanson, all of Los Angeles, for respondents.

PER CURIAM.

In this action the same questions are presented as were before the court in the case of Fred E. Peterson et al. v. W. F. Ball et al. (Cal. Sup.) 289 P. 834, this day decided. The parties are practically the same in each action, and the only difference in the two relates to the amount of the indebtedness claimed to have been illegally incurred. The same procedure was had in this action as was taken in the prior action, L. A. No. 10957, and resulted in a judgment on the pleadings in favor of the defendants herein. On the authority of the prior action, the judgment herein is affirmed.

PEOPLE v. PAINETTI et al.*

Cr. 3317.

Supreme Court of California.
June 26, 1930.

Rehearing Granted July 24, 1930.

Criminal law ⟹200(4).

Prosecution for possession, control, and operation of still *held* barred by prior conviction of manufacturing intoxicating liquor (St. 1921, p. 79; St. 1927, p. 497).

RICHARDS, SHENK, and CURTIS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Fernando Painetti and Fred Casalichio were convicted of owning, operating, possessing, and controlling a still and parts thereof for use in the manufacture of intoxicating liquor for beverage purposes, and they appeal.

Reversed.

Superseding opinion, 282 P. 1013.

Jesse R. Shafer, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

LANGDON, J.

The defendants were convicted of a felony, to wit, the violation of Act 3795 of Deering's General Laws 1925—1927 (Stats. and Amdts 1927, c. 277, p. 497) with which they were charged jointly, and, from that judgment and an order denying a new trial, they appeal. The information charged that the defendants did willfully, unlawfully, and feloniously own, operate, and cause to be operated, and knowingly have in their possession and control a certain complete still, still worm, still cap, still condenser and distilling device, designed, used, and intended to be used in the manufacture and production of intoxicating liquor for beverage purposes.

The defendants pleaded: First, not guilty; second, a former conviction and once in jeopardy. The only question presented upon appeal is as to whether or not the second plea was justified under the facts and circumstances shown by the record. It was conceded that, growing out of the same act, the defendants had been tried and convicted in the municipal court of the city of Los Angeles with violating the so-called Wright Act (St. 1921, p. 79). The charge against them under this act was in two counts: One, possession

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing granted 292 P. 965.

of intoxicating liquor, and two, unlawfully manufacturing and producing intoxicating liquor containing more than one-half of one per cent. of alcohol. These offenses, of which the defendants were convicted in the municipal court, and the one with which they were charged in the superior court, were all charged to have been committed on the same day and it is conceded that they grew out of a connected series of acts.

At the trial in the superior court the defendants placed on the witness stand a police officer who was a witness for the prosecution, and he testified to the finding of the still and the liquor and also testified that he had been a witness for the prosecution in the municipal court in the trial of the defendants in that court and that his testimony there was, substantially, what it had been in the superior court. Defendants offered to call two other officers who had assisted in the arrest of defendants, but it was stipulated by the district attorney that their testimony would also show that they had testified in the municipal court to substantially the same facts as they narrated in the superior court.

In the case of People v. Brannon, 70 Cal. App. 225, at page 235, 233 P. 88, 92, it is said: "It, of course, is true that if two or more offenses arise as one result from a single act, and one of them includes within itself all the others, as murder includes manslaughter, then, if the defendant has been in jeopardy for the offense which includes the others, he has been in jeopardy as to all of the offenses; and this is often true where he has been put in jeopardy for even the lowest of the offenses. In such cases more than one offense cannot be carved out of the same unlawful act."

It would seem that in the offense of manufacturing intoxicating liquor there is included the possession of the means for manufacturing such liquor, and that the conviction in the municipal court could not have been had without showing possession of the still.

In the case of People v. Clemett (Cal. Sup.) 280 P. 681, earlier cases are cited with approval as holding that co-operative acts constituting but one offense when committed by the same person at the same time, when combined, charge but one crime, and but one punishment can be inflicted as one offense. In that case it was held that defendant could not be convicted upon a count for possession and control of a still and upon another count for operation of the same still, as the possession and control were included, necessarily, in the operation thereof.

Likewise, in the instant case, we think the possession, control, and operation of a still were included, necessarily, in the charge of manufacturing the liquor, of which latter charge the defendants had been convicted in the municipal court prior to their trial in the superior court. Therefore, the plea of a prior conviction was sustained by the record.

The judgment and order appealed from are reversed.

We concur: WASTE, C. J.; PRESTON, J.; SEAWELL, J.

RICHARDS, J.

I dissent.

The defendants herein were charged with and convicted of a felony consisting in the violation of an act of the Legislature adopted in 1927 (Stats. 1927, c. 277), which provides that "Any person whether acting in his own behalf or as the agent, servant, officer or employee of any person, firm, association or corporation, who shall be the owner of or have any interest in or who shall operate or cause to be operated or knowingly have in his possession or control, any still, still worm, still cap, still condenser, or stilling device of any kind, designed, used or intended for use in the manufacture or production of intoxicating liquor for beverage purposes, shall be guilty of a felony." Section 1.

When the cause was called for trial the defendants entered, among other pleas, a plea of "once in jeopardy." In attempted support of this plea it was shown upon the trial that these two defendants had previously been charged with and convicted of one or more misdemeanors, consisting of (1) the unlawful possession of intoxicating liquor, and (2) the unlawful manufacture of intoxicating liquor. It further appeared upon the trial of the felony charged that the acts of unlawful possession of intoxicating liquor and unlawful manufacture of intoxicating liquor were committed at the same time and place as that designated in the information and shown upon the trial of the felony charge as being the time and place when said felony, consisting in the ownership and illegal operation of a still, was charged with having been committed. The trial court, upon such trial, directed the jury to find against the defendants upon their pleas of prior conviction and former jeopardy.

The main opinion herein holds that the trial court was in error in so doing. I am of the opinion that the trial court was entirely correct in so doing, since the alleged misdemeanors of which the defendants had theretofore been convicted, consisting as they did merely in the "unlawful possession" of intoxicating liquor and in the "unlawful manufacture" of intoxicating liquor were separate and distinct offenses from that greater offense provided for in the "Still Act" of 1927 which makes the ownership or possession of a still, intended for use in the manufacture and production of intoxicating liquor for beverage purposes, a felony.

The cases of People v. Brannon, 70 Cal. App. 225, 233 P. 88, and People v. Clemett (Cal. Sup.) 280, P. 681, have no application to the instant situation. In the latter case, particularly, both trials were conducted under the provision of the "Still Act," and this court properly held that the possession and control of a still and the operation of the same still upon the same date constituted but a single offense. This case is not parallel to the case at bar, wherein the defendants were charged in the municipal court with a mere misdemeanor, consisting of the unlawful possession and manufacture of intoxicating liquor, which are offenses under the Wright Act, having no necessary connection with the ownership, possession, or operation of a still as distinguished from the felony or felonies provided for in the "Still Act," which makes the ownership, possession, and operation of a still a felony.

The judgment and order appealed from herein should be affirmed.

We concur: SHENK, J.; CURTIS, J.

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209 Cal. 690

EDLUND et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 13802.

Supreme Court of California.

June 30, 1930.

1. Descent and distribution ⟹71(1).

In proceeding to establish heirship, entry of order establishing proof of service is merely formal step and is mandatory, where no valid objection can be made (Code Civ. Proc. § 1664).

2. Executors and administrators ⟹315(4).

Order in proceedings by certain heirs setting aside decree of distribution and revoking order discharging executor opened up administration of estate, so that others could commence proceedings to establish heirship (Code Civ. Proc. § 1664).

3. Executors and administrators ⟹314(1).

Distribution in administration of estate is "proceeding in rem."

A "proceeding in rem" has not ordinarily the nature or characteristics of an action at law or in equity wherein adverse personal interests of the parties are tried or adjudicated.

[Ed. Note.—For other definitions of "In Rem," see Words and Phrases.]

In Bank.

Original proceeding by Alma Skutt Edlund and another against the Superior Court of the State of California, in and for the City and County of San Francisco, and Hon. Thomas F. Graham, Judge of said Superior Court, sitting in Department 10 thereof, for writ of mandate to direct respondents to enter an order establishing proof of service.

Peremptory writ issued.

Andros, Hengstler & Dorr, of San Francisco, for petitioner.

Dinkelspiel & Dinkelspiel and D. K. Lener, all of San Francisco, for respondents.

SHENK, J.

This is an original proceeding for a writ of mandate to direct the respondents, the superior court and judge thereof, to enter an order establishing proof of service pursuant to the provisions of section 1664 of the Code of Civil Procedure.

On March 24, 1927, the respondent court made an order settling the final account of the executor and entered a decree of distribution in the matter of the estate of John H. Peltier, deceased, in accordance with the provisions of the last will and testament of the decedent. The will bequeathed a specific legacy of $6,000 to Margaret Cotter and the rest and residue of the estate to the seven children of the testator, Amelia Peltier, Elizabeth Peltier, Julia Peltier, Lillie Peltier, Richard Peltier, Leander Peltier, and Henry Peltier, share and share alike. It was further provided that, in the event any of said children be dead at the time of the probate of the will, the share to which such deceased child shall be entitled should be given to any issue of such child, and, if there be no issue, then to the surviving children in equal shares. The decree of distribution recited that "Julia Kachimras (formerly Julia Peltier), a legatee and devisee under and by the terms of said will, died on or about the 11th day of September, 1921, in the city of Seattle, State of Washington, leaving her surviving no issue at law." Elizabeth Peltier died without issue prior to the death of her father, and by the decree of distribution the residue of the estate was distributed to Amelia Protextor (formerly Amelia Peltier), Lillie Johnson (formerly Lillie Peltier), Richard Peltier, Leander Peltier, and Henry Peltier, share and share alike. A decree discharging the executor was entered on June 14, 1927.

On September 7, 1927, a motion was made in the respondent court on behalf of Martha Agnes Nelson, an infant, by her guardian ad litem, to set aside, annul, and vacate the decree of distribution on the ground, among others, that said Martha Agnes Nelson was the duly adopted daughter of Julia Nelson (formerly Julia Peltier Kachimras), and there-

fore entitled to the share of Julia Peltier in the residue of said estate. After a hearing on said motion, and on May 15, 1928, the respondent court entered its order "that said final decree of distribution filed in the above-entitled estate March 24, 1927, in so far as it distributes the residue of said estate to Amelia Protextor (formerly Amelia Peltier), Lillie Johnson (formerly Lillie Peltier), Richard Peltier, Leander Peltier, and Henry Peltier, be, and the same is hereby vacated, annulled and set aside"; also annulling the order discharging the executor and ordering the executor to repossess himself of the residue of the estate distributed to said named distributees. This order of May 15, 1928, has become final.

On January 18, 1929, pursuant to the petition filed by Martha Agnes Nelson, the respondent court made and entered its order and decree that the petitioner is the duly and legally adopted daughter of Julia Kachimras, formerly Julia Peltier, and that she is entitled to a one-sixth share of the residue of the estate, and directing the executor forthwith to prepare and file his account and petition for final distribution. It appears that no account or petition of the executor for distribution has since been filed, but that on March 15, 1929, the executor appealed from said order and decree of January 18, 1929, and that the appeal is still pending.

The petitioners herein, Alma Skutt Edlund and Clinton Skutt, claim to be the natural children of Julia Peltier by a previous marriage which they allege was solemnized on September 15, 1894, in Seattle, Wash., and that the petitioners had no knowledge of the death of John H. Peltier, nor of his last will nor of any of the above proceedings until February 19, 1929. On February 26, 1929, these petitioners filed a notice of motion in the respondent court in the matter of said estate for an order vacating the final decree of distribution entered March 24, 1927, and the decree discharging the executor made June 14, 1927, and the order of January 18, 1929, establishing Martha Agnes Nelson as a residuary legatee under said will. The motion was denied. Thereupon on July 2, 1929, the petitioners commenced proceedings to establish heirship under the provisions of section 1664 of the Code of Civil Procedure. In said proceedings the petition was duly filed, the order directing notice thereof was duly made, returns of due service were filed, and appearances of all parties concerned were filed, all in the manner prescribed by law. At the commencement of the hearing on the application to establish heirship, the petitioners applied to the respondent court for an order establishing proof of service of the notice of the application and order to show cause, offering in evidence the aforementioned returns of due service and notices of appearance of all parties. No objection was made that the proceedings up to this point were not in due form and as required by the provisions of section 1664 of the Code of Civil Procedure, but said application for an order establishing due proof of service was resisted by counsel for the other persons concerned and who had filed appearances, on the ground that the court was without jurisdiction to entertain the proceedings at all for the reason that the decree of distribution entered on March 24, 1927, which was set aside and vacated so as to consider the claims of Martha Agnes Nelson, was nevertheless still in full force and effect and was a final and subsisting decree and judgment in rem as against the petitioners; that the proceeding to establish heirship is therefore a collateral attack on said decree of distribution, and that the proceeding is not available to them in the absence of a successful direct attack on the decree of distribution. On the ground that the decree of distribution was binding on the petitioners and was a complete bar to the proceedings initiated under section 1664 of the Code of Civil Procedure, and that it therefore had no jurisdiction to entertain the proceedings, the respondent court refused to make its order establishing proof of service. The petitioners thereupon applied to this court for a writ of mandate for the purpose of directing the respondent court to entertain the motion for an order establishing due proof of service in said proceedings and to enter its order thereon. The matter is submitted on the petition and the respondent's demurrer thereto.

[1] The sole question presented is whether the law imposes upon the respondent court the duty to enter the order requested. Section 1664 of the Code of Civil Procedure provides for the filing at any time after the expiration of six months from the issuing of letters testamentary or of administration, of a petition to establish heirship and upon such filing for an order directing service of notice to all persons interested in the estate to appear and show cause, etc., which notice shall be served in the same manner as a summons in a civil action. The section then states: "Upon proof of which service, by affidavit or otherwise, to the satisfaction of the court, the court shall thereupon acquire jurisdiction to ascertain and determine the heirship, ownership, and interest of all parties in and to the property of said deceased * * *. The court shall enter an order or decree establishing proof of the service of such notice."

It is obvious from a reading of the section that the court before which the proceedings are initiated and which makes the order directing service of notice to all interested parties to show cause, etc., acquires jurisdiction upon proof of due service. No objection to the proof of service was made before the respondent court, and satisfactory proof of such service is admitted by the demurrer to the petition. The entry of an order, it must be ap-

parent, is merely a formal step in the exercise of the jurisdiction thereby acquired and is mandatory, if no valid objection can be made to the entry thereof.

[2] It is the contention of the respondents that the order vacating the decree of distribution upon the motion of Martha Agnes Nelson under section 473 of the Code of Civil Procedure did not inure to the benefit of the petitioners, and that said decree is still in full force and effect against them. The petitioners urge that by a final order of the respondent court the decree of distribution has been set aside, the order discharging the executor has been revoked, and he has been ordered to repossess himself of the residuary estate and continue his duties as executor, and that on this state of the matter the proceeding provided for in section 1664 of the Code of Civil Procedure is available to them.

[3] We think the position of the petitioners must be sustained. Distribution in the administration of such an estate is a proceeding in rem which ordinarily has not the nature nor characteristics of an action at law or in equity wherein adverse personal interests of the parties are tried and adjudicated. See In re Painter, 115 Cal. 635, 639, 47 P. 700; 12 Cal. Jur., p. 164, and cases cited. Although notice is required (section 1668, Code Civ. Proc.), there is no necessity for appearance or participation in the proceedings by an heir or devisee as such unless objections are filed or until conflicting claims arise among them, and there is therefore, until a contest in the nature of an action or special proceeding is instituted, nothing in the nature of a technical default of any interested person and entry thereof. Estate of Ross, 185 Cal. 8, 16, 195 P. 674. Even upon the determination of any such action or proceeding during the course of administration there is no judgment in personam in favor of one of the parties against another. The ultimate aim and purpose of administrative proceedings, including any special proceeding or contest to determine heirship, is to ascertain the persons entitled to share in the estate of the decedent and to decree distribution accordingly. It will not be questioned that justice and sound policy requires that the estates of decedents be distributed to persons rightfully entitled thereto, and that every concern and endeavor of a probate court should be to the accomplishment of that purpose. This does not mean that a valid decree of distribution of a probate court, when once final, may be disturbed at the behest of any rightful claimant, known or unknown, when the decree was rendered, for it is the well-settled policy of the law to preserve the inviolability of final judgments and decrees of courts of law and equity, and a valid decree of a court of probate partakes of the nature of such judgments. Burroughs v. De Couts, 70 Cal. 361, 372, 11 P. 734.

It is true that in controversial proceedings, i. e., in actions at law or in equity, an order granting a motion to open up a default, or set aside a judgment on behalf of one defendant, does not necessarily open up the whole judgment, but the judgment may remain binding on all except those on whose behalf the relief was granted. McKinley v. Tuttle, 34 Cal. 235. This rule was recognized in Osmont v. All Persons, 165 Cal. at page 592, 133 P. 480, relied on by the respondents. But this is not such a case. More particularly this is a case where the effect of the order vacating the decree of distribution established a status in the probate proceeding the same as if, upon reversal without directions, no decree of distribution had been entered. Estate of Ross, 185 Cal. 8, 195 P. 674; 12 Cal. Jur., p. 212. Any proceeding thereafter on distribution would be on a new hearing. It may well be said that the decree of distribution in the present case is of such a nature as to the residuary legatees that it must be effective as to all of them or as to none. With no decree of distribution outstanding as to any of them, the status of the proceeding in probate is as though no steps in distribution had been taken and the matter in controversy is left open for determination. Freeman on Judgments (5th Ed.) vol. 1, p. 594.

We conclude, therefore, that as to these petitioners the form of the order vacating and setting aside the decree of distribution was such as to open up the administration of the decedent's estate for any proceedings lawfully to be taken therein in regular course as though no decree of distribution had theretofore been entered.

Let the peremptory writ of mandate issue as prayed.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

209 Cal. 569

FIRST NAT. FINANCE CORPORATION v. FIVE-O DRILLING CO.

L. A. 10322.

Supreme Court of California.

June 17, 1930.

1. Corporations ⟹384.

Affixing of corporate seal is not essential to validity of corporate transaction.

2. Corporations ⟹399(1).

Generally, secretary of corporation is mere ministerial officer whose authority does not extend to transacting ordinary affairs of corporation on independent volition.

3. Corporations ⟹399(1).

Secretary of corporation may be given authority of general manager, and public exercise of such functions is notice of such authority.

4. Evidence ⟹66.

Directors of corporation are presumed to know of business of corporation which it is their duty to manage.

5. Corporations ⟹432(6).

Authority of subordinate officers of corporation may be established by course of business and practices of corporation and by knowledge that board has, or is presumed to have, of acts of subordinates.

6. Corporations ⟹414(4).

Secretary of corporation, apparently clothed with authority of general manager and generally handling corporate business, *held* authorized to execute trade acceptance for corporation which was bound by secretary's act.

Evidence disclosed that business dealings with corporation were handled by secretary who purported to be representative of corporation. Corporation maintained but one bank account, opened by secretary and vice president as representatives of company, and certified check given for trade acceptance executed by corporation was indorsed in name of corporation by secretary, who was also member of board of directors.

7. Corporations ⟹399(1).

Whether corporation is bound by transaction does not depend on express delegation of authority, but on all circumstances, including manner in which corporation ordinarily conducts business.

8. Corporations ⟹399(2).

Corporation cannot deny authority of its secretary respecting transaction carried on by secretary in ordinary course of corporation's business.

9. Corporations ⟹426(10).

Corporation receiving and retaining proceeds of trade acceptances could not repudiate liability thereunder as unauthorized.

10. Appeal and error ⟹1122(2).

Where jury trial was waived, Supreme Court could make finding based on evidence that corporation sued, as maker of trade acceptance retained benefits thereof (Code Civ. Proc. § 956a).

11. Estoppel ⟹110.

Rule that estoppel must be specially pleaded *held* inapplicable, where party in whose favor it exists does not know that claim must ultimately rest on estoppel.

12. Estoppel ⟹110.

Plaintiff not advised of defenses that may be pleaded is not required to plead estoppel to overcome affirmative matter in answer.

13. Appeal and error ⟹977(1).

New trial ⟹6.

Motion for new trial is addressed to court's discretion, which will not be disturbed in absence of clear showing of abuse.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the First National Finance Corporation against the Five-O Drilling Company. Judgment for plaintiff, defendant's motion for new trial was denied, and defendant appeals.

Affirmed.

Bertin A. Weyl, of Los Angeles, for appellant.

Hyams & Himrod and Aubrey Devine, all of Los Angeles, for respondent.

WASTE, C. J.

This is an action to recover upon a trade acceptance. The instrument sued on reads as follows:

"Trade Acceptance
"Long Beach Branch
"Security Trust & Savings Bank
"Long Beach, Calif.
"(Head office Los Angeles)

"32970 Long Beach, California, February 7th, 1923.

"Due Apl 7th '23.

"On April 7th, 1923, pay to order of Ourselves Twenty-five Hundred and no/100 Dollars ($2500.00).

"The obligation of the acceptor hereof arises out of the purchase of goods from the drawer. The drawee may accept this bill payable at any bank, banker or trust company in the United States which he may designate.

"To Roy Evans Drilling Company, Mission Theatre Bldg., Long Beach, California.

"Five-O Drilling Company
"By G. F. Kelley, Sec'y."

The instrument was duly accepted in writing by the drawee, Roy Evans Drilling Company, and prior to maturity was transferred by the drawer to the plaintiff for value, the indorsement reading: "Five-O Drilling Co., By G. F. Kelley, Sec'y." At maturity the instrument was dishonored by the drawee, and, after notice of dishonor had been given, this action was brought against the drawer for $2,000, the unpaid balance then due thereon. The cause was tried by the court, sitting without a jury, and judgment was entered for the plaintiff as prayed. Defendant's motion for a new trial was denied, and it has appealed.

[1] Appellant's principal attack upon the judgment has to do with the asserted insufficiency of the evidence to support the findings upon which it is based. It is contended that Kelley, as secretary of the appellant company, was without authority to either execute or indorse the instrument in the corporate name. Kelley is asserted to have executed and negotiated the trade acceptance without the knowledge of his fellow officers and directors, and solely for the purpose of concealing prior defalcations upon his part. Much stress is placed upon the fact that no other officer of the appellant company had signed the instrument with Kelley, nor had the corporate seal been affixed thereto. It is now well settled that the affixing of the corporate seal is not essential to the validity of a corporate transaction. City St. Imp. Co. v. Laird, 138 Cal. 27, 31, 70 P. 916. Nor do we attach any particular significance to the fact that no other officer of the appellant company joined with Kelley in the execution or indorsement of the instrument. Furthermore, appellant's contention comes with poor grace, for the facts and circumstances as developed upon the trial of the cause are such as to effectively preclude and estop it from thus attacking the validity of the instrument.

[2-5] As a usual thing the secretary of a corporation is a mere ministerial officer whose authority does not extend to the transaction of the ordinary affairs of the corporation upon his independent volition and judgment. But one who is secretary may also have far more extensive functions than those ordinarily incident to his office. He may be clothed with the authority of a general manager, and his open and public exercise of the functions of such position is notice that he has such authority. Betts v. So. Cal., etc., Exchange, 144 Cal. 402, 407, 77 P. 993. It has always been presumed that directors have knowledge of the business of a corporation which it is their duty to manage and control. And so, the existence of authority in subordinate officers may be established by proof of the course of business and by the usages and practices of the company and by the knowledge which the board has, or must be presumed to have, of the acts and doings of its subordinates in and about the affairs of the corporation. Mahoney Mining Co. v. Anglo-Cal. Bank, 104 U. S. 192, 194, 195, 26 L. Ed. 707; 6 Cal. Jur. 1067, § 441.

[6] Upon being called as a witness, the president of the respondent company testified that, as president of said company and as a director and officer of the Charles M. Woods Company, he had had many business dealings with the appellant corporation, both prior and subsequent to the execution and negotiation of the trade acceptance here involved, and that such transactions were always handled by Kelley, acting as the representative of the appellant company. The witness testified: "I talked to Mr. G. F. Kelley, received the money from him, and did a lot of business with him, purporting to be the representative of the Five-O Drilling Company. In fact, I personally didn't know of any other one of the men who were officers of the Five-O Drilling Company until after they owed the Woods Company a large sum of money and didn't pay it." He also testified that the transactions with the appellant company wherein Kelley had acted as its representative totaled "a good many thousand dollars." There is testimony to the effect that the appellant company maintained but one bank account, and that Kelley and F. N. Miller, vice president and field superintendent, had opened it as representatives of the company, and that they were the only officers and directors of the company with whom the bank manager had any dealings in connection with said account. It is also in evidence that the certified check given by the respondent at the time it discounted the trade acceptance sued on was indorsed "Five-O Drilling Co., By G. F. Kelley," and deposited in the appellant's bank account. Moreover, Miller, in response to a query from the president of the respondent company concerning the instrument in suit, stated that the appellant was "financially embarrassed at the time; that he [Miller] hadn't had to do with the financial matters, and that [the witness] would have to take it up with Mr. Kelley." In addition to being the secretary of the appellant company, Kelley was also a member of its board of directors.

[7, 8] This evidence tends to indicate that Kelley, as secretary and director of the appellant company, was given more or less of a free rein in the conduct of its affairs, and carried on its ordinary business transactions. He was apparently clothed with many of the functions of a general manager, and his open

and public exercise of these functions was a notice that he had such authority. The decisions are numerous to the effect that whether a corporation is to be bound by a transaction does not depend so much upon the presence or absence of any express delegation of authority to the agent purporting to act for it, but is to be determined upon a consideration of all the circumstances connected with the transaction, including the manner in which the corporation ordinarily conducts its business. Betts v. So. Cal., etc., Exchange, supra; Abbott v. Seventy-Six L. & W. Co., 87 Cal. 323, 328, 25 P. 693; Crowley v. Genesee Min. Co., 55 Cal. 273, 275–276; 7 A. L. R. 1459. In Ellet v. Los Altos, etc., Properties, Inc., 88 Cal. App. 740, 745, 264 P. 270, 272, it is said: "Authority of the corporation may be shown by evidence that the person does business for the corporation and on its behalf as agent with the knowledge and acquiescence of its directors or by their direction. * * * Like individuals, a corporation is responsible for the manner in which it permits its agents to hold it out to the world." Appellant appears to recognize this principle, for it states: "As appellant views the law with respect to establishing Kelley's authority in the premises, plaintiff might have established his authority by proof of an ostensible agency." In our opinion the respondent succeeded in doing this, appellant's present contention to the contrary notwithstanding. The transaction leading to the institution of this suit having been carried on by Kelley in the ordinary course of the business of the appellant, it may not now deny his authority in the premises. Under the evidence before it the trial court properly found that the instrument sued on had, in fact, been drawn by the appellant and indorsed by it to the respondent, and, so finding, the court below necessarily and impliedly found that, under the circumstances disclosed by the record, the appellant was bound by the acts of Kelley in his transaction with the respondent.

[9] In addition to what has been said, there appears to be a second and equally sufficient reason why appellant's contention as to the invalidity of the trade acceptance does not come with good grace. The evidence shows that on February 7, 1923, Kelley drew two trade acceptances (one of them being the one here involved) in appellant's name against the Roy Evans Drilling Company, each in the sum of $2,500; that on February 16, 1923, and before the maturity of either instrument, Kelley, purporting to act for the appellant, sold and negotiated the two trade acceptances to the respondent for the sum of $4,800; that respondent thereupon delivered to Kelley, as appellant's representative, a certified check for $4,800, which check was thereafter indorsed by Kelley in the appellant's name and $4,500 of its proceeds deposited by him in appellant's bank account; and that no part or portion of the moneys so received from the respondent has been returned by the appellant, nor has any offer of return been made. The law does not permit a corporation to receive and retain the benefits of a contract or transaction and at the same time repudiate liability thereunder or attempt to escape the burdens thereof on the ground that the contract or transaction was not authorized, or that the authority therefor was not set forth in its records. Pauly v. Pauly, 107 Cal. 8, 18, 40 P. 29, 48 Am. St. Rep. 98; Blood v. La Serena L. & W. Co., 134 Cal. 361, 367, 66 P. 317; McKee v. Title Ins. Co., 159 Cal. 206, 222, 113 P. 140; I Parsons on Contracts, 118. Even if it be assumed that respondent's recovery under this theory rests upon some equitable ground or an implied promise to reimburse it, rather than upon the instrument itself, still that portion of the prayer of the complaint wherein request is made "for such other and further relief as to the court may seem proper" would justify the entry of judgment for the respondent.

[10] A jury trial having been waived in this case, we deem it proper (Code Civ. Proc. § 956a) to make a finding, based on the evidence, in addition to those made by the trial court, which shall be to the effect that no part of the amount received by the defendant from the plaintiff by reason of the indorsement and delivery of said trade acceptance has been paid or returned to the plaintiff, but, on the contrary, the defendant has retained all the benefits accruing out of the transaction.

[11, 12] The principle relied on by appellant that an estoppel must be specially pleaded is without application in cases where the party in whose favor it exists is without knowledge that his claim must ultimately rest upon it. As a plaintiff is not advised of the defenses that may be pleaded, he is not required to plead an estoppel in order to overcome any affirmative matter set up in the answer or by way of defense. McCreery v. Charlton, 185 Cal. 37, 42, 195 P. 670; Llewellyn Iron Works v. Abbott Kinney Co., 172 Cal. 210, 213, 155 P. 986.

We have examined the several rulings complained of and have found nothing that would warrant a reversal of the judgment. In view of respondent's showing upon the trial, the matters generally sought to be elicited by the questions propounded by appellant and to which objections were sustained could not have been of any particular or serious consequence in the final determination of the cause. Having permitted Kelley to hold himself out as clothed with the necessary authority to transact ordinary business deals in its behalf, and having at all times, even up to the present, retained the benefits of his transaction with the respondent, appellant was properly denied the opportunity of attempting to show that it had been unwittingly victimized by

Kelley. Under the circumstances disclosed by the record herein, this is a matter for adjustment solely between the appellant and its erring agent, and is without material bearing upon respondent's rights.

[13] What has already been said sufficiently disposes of the contention that the court below committed error in denying appellant's motion for a nonsuit. Nor do we think the court erred in denying its request for a new trial. Such a motion is addressed to the sound discretion of the court to which the application is made, and its action thereon is conclusive and will not be disturbed in the absence of a clear and affirmative showing of a gross, manifest or unmistakable abuse of discretion. 20 Cal. Jur. 27, § 13. Appellant's showing in this regard has failed to convince us that the court below erred in refusing to grant a new trial.

We therefore make the following finding, to be designated as I a: "No part of the amount of money received by the defendant from the plaintiff by reason of the endorsement and delivery of said trade acceptance has been paid or returned to the plaintiff, but, on the contrary, the defendant has retained to itself all the benefits accruing out of the transaction."

With such finding added, the judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.; PRESTON, J.; SEAWELL, J.; CURTIS, J.

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209 Cal. 658

PEOPLE v. MONSTAD.

L. A. 10329.

Supreme Court of California.

June 27, 1930.

1. Public lands ⟹144(1).

State has title to tide and submerged land, but may grant such land to city, subject to rights of public to use them for navigation and fishing (Acts 1915, p. 62).

2. Municipal corporations ⟹719(4).

City could lease tidelands to individual to erect private wharf (Civ. Code, § 718, as amended by St. 1917, p. 798; St. 1915, p. 62).

3. Municipal corporations ⟹719(4).

Statutes providing procedure for granting "franchise or privilege" *held* inapplicable to lease of tidelands to individual to erect private wharf (Deering's Gen. Laws 1923, Act 2720, St. 1915, p. 62; Civ. Code, § 718, as amended by St. 1917, p. 798).

It is obvious that Deering's Gen. Laws 1923, Act 2720, was only intended to apply to franchise or privilege granted to public utility.

[Ed. Note.—For other definitions of "Franchise," see Words and Phrases.]

4. Municipal corporations ⟹719(4).

Wharf erected by lessee of tidelands from city *held* used for private purposes only, rendering statutes respecting granting of franchises or privileges inapplicable (Deering's Gen. Laws 1923, Act 2720).

In Bank.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action in quo warranto by the People, upon the complaint of Hans Carstensen, against W. L. Monstad to set aside a lease. From an adverse judgment, plaintiffs appeal.

Affirmed.

U. S. Webb, Atty. Gen., and Leon French, of San Francisco, John W. Maltman, and Overton, Lyman & Plumb, all of Los Angeles, Harry Polglase, of Redondo Beach, and William R. James, of Los Angeles, for appellants.

Frank L. Perry, of Redondo Beach, for respondent.

RICHARDS, J.

This quo warranto proceeding was brought for the purpose of excluding the defendant from holding or claiming to hold any rights, privileges, or franchises on or in connection with a certain wharf, and to have a certain lease between the city of Redondo Beach, a city of the sixth class, and defendant declared illegal. The wharf in question was constructed by defendant and is now being operated by him, in reliance on the above-mentioned lease, upon certain tide and submerged lands situated in the harbor of the city of Redondo Beach.

The findings of fact disclose that on November 30, 1925, a certain agreement, designated as a "lease and agreement," was entered into between defendant and the city, such agreement purporting to lease to the defendant the tide and submerged lands in question, for the purpose of the construction, maintenance, and operation of a wharf by defendant thereon; that defendant, in reliance on this agreement, constructed a wharf as provided, and maintained and operated the same until July 19, 1926; that on that date the parties to the above agreement expressly rescinded and revoked the first lease and entered into an "amended lease" for the identical lands covered by the first lease; that

the amended lease omitted many of the provisions of the first lease.

The amended lease, which is the only one to be considered, inasmuch as the first lease was expressly rescinded and superseded by it, provides that the city leases to defendant for a period of twenty years, at a specified rental, certain described tide and submerged lands belonging to the city, "for the purpose of constructing, maintaining and operating thereon a *pleasure wharf*, to be used for the furnishing of fishing and landing facilities, and for purposes incidental thereto, with the privilege of maintaining, repairing, extending, enlarging and operating thereon, the pier or structure heretofore constructed on said lands by said lessee, *as a private pleasure pier*." (Italics ours.) The lessee covenants to keep the pier in good repair, and to maintain the same in a safe and sanitary condition; the lessee is given permission to erect and maintain a fishing and bait stand, such necessary booths as may be necessary, and such fishing concessionary businesses as are sanitary, provided that the consent of the board of trustees must first be secured for the erection of any additional buildings; pole fishermen may use the pier without cost or expense; the lessee is to pay all taxes; the city to be held free of liability for injuries to any person on the wharf, and the lessee is to carry liability and compensation insurance. It is also provided that upon the termination of the lease all improvements on the leased property shall become the property of the city, and the city is given the right to terminate the lease at any time after five years by paying to the lessee the then value of the improvements constructed by him thereon, but the city is not to exercise such right for the purpose of releasing the property to others.

The main objection of complainant to both leases is that they were not executed in the manner provided in the "Broughton Act," Act 2720, Deering's General Laws 1923 (Stats. 1905, p. 777). Appellants contend that that act provides the sole and only manner by which a city may lease its tide and submerged lands, and that a lease executed in any other manner is void. It is admitted that the procedure provided in the Broughton Act was not followed in the execution of either lease, and that the leases were awarded to defendant by resolution of the city trustees duly passed and approved.

Before discussing the main problem here presented, certain well-settled principles in reference to tide and submerged lands must be kept in mind.

[1] The title to tide and submerged lands undoubtedly is in the state, but the state may grant, and frequently has granted lands of this character to cities, subject only to the rights of the public to use them for purposes of navigation and fishing. 18 Cal. Jur. 1031, § 294. The tide and submerged lands bordering the shore line of the city of Redondo Beach were granted to the city by the state by Statutes of 1915, p. 62. This act is almost identical with acts granting tide and submerged lands to many other cities. That act, in so far as pertinent here, provides:

"Said lands shall be used by said city and by its successors, solely for the establishment, improvement and conduct of a harbor and for the establishment and construction of bulkheads or breakwaters for the protection of lands within its boundaries, or for the protection of its harbor, and for the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays and other utilities, structures and appliances necessary or convenient for the promotion or accommodation of commerce and navigation, and the protection of the lands within said city, and said city, or its successors, shall not, at any time, grant, convey, give or alien said lands, or any part thereof, to any individual, firm or corporation for any purpose whatsoever; provided, that said city, or its successors, may grant franchises thereon, for limited periods, for wharves and other public uses and purposes, and *may* lease said lands, or any part thereof for limited periods, for purposes consistent with the trusts upon which said lands are held by the State of California and with the requirements of commerce or navigation at said harbor." (Italics ours.)

Other statutory authority for the leasing of tidelands is found in section 718 of the Civil Code, as amended in 1917 (St. 1917, p. 798), and as it existed until 1927, when it was again amended (St. 1927, p. 1173), the latter amendment having no effect on this case, having been passed subsequent to the trial thereof. That section, in part, provides:

"* * * The tidelands and submerged lands granted to any city by the state, or any lands belonging to such city adjacent to such tidelands and submerged lands, may be leased for a period not exceeding forty years if the grant from the State of California of the use of said tidelands and submerged lands does not provide specifically for a term of years for which said lands may be leased. Said tidelands and submerged lands and lands adjacent thereto can only be leased for industrial uses, the purpose of improvement and development of the harbor of said city, and the construction and maintenance of wharves, docks, piers or bulkhead piers or for other public uses and purposes consistent with the requirements of commerce or navigation at said harbor."

[2] The law is well settled that the power to lease, which exists by virtue of the above statutes, includes the power to lease to an individual, firm, or corporation for the pur-

pose of erecting a private wharf or pier. The leading case on the subject is Pacific Coast S. S. Co. v. Kimball, 114 Cal. 414, 46 P. 275. In that case it was contended that the city of Monterey had no power to lease its tide or submerged land to a corporation with the intention that said lessee was to use the land to erect thereon a private wharf. The court decided otherwise, stating at page 416 of 114 Cal., 46 P. 275, 276:

"I am unable to see, however, any ground whatever for this contention. A wharf is not, like a toll-bridge or a ferry, in its very nature a public utility. Wharves are often appropriated to the use of an individual or a company, and it cannot be doubted that Monterey could lease small portions of its water front for bathing grounds, or for any lawful purpose not injurious to the harbor, or an inconvenience to commerce.

"That being so, I see no reason why it might not lease a small portion to a steamship company for its special use."

In San Pedro, etc., R. Co. v. Hamilton, 161 Cal. 610, 119 P. 1073, 37 L. R. A. (N. S.) 686, the court, in holding that the constitutional prohibition against granting tidelands did not prohibit leasing them, used language which is pertinent here. At page 620 of 161 Cal., 119 P. 1073, 1077, it is stated:

"The purpose of the constitutional provision was not to blight commercial development, but to foster it. * * * It did not mean to abort commerce in embryo or to strangle it in its infancy by putting a ban upon the activities of private commercial enterprises. * * * To hold that the state, or that municipalities acting as its mandatories, may not lease, with proper restrictions of time and proper regard to public and quasi public use, lands such as these, so that private enterprise and capital may build up the commerce of our seaport cities, is to declare that all such commerce must await the slow and frequently incompetent initiative of the municipalities themselves—municipalities which frequently are unwilling to incur the expense and risk which would be accepted under reasonable terms by private enterprise." See, also, City of Oakland v. Williams, 206 Cal. 315, 274 P. 328, and 63 A. L. R. 614, note.

[3] Upon the authority of the above statutory provisions and the above cases, we take it to be settled law that the city of Redondo Beach had the authority and power to enter into a lease with defendant for the purpose of permitting him to erect a private wharf thereon. Appellants concede that the authority and power to so lease tide and submerged lands exists, but contend that the method by which this power was exercised was not proper. It is contended that the "Broughton Act," supra, which provides for the method by which certain franchises and privileges may be granted by a municipality, applies to the lease in question, and that since, admittedly, the procedure therein contained was not followed, the lease must be declared void.

Section 1 of the Broughton Act provides, in part:

"Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street or interurban railroads upon any public street or highway, to lay gas-pipes for the purpose of carrying gas for light, heat or power, to erect poles or wires for transmitting electricity for light, heat or power, along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by boards of supervisors, boards of trustees or common councils, or other governing or legislative bodies of any county, city and county, city or town within this state, except steam railroads and except telegraph or telephone lines doing an interstate business, and renewals of franchises for piers, chutes or wharves, shall be granted upon the conditions in this act provided, and not otherwise."

The act then provides that an "applicant for any franchise or privilege above mentioned" must file an application for the same with the governing body; that the governing body must then advertise the fact that such application has been received, and that the same will be sold to the highest bidder; and that the successful bidder must pay a 2 per cent. gross receipt tax.

Appellants strenuously contend that the granting of the lease here in question was the granting or giving of a franchise or privilege, and, since the above procedure was not followed, the alleged lease is void. If the Broughton Act applies to this situation appellants are correct. City of San Diego v. Kerckhoff, 49 Cal. App. 478, 193 P. 801. We are of the opinion that the Broughton Act has no application to the leasing of tide or submerged lands for the purpose of permitting the lessee to erect a private wharf thereon. Appellants cite many authorities in an endeavor to show that a lease is a franchise or privilege. In a broad and general sense we have no doubt that the granting of a lease is the granting of a privilege to the lessee, but that fact is immaterial if the statute in question used the expression in a more restricted meaning. Certainly there are a great many "privileges" granted to individual inhabitants which, by their very nature, could not come within the meaning of the Broughton Act. Thus, the right to construct gasoline tanks under sidewalks for filling stations, cutting into sidewalks and curbs for automobile drives, to erect signs, construct buildings, etc., amount to the giving of a "privilege," in a general sense, by the city to an individual,

and yet, obviously, those rights are not nor need not be advertised for sale and sold to the highest bidder.

Turning to the express terms of the Broughton Act quoted, supra, it is to be noted that the act particularly specifies the franchises or privileges to which it applies. It is obvious that the act was only intended to apply to franchises or privileges granted to public utilities. The act might well apply to the grant of the right to erect a wharf for the public with the right to collect fees and tolls, but the act does not apply to the leasing of tidelands for the purpose of erecting a private wharf thereon. This view is further strengthened by the fact that the Broughton Act specifically provides that the successful bidder must pay to the county or municipality 2 per cent. of the gross annual receipts arising out of the use and operation of the franchise. Obviously, such a provision could not apply to a wharf used entirely for private purposes, and from which no annual receipts would be received.

[4] The only other point necessary to consider is whether or not the lease in question was for a private purpose. The first lease contained several objectionable features, including the express right to charge or collect fees and tolls, and to make rules and regulations for the operation of the wharf. These provisions were omitted from the second lease, that document specifically stating that the wharf in question was to be a "private pleasure pier." The trial court found on this point that from April 1, 1926, to July 1, 1926 (before the amended lease was entered into), the defendant collected certain charges from two fishermen operating boats from said wharf, and that from "July 1, 1926, to September 15, 1926, one boatman operating a live-bait boat and taking passengers for fishing trips in Redondo Beach harbor, operated from said wharf and paid to the defendant a certain charge for the sale and collection of tickets to his boat and for the use of the landing facilities of said wharf; that since about the 15th day of September, 1926, no person has used said wharf except the defendant, his employees and passengers on boats owned and operated by him; and no charges have been collected for the use of said wharf except as above stated." The complaint was filed herein on October 15, 1926. It is obvious, therefore, that both by the express terms of the lease and in actual practice the wharf is being used for private purposes only, and that the Broughton Act does not apply.

The judgment appealed from is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

209 Cal. 705

BRILL et al. v. CITY OF LOS ANGELES et al.

L. A. 11494.

Supreme Court of California.

June 30, 1930.

Rehearing Denied July 28, 1930.

1. Municipal corporations ⟹514(2).

Power of municipality to reassess applies to case where omission, irregularity, illegality, informality, or noncompliance with requirements of statute is present (Deering's Gen. Laws 1923, Act 8198, § 26a).

2. Municipal corporations ⟹514(1).

Municipality has power to reassess property for improvement, where ordinance of intention contained accurate description of property, though general description was inaccurate (Deering's Gen. Laws 1923, Act 8198, § 26a).

3. Constitutional law ⟹196.

Defect in respect to general description of property taken for street improvement was one on which curative and corrective statute might operate (Deering's Gen. Laws 1923, Act 8198, § 26a).

4. Constitutional law ⟹290(5).

Opportunity afforded adjoining owners for hearing as to extent of benefits on reassessment satisfied every requirement of due process (Deering's Gen. Laws 1923, Act 8198, § 26a).

5. Municipal corporations ⟹514(1).

Municipality was authorized to order reassessment after enactment of ordinance correctly describing lands necessary for improvement and district to be assessed (Deering's Gen. Laws 1923, Act 8198, § 26a).

SHENK, J., and WASTE, C. J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by William Brill and another against the City of Los Angeles and others From the judgment, plaintiffs appeal.

Affirmed.

Rehearing denied; WASTE, C. J., and SHENK, J., voting for a rehearing.

Roy A. Linn, of Los Angeles, for appellants.

Jess E. Stephens, Ex City Atty., Erwin P. Werner, City Atty., and Arthur W. Nordstrom, and Arthur Loveland, Deputy City Attys., all of Los Angeles, for respondents.

PRESTON, J.

This appeal involves alone the question of the propriety, under section 26a of the Street

Opening Act of 1903 (Deering's Gen. Laws, Act 8198, p. 3309), of an order directing a reassessment in a proceeding involving the opening, widening, and extending of Flower street from Washington street to Exposition boulevard, and the laying out of a new street in prolongation of said Flower street from Exposition boulevard, to the intersection of Thirty-Eighth and Figueroa streets in Los Angeles.

[1] This section purports to contain its own measure of power. Power to reassess applies to a case where omission, irregularity, illegality, informality, or noncompliance with the requirements of the statutes is present. It does not exist where "the issuing of such (original) assessment was entirely without the power of the city to issue." In other words, where due process of law is present when the first assessment is made, the reassessment is proper; where it is absent, the reassessment is improper. Said section 26a is closely akin to section 12¼ of the Vrooman Act (St. 1885, p. 147, St. 1913, p. 409), the provisions of which have been held valid and curative under circumstances similar to those of the case at bar. Ferry v. O'Brien, 188 Cal. 629, 206 P. 449. A somewhat analogous situation is found in the case of Wagoner v. La Grande, 89 Or. 192, 173 P. 305. See, also, to the same effect, Tibbits Pacific Co. v. Firth, 53 Cal. App. 771, 200 P. 976. A type of this legislation is also found in section 28 of the Improvement Act of 1911 (St. 1911, p. 746, as amended by St. 1923, p. 118, § 7), upon which a similar construction was placed in the case of California Land Company v. Town of Corte Madera (Cal. App.) 275 P. 866.

[2] It therefore but remains to make plain the nature of the illegality inhering in the original assessment in this case. It appears that on November 30, 1923, appellants and others petitioned the council of the city of Los Angeles to open and widen Flower street, between Washington and Figueroa streets, to a uniform width of 90 feet, and that pursuant to this petition said city council passed an ordinance of intention on April 1, 1924. It is the general description of the proposed improvement found in this ordinance of intention that furnishes the basis of the claim of absence of jurisdiction. Admittedly the ordinance contained a specific and accurate description of the property necessary to be taken to provide for the improvement intended and also purported to contain a general description thereof, but in the latter respect it failed, for there is an offset in Flower street beginning at a point on Exposition boulevard, 100 or more feet east of the line specifically described and running southerly and parallel to said line a distance of about 250 feet, intersecting Thirty-Seventh place where the street ends in a cul-de-sac. To open and widen Flower street, strictly speaking, would be to improve this portion of the street also, but the specific description did not include this offset but instead, as above noted, described a projection or prolongation of Flower street which would continue it, practically speaking, straight through southerly to the intersection of Thirty-Eighth and Figueroa streets. In other words, to be accurate the general description should have provided also for the laying out and opening of the new street, which would be a projection or prolongation southward of that portion of Flower street lying north of Exposition boulevard.

[3, 4] It is manifest at once that one accurate description is a compliance with due process of law; therefore, it would be within the power of the Legislature to dispense with the general description altogether, were it to so enact; hence this defect is one upon which a curative and corrective statute may operate. Moreover, the petitioners here are in no position to urge the absence of due process of law, for: The boundaries of the district were known to them, also the nature, location, and extent of the improvement, which came as a result of the present litigation and the condemnation proceeding of which they had at least, under section 11 of said act, constructive notice; and now on reassessment they will have ample opportunity to secure a hearing as to the extent of the benefits, if any, to their property. This will satisfy every requirement of due process of law.

"The proceedings, from the beginning up to and including the passage of the ordinance authorizing the work, did not include any assessment or necessitate any assessment although they laid the foundation for an assessment, which might or might not subsequently be made. Clearly all this might validly be done without hearing to the landowners, provided a hearing upon the assessment itself is afforded. Voigt v. Detroit, 184 U. S. 115, 22 S. Ct. 337, 46 L. Ed. 459; Goodrich v. Detroit, 184 U. S. 432, 22 S. Ct. 397, 46 L. Ed. 627." Londoner v. Denver, 210 U. S. 373, 378, 28 S. Ct. 708, 711, 52 L. Ed. 1103.

Indeed, it may be within the power of the Legislature to authorize a reassessment where the original assessment was absolutely void for constitutional reasons where on the reassessment due process of law prevails. Elliot on Roads and Streets, vol. 2, § 776. Such a course, however, would be tantamount to a new proceeding. But this question is not before us, and we are indulging this discussion of it only because it illuminates the position we have taken respecting the present case.

[5] Section 26a provides: "In the event that the court shall find that the improvement, the expenses of which are represented by said assessment or bonds, was commenced in good faith and carried on pursuant to an

ordinance or resolution of the city council providing for such improvement to be paid for by a special assessment, it shall be the duty of the said court to order the making of a new assessment." The meaning of this provision is that a reassessment must be ordered when a resolution passed in good faith provides that the improvement be paid for by special assessment. The court found that such an ordinance was passed; that it correctly described the lands necessary for said improvement and the district necessary to be assessed to pay the expenses thereof. This is clearly sufficient to bring the improvement within the power of the city to carry out. The following further provision of said section 26a is also applicable: "It is hereby declared to be the true intent and meaning of this section to make the cost and expense of all local improvements actually made or proposed to be made in the attempted exercise of the powers conferred upon municipalities under this statute, payable by the real estate benefited or to be benefited by such improvements by making a reassessment therefor which shall be equitably proportioned to each lot, each piece or parcel of land thereby benefited the amount of the actual benefits derived or to be derived from said improvement, notwithstanding that the proceedings of the city council or other officers or agents of the city, or other persons connected therewith may have been irregular, illegal or defective, or not in full conformity with the requirements of this statute."

The chief reliance of appellants is on O. T. Johnson Corp. v. City of Los Angeles, 198 Cal. 308, 245 P. 164. It is true that there an error was contained in the ordinance of intention similar to the one before us, but proceedings in that case were arrested before any interlocutory judgment of condemnation was procured and, of course, before any assessment was made or reported and before any collections had been made thereunder. Consequently section 26a could not be invoked; hence, the situation of that case is such that it is not helpful on the question before us. For these reasons it is unnecessary to pursue the subject further.

The judgment is affirmed.

We concur: CURTIS, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.

SHENK, J.

I dissent. The court found on the undisputed record of the proceedings to open, widen, and extend Flower street, that the improvement proposed contemplated the opening of a new street to be known as Flower street, but separate and distinct from and approximately parallel to the existing Flower street for a distance of approximately 900 feet south of Exposition boulevard. I am unable to distinguish this situation from that presented in O. T. Johnson Corporation v. City of Los Angeles, 198 Cal. 308, 245 P. 164, wherein it was held that under similar circumstances the city council was without jurisdiction to proceed because of the want of due process. In such case any assessment thereafter made would be void. I am in agreement with the premise laid down in the main opinion that jurisdiction does not exist where the issuing of the original assessment was entirely without the power of the city, and that "where due process of law is present when the first assessment is made, the reassessment is proper; where it is absent, the reassessment is improper." If the original assessment would have been invalid for want of jurisdiction, it would necessarily follow from the above premise that the reassessment would likewise be invalid unless jurisdiction be lawfully acquired in the meantime. I cannot ascribe to section 26a the potency accorded to it in the main opinion. Notice of the reassessment ordered by the court cannot, in my opinion, bring to life the antecedent steps taken in the initiation of the proceeding to establish the extent of the assessment district, etc., which were void for lack of notice. The fact that the proceeding was not attacked before the original assessment was made would not, in my opinion, estop a property owner from contesting the void proceeding.

I concur: WASTE, C. J.

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106 Cal. App. 696

McCONVILLE v. MILK WAGON DRIVERS' UNION, LOCAL NO. 226, OF SAN FRANCISCO, et al.

Civ. 7008.

District Court of Appeal, First District, Division 1, California.

June 27, 1930.

1. Trade unions ⟹4.

In administering disciplinary measures, milk wagon drivers' union acts in quasi judicial character, and its sentence is conclusive, if authorized.

2. Trade unions ⟹4.

Court cannot interfere with union's expulsion of member unless action was contrary to natural justice or rules of union or was malicious.

3. Trade unions ⟹4.

In reviewing expulsion of member from union, court determines only whether there was evidence supporting union's conclusion.

4. Trade unions ⟹4.

Suspension of member from milk wagon drivers' union for violating rules prohibiting soliciting trade *held* supported by evidence and binding on trial court.

Constitution of milk wagon drivers' union prohibited solicitation of trade of former employer or of any employer or payment of bonus to solicit trade. Evidence disclosed that member was twice convicted for repeated offenses of soliciting trade.

5. Trade unions ⟹4.

Member of union notified of charges at hearing, but proceeding without requesting postponement, waived requirement of delivery of copy of charges before hearing.

6. Trade unions ⟹4.

In reviewing disciplinary proceedings by union, court will disregard technicalities, unless accused has been denied opportunity to defend and union has not exercised good faith.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Hugh McConville against the Milk Wagon Drivers' Union, Local No. 226, of San Francisco, and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

George O. Bahrs, of San Francisco, for appellant.

Henry Heidelberg, of San Francisco, for respondents.

PER CURIAM.

This is an appeal by plaintiff from a judgment of dismissal entered after a motion for nonsuit was granted in an action for damages brought by plaintiff against the Milk Wagon Drivers' Union, its business agent and its secretary-treasurer, for the alleged illegal suspension of plaintiff from the membership of said union for a period of 90 days for having violated the laws of the union prohibiting its members from soliciting trade from each other's milk routes.

[1-3] As pointed out in the case of Otto v. Tailors' P. & B. Union, 75 Cal. 308, 17 P. 217, 219, 7 Am. St. Rep. 156, the general rule is that, in the matter of administering disciplinary measures, an organization such as the one here involved "acts in a quasi judicial character, and, so far as it confines itself to the exercise of the powers vested in it, and in good faith pursues the methods prescribed by its laws, such laws not being in violation of the laws of the land, or any inalienable right of the member, its sentence is conclusive, like that of a judicial tribunal. Commonwealth v. Pike Benevolent Society, 8 Watts & S. [Pa.] 250; Burt v. Grand Lodge, F. & A. M., 44 Mich. 208; Id., 66 Mich. 85, 33 N. W. 13; Robinson v. Yates City Lodge, 86 Ill. 598." And it is beyond the power of the courts to interfere with its action, "except in the following cases: 'First. If the decision arrived at was contrary to natural justice, such as the member complained of not having an opportunity to explain misconduct. Secondly. If the rules of the club have not been observed. Thirdly. If the action of the club was malicious and not bona fide.'" See, also, Lawson v. Hewell, 118 Cal. 613, 50 P. 763, 49 L. R. A. 400. Furthermore, it is held generally that, with respect to the merits of the charges which have resulted in suspension or expulsion of the member, the province of the court is restricted to the ascertainment of whether there was any evidence whatever before the union to support its conclusion, and that it may not consider the weight of such evidence nor substitute its judgment thereon for the judgment of the tribunal before whom the member was tried. Martin's Modern Law of Labor Unions, p. 393; Fritz v. Knaub, 57 Misc. Rep. 405, 103 N. Y. S. 1003.

The complaint in the present action does not set forth the particular facts plaintiff relies upon as establishing the illegality of the action of the union in suspending him from its membership, it being alleged merely that, "without just or any cause, or any right, reason, or excuse, [the defendants] deliberately, intentionally, and wilfully suspended the plaintiff above named from membership * * * for a period of ninety (90) days. * * *" However, on this appeal, he urges the points, first, that the proceeding before the union was not instituted and prosecuted in good faith, but on the contrary was "merely a step and a plan on the part of the union and the milk dealers' association to put [plaintiff] out of business"; and, secondly, that such proceeding was not conducted in conformity with the provisions of the union's constitution and by-laws.

[4] In our opinion the evidence adduced at the trial before the superior court was wholly insufficient as a matter of law to establish either of the foregoing points, and consequently we think the trial court was justified in granting the motion for nonsuit.

Admittedly, the constitution of the defendant union declares that "no member of this organization shall solicit trade of any former employer and no member shall solicit the trade of any employer whatsoever"; and the written agreement existing between the Milk Dealers' Association of San Francisco and the Milk Wagon Drivers' Union, which is expressly made a part of the laws of the union, provides that "no driver shall be permitted to solicit the trade of any former

employer or of any dairy whatsoever and it is agreed that no bonus, percentage, or commission shall be paid to or accepted by any driver to induce him to solicit trade." Furthermore, the by-laws of the union are to the effect that "violations of constitution, by-laws, working rules or agreement (are punishable) by a fine of not less than $5 nor more than $50; second or repeated offenses by a fine or suspension." Besides testifying in his own behalf before the superior court plaintiff called three witnesses to substantiate the allegations of his complaint. Two of them were respectively the business agent and secretary-treasurer of the union; and it was disclosed by their testimony, without conflict, that the decision of the union sustaining the charges against plaintiff and directing his suspension was based upon the affirmative testimony of at least seven witnesses; and that it was plaintiff's second conviction for repeated offenses. Obviously, therefore, under the rule of the cases above cited, the decision of the union as to the merits of the charges was controlling upon the trial court and jury. True, all of the witnesses appearing before the union were employees of a competing milk company, but certainly it does not follow from such fact alone, as a matter of law, that their testimony was worthless and should be disregarded, or that they were not acting in good faith in testifying. Nor are we able to find anything in the testimony given by plaintiff or the officers of the union from which the inference could be fairly drawn that the latter's activities in causing the charges to be instituted and prosecuted were prompted by impure motives. The fourth witness was one of the officers of plaintiff's employer, and his testimony had no material bearing upon the question now under consideration. We therefore agree with the ruling of the trial court that the evidence as a whole was legally insufficient to establish an element of bad faith.

[5, 6] The Constitution of the local union provided that "no member shall be placed on trial unless charges are preferred, duly specifying the grievances and submitted in writing and signed by the member making the charges, a copy of which shall be delivered to the accused. The Secretary shall notify the accused and the witnesses to appear before the Executive Board of the Union." The evidence before the trial court shows that charges were preferred against plaintiff by a fellow member of the union in conformity with the foregoing provisions, accusing plaintiff of "soliciting as laid down in the aforesaid constitution and by-laws of this union," and that plaintiff was notified in writing by the secretary-treasurer of the filing of said charges and of the time and place for the hearing of the same; but it appears that a copy of said charges was not delivered to plaintiff prior to the time of the commencement of the hearing before the union, and he therefore contends that the proceedings based on said charges were illegal and void. The evidence further shows, however, without conflict, that in obedience to the written notice served upon plaintiff by the secretary-treasurer he appeared before the executive board of the union for trial, was fully informed at that time of the nature of the charges filed against him, and, although he objected to the legality of the proceeding upon the ground that a copy of said charges had not been previously delivered to him, he requested no postponement and proceeded with the hearing and fully participated therein by cross-examining the witnesses produced against him and testifying in his own behalf. Under such circumstances, the authorities hold, he waived the requirement of the delivery of a copy of said charges. Harris v. Aiken, 76 Kan. 516, 92 P. 537, 123 Am. St. Rep. 149; Durel v. Perseverence Fire Co., 47 La. Ann. 1101, 17 So. 591; People v. Coachman's Union, 4 Misc. Rep. 424, 24 N. Y. S. 114. Moreover, as held in the cases hereinafter cited, associations of the kind here involved are not bound to use the strict regularity of legal proceedings, and, in reviewing the proceedings taken by such organization relating to the enforcement of its disciplinary laws, the courts will disregard technicalities and not interfere, because of a departure from form, unless it appears that the accused has been denied a full opportunity to defend himself and the organization has not exercised its powers fairly and in good faith. Levy v. Magnolia Lodge, 110 Cal. 297, 42 P. 887; People v. St. George's Society, 28 Mich. 261; Albers v. Merchants' Exch., 39 Mo. App. 583; Hutchinson v. Lawrence, 67 How. Prac. (N. Y.) 38; Martin's Modern Law of Labor Unions, p. 386. We find no such situation here.

The judgment is therefore affirmed.

106 Cal. App. 673

FIERCE v. REED.

Civ. 4127.

District Court of Appeal, Third District, California.

June 25, 1930.

1. Contracts ⟹88.

Under statute making written instrument affirmative evidence of consideration, defendant had burden of establishing there was no consideration for contract (Civ. Code, § 1614).

2. Contracts ⟹340, 346(2).

Want of consideration for contract must be specially pleaded, and pleader must support pleading by testimony.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by T. N. Fierce, doing business under the fictitious name and style of the Pacific Coast Blackboard Company, against William G. Reed. From a judgment for plaintiff, defendant appeals.

Affirmed.

Homer C. Mills, of Long Beach, for appellant.

Fall & Fall, Lucius Fall, and J. Gilbert Fall, all of Los Angeles, for respondent.

PLUMMER, J.

The plaintiff had judgment against the defendant for the sum of $1,077.66, balance alleged to be due for and on account of certain work performed by the plaintiff pursuant to contracts hereinafter referred to. From this judgment the defendant appeals.

The record shows that both the plaintiff and defendant were building contractors, and that the defendant had a contract for the erection of a certain school building; that on or about the 23d day of January, 1925, Deatherage & Lyon, manufacturers' agents, submitted to the defendant, Reed, a proposal to perform certain work and furnish certain materials in the construction of the school building for which the defendant, Reed, had a contract. This proposal, so far as necessary to be considered herein, reads as follows: "This proposal includes necessary slate blackboard for the net price of Four Thousand Dollars ($4000.00). If two toilet rooms on second floor are changed to classrooms, Alt. bid No. 2 add this footage to above figure at seventy-nine (79c) cents per sq. ft. installed. If 4-room wing is omitted, Alt. bid No. 4, deduct from above figure Two Hundred and Ninety-two Dollars and eighty cents ($292.80). Includes—Necessary cork carpet for the net price of Three Dollars and twenty-five cents ($3.25) per square yard, installed." This proposal was signed by Deatherage & Lyon, by M. S. Lyon, and was accepted by the defendant, Reed, on the 4th day of March, 1925. Thereafter, and on the 17th or 18th day of March, 1925 (the heading of the instrument is dated March 18, 1925; the date on which this agreement appears to have been accepted bears date of the 17th day of March, 1925), two agreements were entered into between the plaintiff and defendant relative to the work included in the Deatherage & Lyon's proposal. The first instrument bearing the two dates of March 17th and 18th, so far as necessary to be considered herein, reads as follows: "In accordance with your order given to Deatherage & Lyon, accepted by you March 3, 1925, we propose to furnish and erect complete, all the 3′ 0″ and 4′ 0″ slate blackboards in the Frances E. Willard School which you are erecting in Long Beach, for the total sum of $4000.00. If the two toilet rooms on the second floor are changed to class rooms, add the footage of slate required to above price at 79c per square foot. If the four room addition is omitted as provided in alteration No. 4 deduct from the total $292.80. You are to prepare all wood trim in place, leaving us exactly where the 3 ft. boards are to go 3′ 0¼″ and where the 4 ft. boards are to go, leaving us exactly 4′ 0¼″ from where the slate sets on the chalk trough to the underside of the capstrip. Note: This is very necessary to enable us to tilt the slate and bring the joints together in a proper manner. Should this clause not be complied with then it is understood and agreed that there will be an additional charge of $25.00, as it will necessitate cutting off the slate." This agreement bears the signature of both the plaintiff and the defendant. The second agreement entered into between the plaintiff and the defendant, bearing date of the 17th day of March, 1925, reads, so far as material here, as follows: "We propose to furnish and install all necessary buff cork to make boards in the Frances E. Willard School you are now building at Long Beach at a price of $3.25 per square yard, measurements to be taken when the cork is installed." It is provided in this contract that payment is to be made within 30 days after the completion of the work, and bears the signature of both the plaintiff and the defendant.

This controversy arises by reason of the fact that the proposal submitted by Deatherage & Lyon included the following clause: "Includes necessary cork carpet for the net price of $3.25 per square yard, installed"; while the main agreement, and the one set out in the plaintiff's complaint, and executed between the plaintiff and the defendant, did

not include this work, but was set forth and provided for in a special contract, which is the third contract which we have above set forth providing for the installation of buff cork to make boards for the Frances E. Willard School, at the price of $3.25 per square yard, etc.

The answer of the defendant in this action tendered the issue that the contracts executed between the plaintiff and defendant were executed through mutual mistake, and that the contract should have been so executed as to provide that the sum of $4,000 mentioned in the main contract should cover payment for the cork carpet. The record shows that the cork carpet cost, installed, $865.65, and that for some extra "Mission" slateboards the further sum of $12 was charged, making a total of $877.65, being the sum contested in this action. Upon the trial of the action, however, practically no testimony was introduced to show any mutual mistake.

The record sets forth that the firm of Deatherage & Lyon was engaged in making proposals for work; that, while they made proposals for work in behalf of contractors, and made proposals for this work in behalf of the plaintiff, yet the plaintiff tendered his own contracts and did not enter into a contract with the defendant to do the work as proposed by Deatherage & Lyon, though the beginning of the contract does refer to the proposal. There is testimony in the record to the effect that the plaintiff presented the two contracts which were executed by the plaintiff and defendant to the defendant for his signature, and explained that the second contract, or the contract relating to the cork carpet, entered into between the plaintiff and defendant, was necessary to do away with any misunderstanding as to the price for which the work was to be done; that the main contract, the one for slatework, did not include the work of supplying and installing cork carpets. These contracts, after this explanation, as testified to by the plaintiff, were signed by the defendant, and became the contracts under which the work was performed. The defendant gives a different version of this conversation, and testifies that the two contracts were presented to him by the plaintiff, with the explanation that the change was made so as to make some alteration in the payment for the work, or to enable the plaintiff to obtain pay from the authorities having charge of the erection of the school building. The defendant also testified that the contracts were presented to him by his bookkeeper, and that he himself did not read the contracts in their entirety. Upon this appeal the question of mutual mistake is not urged, and, as there is really nothing in the record to sustain such a defense, no further consideration need be given thereto.

[1, 2] While the appellant raises the question that the findings of the court are not sustained by the testimony, there is a complete failure to point out any particulars in which the testimony is so deficient. There is some conflict between the testimony of the plaintiff and the testimony of the defendant, and, if the testimony of the plaintiff, and the fact of the two contracts being signed by the defendant, satisfied the trial court that the plaintiff's version was correct, the finding of the court is abundantly supported by the testimony. Upon this appeal the appellant urges that there was no consideration for the execution of the last contract which we have set forth in this opinion. This, of course, places upon the defendant and appellant the burden of establishing the same, as by section 1614, Civil Code, a written instrument is affirmative evidence of a consideration. An examination of the record, and of the answer filed by the defendant, and a reading of the testimony taken upon the trial of the action, discloses that the defendant did not, either by his pleadings or testimony, introduced at the trial of the action, tender the issue of want of consideration. In 6 Cal. Juris. p. 209, § 138, the rule of law is thus stated: "The defense of want of consideration for the execution of a written instrument is new matter which must be specially pleaded, and it seems to be the rule that a general averment that the contract sued on was executed without any consideration whatever is but an allegation of a conclusion of law." The following cases show that want of consideration must be specially pleaded, and that the party pleading want of consideration must support his pleading by testimony. Pastene v. Pardini, 135 Cal. 432, 67 P. 681, 684; Winters v. Rush, 34 Cal. 136; Flint v. Giguiere, 50 Cal. App. 314, 195 P. 85; Yellow Jacket Co. v. Holbrook, 24 Cal. App. 687, 142 P. 128. We may also add the case of Imperial Valley Land Co. v. Globe Grain & Milling Co., 187 Cal. 352, 202 P. 129, where it is held that a question not raised in the lower court cannot be determined on appeal.

Not having, by his pleadings or his testimony, tendered to the trial court any question as to want of consideration for the execution of the two contracts, we do not very well perceive any grounds upon which the judgment of the trial court can be reversed. The two contracts are not a variance of the proposals made by Deatherage & Lyon. It does not appear that Deatherage & Lyon had any authority to bind the plaintiff by a contract, although they were engaged in making proposals for work leading up to the execution of contracts. But whatever the proposal may have been, the two contracts entered into by the plaintiff and the defendant appear to have been entered into without any element which would tend either to vitiate or change the terms thereof. The balance

due for the work performed is not questioned, if the defendant is found to be liable.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

CALHOUN v. DOWNS et al.*
Civ. 70.

District Court of Appeal, Fourth District, California.

June 28, 1930.

Rehearing Denied July 14, 1930. Hearing Granted by Supreme Court Aug. 25, 1930.

1. Brokers ⟹40.

Sales agreement containing sentence, "I agree to pay commission of $——— to ———," raised inference that vendor and purchaser agreed to pay some one commission.

2. Reformation of instruments ⟹26.

"Party aggrieved," within statute providing for reformation of instrument containing mutual mistake on application of "party aggrieved," means one whose pecuniary interest is affected by mistake (Civ. Code, § 3399).

Civ. Code, § 3399, provides that when, through mutual mistake, written contract does not express intention of parties, it may be revised on application of party aggrieved.

[Ed. Note.—For other definitions of "Aggrieved Party," see Words and Phrases.]

3. Reformation of instruments ⟹19(1).

Statute providing for reformation of instrument containing mutual mistake should never be strictly construed unless manifest justice demands it (Civ. Code, § 3399).

4. Pleading ⟹214(1).

Demurrer admits truth of material allegations of complaint.

5. Reformation of instruments ⟹11.

Instrument containing promise to pay commission, but blank as to amount of commission and promisee, could be reformed.

6. Reformation of instruments ⟹36(1).

Complaint, alleging that vendors signed sales agreement containing stipulation "to pay commission of $——— to ———," stated cause of action against vendors for reformation not barred by statute (Civ. Code, § 1624).

7. Reformation of instruments ⟹36(1).

Complaint, alleging purchaser signed sales agreement containing stipulation "to pay commission of $——— to ———," stated cause of action against purchaser for reformation not barred by statute (Civ. Code, §§ 1624, 1660).

The complaint alleged, in addition, that after execution of agreement for purchase and sale of realty, purchaser for valuable consideration agreed in writing with vendor that he would pay any commission claimed for sale of property under consideration and guaranteed the vendor against any loss thereon; that the commission so referred to was commission due plaintiff, the broker, and which respondents had theretofore agreed to pay.

8. Reformation of instruments ⟹3.

Even if parol evidence was admissible to show broker was entitled to commission, it was not error for broker to seek reformation.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Suit by F. G. Calhoun against George G. Downs and others. Judgment for defendants, and plaintiff appeals.

Reversed, with instructions.

E. W. Peterson and Sherman Lacey, both of San Diego, for appellant.

Wright & McKee and C. M. Monroe, all of San Diego, for respondent Ahlborn.

Hendee & Rodabaugh, of San Diego, for respondents Downs.

BEAUMONT, Justice pro tem.

Plaintiff brought an action to reform a contract and have it enforced as reformed. He alleges that he is a licensed real estate broker; that defendants George G. Downs and Lola Downs gave him authority to sell certain real property for the sum of $10,000 and agreed to pay the commission usually paid in the community, 5 per cent.; that this agreement was not in writing; that he, at his own expense, procured a purchaser, respondent Ahlborn, who was ready, willing, and able to buy; that he effected a meeting of the sellers and purchaser and that, at such meeting, the sale and purchase of the property was agreed upon and the price and terms determined; that the price was $10,000; that they (the defendants) agreed to pay plaintiff the sum of $500 as commission for said sale; that plaintiff and defendants agreed to reduce the oral agreement to writing, and that accordingly a written agreement was then made, but that the name of plaintiff and the amount of his commission were omitted; that such omission was due to the mutual

*Rehearing granted 297 P. 548.

mistake of plaintiff and defendants; that said instrument was then and there signed by each of the defendants. The last paragraph of the written agreement so executed is as follows: "I agree to pay a commission of $——— to ———." Plaintiff asked reformation by insertion of "500" in the first blank above mentioned and his name in the second, and enforcement as reformed. Defendants demurred generally, and defendant Ahlborn, in addition, demurred on the ground that the agreement sued on was within the statute of frauds. The demurrers were sustained without leave to amend.

In the briefs much of the argument is directed to the statute of frauds. Respondents claim that the agreement sought to be reformed is within the statute. Appellant is just as positive it is not. The allegations of the complaint place it, if reformed as plaintiff prays, in substantially the same position as the complaint in Cole v. Low, 81 Cal. App. 633, 254 P. 676, 677, in so far as respondents Downs are concerned. In that case the complaint was in two counts. Both counts allege that defendant had verbally employed plaintiff to sell certain property and that he had agreed to pay a commission to plaintiff; that plaintiff procured a purchaser in accordance with the terms of the oral agreement; that an agreement of sale was made in writing between the seller and the purchaser; and that at the bottom of said agreement was the following: "Commissions of $3400.00 to Cole Brothers." The second count alleged, in addition, that the written agreement was "and is an agreement in writing made for the express benefit of plaintiffs herein and said agreement has not been rescinded by the parties thereto." Defendant contended that the employment was oral and that the written agreement was not sufficient to satisfy the statute of frauds. The appellate court held that the question of such statute was not involved; that the first count was "founded upon the doctrine that, where services have been rendered with the intention that they shall be paid for, but payment therefor is unenforceable because there exists no written contract between the parties, and after rendition of said services the party receiving the benefit thereof promises, in writing, to pay therefor, his moral obligation to pay for what he has previously received furnishes a consideration to support the subsequent promise to pay." Crawford v. Kennedy, 64 Cal. App. 719, 222 P. 644, 645; Carrington v. Smithers, 26 Cal. App. 460, 147 P. 225; Muir v. Kane, 55 Wash. 131, 104 P. 153, 26 L. R. A. [N. S.] 519, 19 Ann. Cas. 1180; Mohr v. Rickgauer, 82 Neb. 398, 117 N. W. 950, 26 L. R. A. [N. S.] 533; Bagaeff v. Prokopik, 212 Mich. 265, 180 N. W. 427, 17 A. L. R. 1292. And the second cause of action is grounded upon the theory that the provision of said agreement relating to commissions was made expressly for respondents' benefit, and that said agreement not having been rescinded, the provision mentioned may be enforced by respondents under section 1559 of the Civil Code, which declares that, "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Lundeen v. Nowlin, 20 Cal. App. 415, 129 P. 474; Stanton v. Carnahan, 15 Cal. App. 527, 115 P. 339; Washer v. Independent, etc., Co., 142 Cal. 702, 76 P. 654.

"It will therefore be seen that in both counts respondents rely upon an alleged subsequent written promise to pay for past services, and, consequently, that portion of the statute of frauds invoked by appellant is not pertinent, the determinative question being whether said agreement as a whole fairly implies a promise to pay for said past services."

[1] In the present case we have an agreement in writing wherein a seller agrees to sell and a purchaser agrees to buy real estate particularly described. The terms are agreed upon. A receipt of the first payment made is acknowledged. The rate of interest upon the deferred payments is determined. Add to this the sentence above quoted, and the inference therefrom is that respondents had agreed to pay some one a commission for services rendered in the sale of the property described therein.

[2-5] Respondents call to the attention of the court, with the mere statement that the appellant is not a party to the instrument sought to be reformed, the case of Mabb v. Merriam, 129 Cal. 663, 62 P. 212. We are of the opinion that that case has no application here. In that case there was an attempt to substitute the name of one person for that of another, the latter being one of the parties to the contract. The contract, as executed, apparently was complete within itself, and there was nothing to indicate that any other person could even be interested in the subject-matter thereof. Where, as here, it clearly appears upon the face of the instrument that the name of a party has been omitted, and when accompanied by proper allegations in the complaint, equity will not be denied the right to supply it by reformation. There is neither an attempt herein to add another party nor to change the contract. Reformation is invoked for the purpose of supplying the name of a party clearly omitted. In Wilson v. Shea, 194 Cal. 653, 229 P. 945, 946, Mabb v. Merriam is cited. After discussing the absence of certain allegations that seemingly might have been added to the complaint, the court therein said: "The instrument itself is neither ambiguous nor uncertain in any of the foregoing respects, and is nowhere in the plaintiff's said complaint alleged to be so. It would seem clear therefore that the case of Mabb v. Merriam, 129 Cal. 663, 62 P. 212, must be given exact application to the facts

of the case at bar. * * *" Section 3399 of the Civil Code provides that, when, through mutual mistake, a written contract does not express the intention of the parties, it may be revised on the application of the party aggrieved, and "the party aggrieved, in the sense of the statute, means one whose pecuniary interest is affected by the mistake," as was said in Enos v. Stewart, 138 Cal. 112, 70 P. 1005, 1006. The statute should never be strictly construed unless manifest justice demands it. Merkle v. Merkle, 85 Cal. App. 105, 258 P. 969. In this case it seems clear to us that the facts, for the demurrer admits the truth of the material allegations of the complaint, require a liberal construction of the statute, and that we have before us an instrument that can be reformed.

[6, 7] From the foregoing it is our opinion that a cause of action, not barred by the statute of frauds (Civ. Code, § 1624), is stated against respondents, Downs. A short discussion only is required as to the position of respondent Ahlborn. Respondents' brief impliedly admits that if liability is established as to respondents Downs, it attaches to Ahlborn. From the allegations of the complaint it is clear that Ahlborn signed the written instrument sought to be reformed and that if it is reformed, he will be severally and jointly (with respondents Downs) liable thereunder. Civ. Code, § 1660. Appellant's services in negotiating the purchase and sale of the property and in obtaining the execution of a binding written agreement were of some benefit to the buyer, Ahlborn, as well as to the sellers, respondents Downs. Cole v. Low, supra. In addition to the allegations of the complaint heretofore considered, appellant alleged that after the execution of said instrument, respondent, Ahlborn, for a valuable consideration, agreed in writing with respondent Downs that he would pay any commission claimed for the sale of the property under consideration and guaranteed the Downs against any loss thereon; that the commission so referred to was the commission due appellant, and which respondents had theretofore agreed to pay. When all the allegations of the complaint are considered together, a cause of action not barred by the statute is clearly stated against respondent Ahlborn.

[8] Appellant claims that the allegations of his complaint are sufficient without seeking reformation of the instrument, but that he has gone further and invoked the aid of equity. Even if parol evidence could be introduced under appellant's pleading without its being reformed, as appellant contends, it is not error to seek the assistance of equity by reformation. 34 Cyc. 906; Murphy v. Lacey, 204 Cal. 94, 266 P. 535. In Braithwaite v. Henneberry, 124 Ill. App. 416, in affirming a judgment for the reformation of a lease, the court said: "Counsel for appellee contend that appellants have an adequate remedy at law, because in a suit at law for damages for breach of the contract, they might show the mistake by parol evidence; but this does not exclude jurisdiction in equity to correct the mistake."

The judgment is reversed with instructions to overrule the demurrers.

We concur: MARKS, Acting P. J.; BARNARD, J.

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106 Cal. App. 745

SNYDER v. CITY BOND & FINANCE CO.

Civ. 105.

District Court of Appeal, Fourth District, California.

June 27, 1930.

Rehearing Denied July 19, 1930. Hearing Denied by Supreme Court Aug. 25, 1930.

1. Fraud ⟹4.

In action for fraud in making promise with intention not to perform, essence of fraud is not breach of promise, but fraudulent intent not to perform (Civ. Code, § 1572, subd. 4).

2. Pleading ⟹34(1).

On general demurrer, complaint must be considered as a whole.

3. Pleading ⟹34(1).

On general demurrer, pleading is to be liberally construed with view to effecting substantial justice between parties (Code Civ. Proc. § 452).

4. Pleading ⟹406(9).

Defect, if any, in complaint based on fraud in selling plaintiff's stock contrary to agreement, in making promise with intention not to perform it, *held* cured by theory on which case was tried and reception of evidence without objection, which supplied all essential facts (Civ. Code, § 1572, subd. 4).

5. Fraud ⟹58(1).

Fraud in making promise without intention to perform may be proved by circumstantial evidence (Civ. Code, § 1572, subd. 4).

6. Fraud ⟹58(2).

Evidence *held* to show that defendant made promise on which it obtained stock from plaintiff without intention to perform (Civ. Code, § 1572, subd. 4).

Appeal from Superior Court, Kern County; R. B. Lambert, Judge.

Action by Charles Snyder against the City Bond & Finance Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Harvey & Heard, of Bakersfield, for appellant.

M. G. Brittan, of Bakersfield, for respondent.

BEAUMONT, Justice pro tem.

This is an action based on fraud. The kind of fraud relied upon is that defined in subdivision 4, § 1572, of the Civil Code as "a promise made without any intention of performing it." In his complaint, with other allegations, plaintiff stated in substance that he owned certain shares of the capital stock of the Standard Oil Company of California and of Armour & Company; that defendant, for the purpose of defrauding plaintiff, promised plaintiff that, if he would indorse and deliver said stock to defendant, it would pay a certain indebtedness of $2,832 for which the stock was held as a pledge; that it would hold possession of the stock and would not sell the same; that it would advance money to plaintiff, holding said stock as collateral security, and with the money advanced buy and sell stocks and bonds, after securing plaintiff's consent; that it would invest $3 of its own money, in the buying and selling of stocks for the benefit of plaintiff, to every $1 so invested by plaintiff; that plaintiff, relying on the promise of defendant, delivered said stock to defendant; that defendant had no intention of fulfilling said promise at the time it was made, but made it with the express intention not to fulfill it and with the intention of defrauding plaintiff of said stock. Plaintiff alleges that defendant did sell the stock, and, without the consent of plaintiff, invested the money in stocks and bonds, and that defendant failed and refused to invest $3 to every $1 invested by plaintiff. Plaintiff alleges that by reason of the foregoing the stocks were lost to him, and that he was damaged in the sum of $6,390, the difference between the market value of the stocks, $9,222, and the sum of $2,832. Plaintiff's prayer is for $6,390.

[1-4] Defendant's general demurrer was overruled, and, upon submission of the cause to a jury, a verdict was rendered in favor of plaintiff for the amount prayed. Defendant has appealed from the judgment. It now urges that its demurrer should have been sustained. It is argued by appellant that certain breaches are alleged, but that the damages do not flow naturally therefrom. The essence of fraud in this case is not the breach of a promise, although such is alleged, but the fraudulent intent not to perform. 12 Cal. Jur. 739. Plaintiff has alleged that the promise made with fraudulent intention not to perform caused him to part with his stocks, and that his damage was their value less the incumbrance. A general demurrer calls for a consideration of the attacked complaint as a whole (Peardon v. White, 65 Cal. App. 463, 465, 224 P. 263), and, for the purpose of determining the effect of a pleading, it is to be liberally construed with a view to effecting substantial justice between the parties (section 452, Code Civ. Proc.). If we should hold that the complaint only attempted to state a cause of action, still the judgment should not be reversed, in view of the situation presented by the record. The defect, if any, in the complaint, was cured by the theory on which the case was tried, the conduct of the parties with reference to the issues before the court, and the reception of evidence, without objection, which supplied all the essential facts. Boyle v. Coast Imp. Co., 27 Cal. App. 714, 151 P. 25; Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 324, 147 P. 90. The record shows a clear understanding was had of the issues. Counsel for defendant stated: "Their whole case rests upon the proposition that the defendant agreed to do certain things, and, at the time they agreed to do it, they had no intention of doing it. * * * There is only one point in the case and that is whether they made this contract without any intention of performing it."

[5] As a further contention for the reversal of the judgment, appellant urges the ground of insufficiency of the evidence. Appellant argues that there was no evidence before the jury that would justify the necessary finding that the promises were made without intention to perform. It is well settled that fraud may be proved by circumstantial evidence. "An intention not to perform a promise may be a matter of inference from the facts proven" (12 Cal. Jur. 829), and subsequent conduct may be sufficient to show that there was no intention of performing at the time of the promise. 12 Cal. Jur. 740, citing Williams v. Hasshagen, 166 Cal. 386, 137 P. 9; Holiday v. Tolosano, 39 Cal. App. 151, 178 P. 170, 171. American Law Reports, Annotated, in volume 51, page 166, states the rule as follows: "A person's intent, within the meaning of the rule relating to fraudulent promises made without intention of performance, is often a difficult matter to determine, and evidence of subsequent conduct and speech on the part of the promisor may be resorted to for the purpose of showing fraudulent intent, which may be shown by such evidence as matter of inference, although there is no direct evidence of a preconceived, secret intention on the part of the promisor at the time of making the promise, not to perform it." In Holiday v. Tolosano, supra, the court said: "It is also true that there is no direct evidence in the record before us that at the time of making the contract here involved there was any preconceived secret intention on the part of Tolosano not to perform it; but in this con-

nection the record, in our opinion, discloses sufficient evidence from which it may be justly inferred that at the time of entering into the contract Tolosano had in fact no intention of performing his obligations thereunder. 'What a person's intent in such a matter may be is often a difficult thing to determine. It usually must be ascertained from his future conduct and speech, and the fact as to such intent is one peculiarly to be deduced by process of reasoning from the facts in evidence by the trial judge.' Tench v. McMeekan, 17 Cal. App. 14, 20, 118 P. 478."

[6] The evidence is sufficient to show that the promises alleged as having been made by appellant were in substance clearly understood by appellant to have been so made. This is apparently conceded by appellant, but appellant most positively urges that there was no substantial evidence to support the implied finding that appellant did not intend to perform its promises, and it further contends that in fact the promises were fulfilled. Applying the rule laid down in the authorities above mentioned, we find there was sufficient evidence to sustain the verdict of the jury.

It appears that respondent was a man past sixty-six years of age, of little education; that he had been an employee of the Standard Oil Company; that he had 108 shares of the capital stock of the Standard Oil Company, part of which was "employee's" stock; that, although of slight business experience, he had purchased either through brokers or a bank said stock and 200 shares of Armour & Company stock. After having stated that he had no education, he gave the following testimony:

"Q. Can you read or write? A. I can read if the words are not any too big.

"Q. Can you read anything that is written with the hand? A. No.

"Q. And small typewritten pages, can you read them? A. I can only read print if the words are not too big.

"The Court: You can read if they are not too big or too little, do you mean? A. If they are not too big.

"Q. It is not the size of the print you are talking about? A. If it is too small a print if I can see it, if it is not too big a words."

The first conversation respondent had with any of appellant's agents was with W. O. Dorsey. Respondent's stocks were being held by the Bakersfield branch of the Bank of Italy as security for the payment of a loan of $2,832, principal and interest. Upon receiving an order from respondent for the stock, appellant paid the loan and obtained the stocks. Just as soon as they were secured from the bank, they were forwarded by appellant to its Los Angeles office. The evidence shows that appellant sold respondent's Armour & Co. stock within four days after receiving it. Paul Rheinhardt, general manager of appellant, testified in regard to the Armour & Co. stock:

"Q. In accordance with that letter of February 10 you were to hold that stock as collateral security? A. Yes.

"Q. And you sold it without written authority from him? A. Yes."

Respondent testified that he gave no orders, verbal or written, to sell the stock, and that he did not know said stock was sold until he received a statement from appellant about five months after the stock was delivered. Respondent testified under cross-examination as follows:

"Q. You told the City Bond and Finance Company to sell that 200 shares of Armour, didn't you? A. I did not.

"Q. You never told them to sell it? A. No.

"Q. You knew that they had sold it? A. I did not know they had sold it until I called for a settlement.

"Q. You never knew the Armour A had been sold until you called for a settlement? A. I called for a settlement and I found it was sold."

Notwithstanding a written authorization to sell, signed by respondent, the record is replete with statements by respondent that throughout his dealings with appellant he repeatedly told appellant his Standard Oil stock was not to be sold. Respondent testified that in June, 1927, he went to see Dorsey, appellant's Bakersfield manager; that he was told a profit of $4,300 had been made for him, and that his Standard Oil stock would be returned to him by the 1st of July; that he was so pleased with the success appellant was having in his behalf he took a friend to visit Dorsey, and the following conversation ensued:

"I says, 'By the way, Mr. Dorsey, you said you made $4,300 and give me my Standard stock back—how could you make that much money when the stock was going down?' He says, 'Everything works automatically.' I says, 'I don't understand what that means, "automatically," so I think in my mind he was handling short. I often hear people say when stock went down they could make money'—

"Mr. Brittan (interrupting): Never mind what was in your mind. A. He says 'Everything was working automatically,' so then Mr. Livingstone spoke up and he says, 'I will wait until he settles up with you the first of July and then I will probably do some business with him.'"

Respondent went back to see Dorsey on July 1st and was told that it was "too bad" plaintiff could not wait until July 15th; that no settlement was had; that he returned to find Dorsey had gone; and that he was given a vague answer in regard to his inquiry as to

Dorsey's whereabouts. He was told that "Dorsey went to buy a big block of stock; he may go to New York. So that was the answer I got." Respondent testified he received a number of bills from appellant before Dorsey left Bakersfield; that he took them to Dorsey and asked him to explain them.

"The Court: What did you do with those bills? A. I took them to the Bond office and says, 'What in the world is this, here is enough to set a man crazy.'

"The Court: What I want to know is have you got one of these bills now? A. No, because he took them. He says, 'Don't pay no attention to them; we got lots of collateral to cover them.'

"Mr. Brittan: Q. You took these bills to Mr. Dorsey? A. Yes.

"Q. And he took possession of them and kept them? A. Yes.

"Q. And told you not to worry about them? A. 'Don't count them,' he says, 'take them to your pyramid.'"

Respondent went to Los Angeles and called on Rheinhardt, telling him that he desired a settlement; that Dorsey had made $4,300 for him, and was to return his Standard Oil stock to him. He returned in about a week later, and was told he had $700 coming to him; and on the next day he was informed he had a credit of $500. The following is from the record:

"Q. When next did you come back? A. Then the next day or two, I can't remember exactly what day it was, but I went back either the next day or the second day after that—so I began to get a little leery, I saw something was not working on the square, so I demanded my Standard oil stock. * * *

"Q. Don't tell about the letter. Did you ask for the Standard stock back? A. Yes, sir; I asked for the Standard stock.

"Q. What did he say? A. He says, 'Well, old fellow, we will just sell you out.'

"Q. Who said that? A. Mr. Rheinhardt.

"Q. Was anyone else present when he told you that? A. Mr. Fernald was in the doorway; he was there when he said that, and he says, 'Mr. Snyder, I would advise you to sue Mr. Dorsey.' And I says, 'I don't know how to go about it to sue him; I never have been in a lawsuit, I know now that you broke me up.' And Mr. Fernald spoke up and he says, 'Mr. Snyder, you go back to Bakersfield and see Mr. Emmons.' So Mr. Rheinhardt he spoke up and he says, 'No, you can't get Mr. Emmons; he is already defending Mr. Dorsey in some cases against him.'" Respondent's Standard Oil stock was sold, and in the end he received a check for $32 as the balance due him.

As to the investment made by appellant of $3 to every one advanced by respondent it appears that appellant purchased certain stocks allegedly for respondent's benefit. Upon cross-examination, the general manager of appellant stated:

"Q. Let me ask you this question then: The final windup of the stock that Mr. Snyder placed with you caused him a loss of five or six thousand dollars. A. I believe so.

"Q. Did you lose three times that amount in this transaction? A. No, for the reason that the client doing the buying and selling receives any profit or assumes any loss.

"Q. But he only puts up 25 per cent? A. By reason of the fact that we have the privilege of calling him for an additional deposit if the stock declines. * * *

"Q. Then why did he lose and you didn't? A. For the reason that a customer in purchasing stock must always keep up the margin against any decline in the market; in other words, no broker who puts up seventy-five per cent against twenty-five per cent will carry any security if the market declines below it or the portion of seventy-five per cent which it has deposited.

"Q. That is buying on margin, isn't it? A. No, because we buy our stocks outright and have them ourselves.

"Q. For instance, this Hupp stock $14,000, you bought that? A. Yes.

"Q. You agreed to put up three times more than him? A. Yes.

"Q. And when the price of that stock dropped he took the loss and you didn't, is that correct? A. Yes."

Appellant's witness, P. W. Lacy, testified under cross-examination:

"Q. When you advanced this 100 per cent on the purchase of stock for Mr. Snyder you always kept within your margin, so if the market broke you could get out without making a loss to yourself, did you not? A. Yes.

"Q. And if he took a loss it was just too bad for him? A. Yes."

Is there sufficient evidence to support the finding of the jury that when the promise was made appellant did not intend to "invest" for the benefit of respondent $3 to every $1 invested by respondent? We are of the opinion there is, particularly when the following statement, related as occurring in the conversation with Dorsey when plaintiff first met him and just preceding the agreement to deliver the Armour & Co. and Standard Oil stocks, was not denied: "I says, '*How is a man guaranteed for his dollar?*' He says, '*That three dollars we put up.*' And I says, 'You fellows put up three dollars to the customer's one dollar.' And he says, 'Yes.'" Dorsey did not appear at the trial as a witness.

It will not serve any purpose to detail the evidence further. There are many statements of respondent that he did not authorize the buying and selling of stocks that were bought

and sold in the course of the transaction, and which were charged to his account. Particularly is this true of the Hupp Motor stock mentioned above. Respondent testified positively he had not desired to purchase such stock; that he did not give his consent or authorization either to its purchase or sale. As to this, as on substantially all material points of the case, there was a sharp conflict of evidence. The jury resolved the conflicting evidence in favor of respondent, and we are not at liberty to disturb the finding.

Judgment affirmed.

We concur: MARKS, Acting P. J.; BARNARD, J.

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106 Cal. App. 690

RYAN v. BANK OF ITALY NAT. TRUST & SAVINGS ASS'N.

Civ. 7024.

District Court of Appeal, First District, Division 1, California.

June 27, 1930.

Rehearing Denied July 26, 1930. Hearing Denied by Supreme Court Aug. 25, 1930.

1. Acknowledgment ⟹52.

Notary's certificate of acknowledgment was sufficient to support finding that deeds were executed by person having name signed to deeds (Civ. Code, § 1185; Code Civ. Proc. § 1963, subd. 15).

Civ. Code, § 1185, forbids taking of acknowledgment, unless notary knows or has satisfactory evidence that person making acknowledgment is person described in and who executed instrument. Code Civ. Proc. § 1963, subd. 15, creates presumption that official duty has been regularly performed.

2. Evidence ⟹573.

Testimony of handwriting expert that names signed to deeds and indorsed on check were written by same person supported finding that person executing deeds indorsed check.

3. Banks and banking ⟹148(2).

Bank cannot charge against depositor's account amount paid by it on forged indorsement of depositor's check.

4. Banks and banking ⟹148(2).

Indorsement of check in payment of land by person executing deed was not forgery, though person executing deed was an impostor.

Title to land was in Mary Smith. Real estate dealer furnished title insurance company with deeds signed and acknowledged by a different Mary Smith, and title insurance company, believing deeds to be executed by owner, delivered it to grantees, collected price, and delivered check payable to Mary Smith to real estate dealers who delivered it to M. The evidence showed that real estate dealer and M. were agents of the person who executed the deeds and indorsed the check.

5. Banks and banking ⟹154(9).

Circumstances *held* to make question of fact as to negligence in issuing check in payment for land to person who was not owner.

Title insurance company delivered deeds for land to grantees, collected price, and gave its check for amount payable to order of person executing deeds. It required affidavit that person executing deed was not person of the same name who was party to bankruptcy proceedings nor person by that name who had been adjudged insane, but required no affidavit that she was the owner of the property, and she was not in fact the person of that name who owned the property. The check was paid on indorsement of the person who executed the deeds.

6. Evidence ⟹314(1).

In action against bank for amount paid on alleged forged indorsement of check, purported confession by alleged forger and indictment against him were hearsay.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by J. J. Ryan against the Bank of Italy National Trust & Savings Association. From a judgment for defendant, plaintiff appeals.

Affirmed.

Tobin & Tobin and George A. Clough, all of San Francisco, for appellant.

Louis Ferrari and J. J. Posner, both of San Francisco, for respondent.

PER CURIAM.

An action brought by the assignee of City Title Insurance Company, a corporation, hereinafter called the company, to recover from defendant bank the amount of a check drawn by the company upon the bank and paid by the latter; it being alleged that the name of the payee indorsed thereon was a forgery. The facts are as follows:

On December 8, 1926, W. G. Miller, a real estate broker doing business under the name of W. G. Miller Realty Company, through his agent, H. T. Hunt, applied to the company

for a policy of title insurance upon two parcels of real property in San Francisco. The company caused the records to be examined, and on December 9, 1926, issued its preliminary report to Miller showing the title to be vested in Mary Smith, an unmarried woman, subject to certain bankruptcy proceedings in the matter of Mary Smith doing business under the name of H. L. Smith, a judgment against a person of the same name, and an insanity proceeding in which the commitment of one Mary Smith to the asylum at Napa was shown. The company demanded, and was furnished, affidavits purporting to be signed by Mary Smith and sworn to before a notary public, stating that affiant was not a party to the bankruptcy proceedings, was not the judgment debtor mentioned, and had never been adjudged insane or committed to the asylum. No affidavit that the person who signed the above affidavit had executed the deeds hereinafter mentioned and was the owner of the property was required by the company or furnished. Later Miller delivered to the company two deeds, each purporting to be a deed from Mary Smith conveying the property to A. E. Ingram, and to each was attached the certificate of a notary public in the usual form certifying that the instruments were acknowledged before him by Mary Smith, a single woman. At the same time Miller delivered to the company two grant deeds of the same property purporting to have been executed and acknowledged by Ingram, and in which Nellie Bernhard and Helen Stern were named as grantees. The company was instructed to deliver the deeds to the grantees upon the payment of the purchase price, namely, $8,500, from which amount the company was directed to pay the sum of $7,187.50 to Mary Smith. The purchase price was paid by the grantees to the company. The deeds were delivered and recorded, and a check for $7,187.50, payable to the order of Mary Smith, was drawn by the company upon the bank with which it had funds upon deposit and delivered to Miller. The latter delivered the check to one R. V. McGrew of Los Angeles, from whom he had received the deeds and affidavits mentioned. The names Mary Smith and Heartwell Holding Corporation by R. V. McGrew were indorsed on the check upon which there also appears the subsequent indorsements of the California Bank and the Bank of California. The check was afterwards presented to defendant bank and paid, and the amount charged to the account of the company.

[1, 2] The court found that the check was indorsed by the Mary Smith, who executed the deeds, and that any loss suffered by the company was proximately caused by its negligence. Judgment was accordingly entered for defendant, and plaintiff, who has appealed, contends that the findings are not sustained by the evidence, and that the court erred in excluding a statement signed by McGrew. It is admitted that the deeds were not executed or the check indorsed by the Mary Smith, who was the owner of the property. It was testified, however, by a handwriting expert that the name Mary Smith signed to the deeds, the affidavits, and indorsed upon the check, was written by the same person, and the notary public in his certificates of acknowledgment attached to the deeds mentioned certified that Mary Smith, an unmarried woman, known to him to be the person whose name was subscribed thereto, personally appeared before him and acknowledged their execution. The statute expressly forbids the taking of an acknowledgment unless the notary knows or has satisfactory evidence that the person making such acknowledgment is the individual who is described in and who executed the instrument. Civ. Code, § 1185. The purpose of the certificate of acknowledgment is to establish the identity of such person and the genuineness of the signature attached to the instrument (Homan v. Wayer, 9 Cal. App. 123, 98 P. 80; Ross v. New Amsterdam Casualty Co., 56 Cal. App. 254, 205 P. 43), and the certificate is prima facie evidence of the truth of the facts stated therein (1 Cal. Jur., Acknowledgments, § 32, p. 268; French Bank v. Beard, 54 Cal. 480; Baldwin v. Bornheimer, 48 Cal. 433; Banning v. Banning, 80 Cal. 271, 22 P. 210, 13 Am. St. Rep. 156; Overacre v. Blake, 82 Cal. 77, 22 P. 979; Langenbeck v. Louis, 140 Cal. 406, 73 P. 1086).

[3, 4] It is to be presumed that the duties of the notary were regularly performed. Code Civ. Proc. § 1963, subd. 15; Pardee v. Schanzlin, 3 Cal. App. 597, 86 P. 812. The facts certified by him, together with the testimony of the handwriting expert, were sufficient to support the conclusion that the deeds in question were executed by a person named Mary Smith and the finding that this person also indorsed the check. A bank is authorized to pay only to the person designated by the depositor, and it cannot charge against the depositor's account an amount paid by it on a forged indorsement of the depositor's check. Hatton v. Holmes, 97 Cal. 208, 31 P. 1131; Garthwaite v. Tulare Bank, 134 Cal. 237, 66 P. 326; Otis Elevator Co. v. First National Bank, 163 Cal. 31, 38, 124 P. 704, 41 L. R. A. (N. S.) 529. But, according to the majority of cases where a check is delivered to an impostor as payee in the belief that he is the person to whom or upon whose endorsement it will be paid, the indorsement by such impostor is not a forgery, for the reason that the drawer of the check intends it to be indorsed by the person to whom he delivers it, and the drawee bank is protected. United States v. National Exchange Bank (C. C.) 45 F. 163; United States v. Chase National Bank (D. C.) 241 F. 535, 537; Sherman v. Corn Exchange Bank, 91 App. Div. 84, 86 N. Y. S. 341; McHenry v. Old Citizens' National Bank, 85 Ohio St. 203, 97 N. E. 395, 38 L. R. A. (N. S.) 1111,

note; Hoffman v. American, etc., National Bank, 2 Neb. (Unof.) 217, 96 N. W. 112; Robertson v. Coleman, 141 Mass. 231, 4 N. E. 619, 55 Am. Rep. 471; Land, etc., Trust Co. v. N. W. National Bank, 196 Pa. 230, 46 A. 420, 79 Am. St. Rep. 717, 50 L. R. A. 75, note; Montgomery Garage Co. v. Manufacturers Liability, etc., Co., 94 N. J. Law, 152, 109 A. 296, 22 A. L. R. 1224, note; Metzger v. Franklin Bank, 119 Ind. 359, 21 N. E. 973; Uriola v. Twin Falls Bank & Trust Co., 37 Idaho, 332, 215 P. 1080. This rule is opposed by Tolman v. American National Bank, 22 R. I. 462, 48 A. 480, 52 L. R. A. 877, 84 Am. St. Rep. 850, but the weight of authority seems to be decidedly in favor of the rule and upon its facts the case of Bank of Italy v. First Bank of Kern, 69 Cal. App. 319, 231 P. 44, is not a decision to the contrary. Appellant contends, however, that the present case is within the rule that, where the impostor, upon whose indorsement the check is paid, obtains the same from the drawer by representing himself to be the agent of the payee, and not the payee himself, such indorsement is a forgery, and payment by the drawee is unauthorized. Hatton v. Holmes, supra; Bennett v. First National Bank, etc., 47 Cal. App. 450, 190 P. 831. This contention cannot be sustained, as the evidence sufficiently showed that Miller and McGrew were the agents of the Mary Smith who executed the deeds and indorsed the check. Moreover, it was the intention that the check should be delivered to and indorsed by the person who executed the deeds; the officers of the company believing that person to be the owner of the property. Nor is there any distinction in principle between cases where the check is delivered to the impostor in person and where such delivery is through an intermediary, if the drawer causes it to be delivered to him in the belief that he is the person to whom or upon whose indorsement it will be paid. Emporia National Bank v. Shotwell, 35 Kan. 360, 11 P. 141, 57 Am. Rep. 171; States v. First National Bank, 203 Pa. 69, 52 A. 13; Hartford v. Greenwich Bank, 157 App. Div. 448, 142 N. Y. S. 387; Id., 215 N. Y. 726, 109 N. E. 1077; Uriola v. Twin Falls, etc., Bank & Trust Co., supra.

[5, 6] On the issues of negligence the circumstances were such as to make the question properly one for the jury or for the court sitting as a jury (S. Weisberger Co. v. Barberton Savings Bank, etc., 84 Ohio St. 21, 95 N. E. 379, 34 L. R. A. [N. S.] 1100; Missouri Pac. Railway Co. v. M. M. Cohn Co., 164 Ark. 335, 261 S. W. 895; Land Title, etc., Co. v. N. W., etc., Bank, 196 Pa. 230, 46 A. 420, 50 L. R. A. 75, 79 Am. St. Rep. 717), and we cannot say that the finding of the court thereon is unsupported. The plaintiff offered a purported confession by McGrew and also an indictment returned by the grand jury of the city and county of San Francisco charging him with a felony, to wit, the forgery of the deeds in question. This evidence under the hearsay rule was properly rejected.

The findings of the trial court are fully sustained, and, no error being shown, the judgment is affirmed.

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106 Cal. App. 709

KLEIBER MOTOR TRUCK CO. v. INTERNATIONAL INDEMNITY CO.

Civ. 210.

District Court of Appeal, Fourth District, California.

June 27, 1930.

Rehearing Denied July 19, 1930. Hearing Denied by Supreme Court Aug. 25, 1930.

1. Insurance ⟹624(2).

Party to whom loss is made payable under fire policy, if he has substantial interest in property destroyed, may sue on policy.

2. Insurance ⟹115(6).

Company selling truck, under contract reserving title, to one who resold truck and assigned contract to it had insurable interest in truck.

The truck company sold truck under installment contract under which it reserved title, and the contract provided that buyer should keep truck insured against fire in seller's name. The buyer resold the truck to another and assigned to truck company contract for resale containing provision that interest of seller should be covered by insurance.

3. Insurance ⟹112.

Fire insurance on interest of original seller of truck, without knowledge of policy, was made valid by such seller's ratification subsequent to loss.

4. Insurance ⟹155.

Evidence did not support finding that insured did not intend fire policy to cover interest of original seller in truck.

5. Insurance ⟹282(13).

Where insured purchased truck from one still owing money thereon, fact that policy stated truck was being purchased from original seller did not make policy void.

Insured referred insurance agent to his seller who had bought from truck company, and, on information furnished by seller, insurance agent stated in policy that truck

was being bought from motortruck company and inserted clause making loss, if any, payable to that company and to insured, as their interests appeared, instead of stating that insured was purchasing truck under contract from one who bought from motor company, but latter had assigned his contract to motor company so that motor company was owner of both contracts at time insurance was applied for.

6. Insurance ⚷131(1).

Oral contract for fire insurance to take effect immediately binds insured, although policy is not issued until later.

7. Insurance ⚷392(6).

Fire insurer waived representation of ownership of truck of which it had knowledge through agent by accepting premium payment after fire.

After fire occurred and after proof of loss had been furnished to agent of insurance company, showing facts as to ownership of truck, insurance company through its agent demanded and accepted payment of premium.

8. Appeal and error ⚷173(6).

Defense that there was no meeting of minds of parties to insurance contract, not raised at trial, was not available on appeal.

9. Insurance ⚷665(3).

Finding that insured truck was 1923 model rather than 1924 model as stated in policy *held* not supported by evidence.

10. Insurance ⚷280.

Statement in fire policy that truck was 1924 model could not be deemed of materiality, when no information was sought or given regarding year or month truck was built (Civ. Code, § 2565).

Civ. Code, § 2565, provides that materiality is to be determined, not by event, but solely by probable and reasonable influence of facts upon party to whom communication is due in forming his estimate of disadvantages of proposed contract or in making his inquiries.

11. Insurance ⚷280.

Misstatement in fire policy regarding date of purchase of truck as August, 1924, rather than May, 1924, *held* immaterial (Civ. Code, § 2565).

12. Insurance ⚷286.

Misstatement that no insurance had previously been canceled on truck was not material, where cancellation was for reason not affecting nature of risk (Civ. Code, § 2565).

The evidence showed that a previous policy had been canceled within four months for nonpayment of premium, and not because of any defect in truck or anything that affected its insurability, and that delinquency in failure to meet premiums was not that of insured or the other plaintiff, but of one selling truck to insured.

13. Insurance ⚷582.

Where fire insurance policy insured truck owner "as his interest may appear," quoted phrase referred to time of fire.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by the Kleiber Motor Truck Company and another against the International Indemnity Company. From the judgment, plaintiffs appeal.

Reversed, with directions.

Jesse George, of San Diego, and Peter tum Suden and Richard tum Suden, both of San Francisco, for appellants.

Heskett, Weinberger & Miller, Frank H. Heskett, and Eugene W. Miller, all of San Diego, for respondent.

BARNARD, J.

This is an action to recover on an insurance policy. The Kleiber Motor Truck Company on December 8, 1923, by a written contract agreed to sell a truck to one M. Haydis for $4,573.20, payable in installments, with the title reserved in the vendor. This contract provided that the vendee should keep the truck insured against fire in the vendor's name in a sum not less than $4,000, and that all policies should be retained by the vendor. The truck was especially built for this vendee, and was delivered on December 22, 1923, complete, except that it had no body. The vendee at his own cost installed a body. About May 1, 1924, the original motor in said truck was replaced with a new one, for which the vendee paid. Soon after said change in motors and on May 6, 1924, the said Haydis entered into another written contract with the plaintiff Alva P. Sumrall, whereby Haydis agreed to sell the truck to Sumrall for $6,000, of which $3,000 was paid down and the balance to be paid in monthly installments. Sumrall took possession, and continued such possession until the truck was damaged by fire, as hereinafter mentioned. Until after the truck was destroyed by fire Sumrall had no knowledge that the Kleiber Motor Truck Company had or claimed any right or interest in the truck, nor did he know of the contract between that company and Haydis. Under his contract Sumrall had agreed to keep the truck insured for the benefit of Haydis, the policy to be retained by the

seller. This contract also provided that it should inure to the benefit of and be binding upon the successors of the parties thereto, and the assigns of the vendor. On the 6th day of May, 1924, Haydis assigned, transferred and delivered to the Kleiber Motor Truck Company all of his interest in said truck and in the contract between himself and Sumrall.

The truck was registered with the division of motor vehicles under date of December 22, 1923, the registration certificate setting forth the said Haydis as registered owner, the Kleiber Motor Truck Company as legal owner, and describing the truck as "year model 1924." On May 5, 1924, after the new motor had been installed, the truck was again registered; the certificate showing Kleiber Motor Truck Company as legal owner and Haydis as registered owner, but lines were drawn through the name of Haydis and the word "corrected" typewritten in, but no name substituted. This was the last registration of the truck prior to its damage by fire. However, on September 10, 1924, after the fire, a new certificate was issued, designated as corrected, wherein the Kleiber Motor Truck Company was designated as legal owner and Sumrall as registered owner.

On August 26, 1924, Sumrall applied to an agent of defendant at San Diego who was authorized to issue policies and collect premiums for a policy of insurance upon the motor-truck involved in this action. The truck was standing in front of the office at the time. The agent asked Sumrall to go out to the truck and get the engine number and the year model. Sumrall took these from the registration slip on the truck and gave them to the agent, and told him that he had bought the truck from Haydis, who was in the office at the time, referring him to Haydis for full particulars. Sumrall testified that he signed a blank application to be filled in by the agent, and left the office. Haydis told the agent that Sumrall still owed $3,500 on the truck, and that he had only paid $2,500 down, although at that time Sumrall had paid $3,600. On or about that date the agent of defendant countersigned and issued the policy of insurance sued on herein, and caused said policy to be mailed to the Kleiber Motor Truck Company, it being received by them on August 30, 1924, the day after the truck had been burned.

The court found upon sufficient evidence that the statements and warranties set forth in the policy, except for the statement as to the year model, were furnished to the agent by Haydis, and that at no time before the fire did either of the plaintiffs know what had been inserted as statements or warranties in the insurance policy. The court also found that neither of the plaintiffs knew, prior to the fire, that the policy had been issued or mailed. The policy in question covered loss or damage to the truck by fire, and contained the following provision:

"It is understood and agreed that Kleiber Motor Truck Company has an interest in the automobile insured hereunder.

"Therefore, loss, if any hereunder, payable to Kleiber Motor Truck Company and/or Alva P. Sumrall as their respective interests may appear.

"Anything in the policy to the contrary notwithstanding."

The court also found upon sufficient evidence that neither of the plaintiffs knew until after the fire that said clause had been attached to the policy. The policy also contained the following:

"Schedule of Statements

"The following are statements of facts known to and warranted by the Assured to be true, and this Policy is issued by the Company relying upon the truth thereof."

Under this schedule of statements, three matters are set forth which are of concern here: First the truck is described as a "year model 1924." Second, it is described as purchased by the assured in August, 1924, secondhand, at a cost to the assured of $6,000, and under the heading that it is "not mortgaged or otherwise encumbered excepting as follows" appears the following: "Purchased under conditional sale contract from Kleiber Motor Truck Company, balance due $3,500.00." And, third, it contains the following: "No automobile insurance has been declined or cancelled by any company during the past three years, except as follows: No exceptions."

On August 29, 1924, at 2:30 a. m., through no fault of either of the plaintiffs, said truck was almost completely destroyed by fire, the salvage being about $250, and the court found upon sufficient evidence that it was at that time worth largely in excess of the whole amount for which it was insured, plus the salvage upon it, and that the damage to the truck exceeded $4,500. At the date of the fire there was due to the Kleiber Motor Truck Company, as vendor under the Haydis contract, the sum of $2,897.67, and on the same day there was due from Sumrall, as vendee under his contract with Haydis, which had been assigned to the Kleiber Motor Truck Company, the sum of $2,400. The evidence shows without contradiction that the truck had been previously insured in another insurance company; that when Sumrall purchased the truck on contract he paid Haydis $130 to cover insurance on the truck; that shortly before August 26, 1924, Sumrall received a letter from this other insurance company notifying him that the insurance was canceled for nonpayment of the premium; that on August 26, 1924, he went to Haydis'

office to find out why it was not insured; and that in this conversation Haydis introduced him to the agent of the defendant as one who would take his application for insurance, and it was there agreed between all three that Haydis was to pay the first installment of $45 of the premium on the policy here involved. The next morning after the fire, Sumrall made a preliminary report of the fire to the agent of the company and on September 24, 1924, made a formal proof of loss, with an amended proof of loss on October 23, 1924, in all of which the Kleiber Motor Truck Company's interest under conditional sales contract was set forth. After the first proof of loss and on September 16, 1924, the agent of the defendant who had issued the policy, wrote to Sumrall as follows:

"Repairs on your truck, damaged in your recent fire loss, are now well under way, but it will be impossible to complete this adjustment unless the premium on this policy in the amount of $140.95 is paid to this office.

"This is holding up the settlement of this claim, and we would therefore thank you to let your check in the above amount come forward by early mail, thereby obliging."

—and inclosed a bill for $140.95. A few days later the amount of the premium was paid to this agent of the defendant, who accepted it, and subsequently, on October 3, 1924, the defendant addressed a letter to Sumrall in which it denied liability on the insurance policy in question, and stated that its records did not show it had received the premium and that the company did not claim any premium as due.

In connection with the three statements set forth in the policy above referred to, the court found that all three were untrue, that the truck was in fact a 1923 model; that it was purchased from M. Haydis under a conditional sales contract and not from the Kleiber Motor Truck Company, that the date of the contract was May 26, 1924, and not August, 1924, and that within four months previous to the date of the policy another insurance company had issued a policy on said truck and the same had been canceled, prior to the issuance of this policy, for the nonpayment of the premium. The court did not find that either of these statements were as to a material matter or that they were knowingly or intentionally misrepresented. On the other hand, the court found, with the exception that the information as to the year model was furnished by Sumrall, that none of these statements were made by either of the plaintiffs, and that neither of the plaintiffs knew that any one of these statements was inserted in the policy. In a written opinion the court held that all of these statements were as to immaterial matters, but the decision of the court was based upon the holding that Sumrall, when he applied for the policy, had no knowledge of the interest of the Kleiber Motor Truck Company; that he did not intend to cover any such interest by insurance; that there was no mutuality of contract, as between the plaintiff Kleiber Motor Truck Company and either the defendant International Indemnity Company or the plaintiff Sumrall; and that there was no mutual agreement or meeting of the minds of the parties as to the insurance of the interest of the Kleiber Motor Truck Company in said truck. A judgment was entered in favor of the plaintiff Sumrall for $1,875 and denying all relief to the Kleiber Motor Truck Company. From said judgment both of said plaintiffs have appealed.

The first question presented is as to whether or not the contract of insurance, as made, covered the interest of the plaintiff Kleiber Motor Truck Company. The judgment of the court was based upon its findings that Sumrall had not agreed with the defendant either for himself or for the Kleiber Motor Truck Company that any part of the loss under said policy should be payable to the Kleiber Motor Truck Company, and that the defendants had not agreed with either of said plaintiffs after the fire that any portion of the loss should be payable to the Kleiber Motor Truck Company.

[1, 2] It seems to be well settled in California that a party to whom a loss is made payable under the terms of an insurance policy, if he has a substantial interest in the property destroyed, may bring suit on said policy as the real party in interest. West Coast Lumber Co. v. State Inv. & Ins. Co., 98 Cal. 502, 33 P. 258; Blasingame v. Home Insurance Co., 75 Cal. 633, 17 P. 925; Reynolds v. London, etc., Insurance Co., 128 Cal. 16, 60 P. 467, 79 Am. St. Rep. 17; Loring v. Dutchess Insurance Co., 1 Cal. App. 186, 81 P. 1025. Nor does it make any difference that the Kleiber Motor Truck Company did not know that this particular policy was being taken out at the time it was applied for. It had a contract with Haydis whereby he agreed to keep the truck insured in its favor, and Haydis' contract with Sumrall containing a provision that the interests of the vendor should be covered by insurance had been assigned to the truck company. That company unquestionably had an insurable interest in the truck. The insurance policy in question expressly covered this interest and provided that loss, if any, should be paid to them as their interest appeared.

In the case of Hooper v. Robinson, 98 U. S. 528, 537, 25 L. Ed. 219, the Supreme Court of the United States says:

"One may become a party to an insurance effected in terms applicable to his interest, without previous authority from him, by adopting it either before or after the loss has taken place, though the loss may have

happened before the insurance was made. * * *

"The adoption of the policy need not be in any particular form. Anything which clearly evinces such purpose is sufficient."

In Phœnix Insurance Co. v. Hancock, 123 Cal. 222, 55 P. 905, 906, the court says: "Although defendant had no authority to procure insurance for the administratrix, yet she could have ratified his act, even after the occurrence of a loss." Hooper v. Robinson, 98 U. S. 528, 25 L. Ed. 219.

[3] Even if it be held that no particular authority to take out this definite insurance is here shown, still, under the authorities, it was made valid by the ratification of the Kleiber Motor Truck Company, subsequent to the loss. Ferrar v. Western Assurance Co., 30 Cal. App. 489, 159 P. 609, 611. In the case of Union Inst. for Savings v. Phœnix Insurance Co., 196 Mass. 230, 81 N. E. 994, 14 L. R. A. (N. S.) 459, 13 Ann. Cas. 433, the court said: "The first question is whether the plaintiff can avail itself of the contract thus made for its benefit. We think it plain that this question should be answered in the affirmative. Surbridge acted in part for himself and in part as an agent and representative of the plaintiff in procuring the policy. He must be held to have acted in the same double capacity in receiving and holding it. This policy contained a contract between the defendant and Surbridge, and a somewhat different contract between the defendant and the plaintiff. Both the mortgagor and the mortgagee were protected in their rights under their several contracts contained in a single paper signed by the defendant. Palmer Sav. Bank v. Insurance Co. of N. A., 166 Mass. 194, 32 L. R. A. 615, 55 Am. St. Rep. 387, 44 N. E. 211; Hastings v. Westchester F. Ins. Co., 73 N. Y. 141; Hartford F. Ins. Co. v. Olcott, 97 Ill. 439–456. Surbridge's action in procuring the policy was in pursuance of the covenant in the mortgage, and was founded in part upon the consideration stated in the mortgage. It was immaterial which of the parties protected by the policy retained possession of the paper. It is also immaterial that the plaintiff, at the time of the fire, had not been informed of the action taken by the mortgagor for its benefit, under its authority."

[4-6] We think the finding of the court that Sumrall at no time prior to the fire intended that such policy should cover any interest of the Kleiber Motor Truck Company in said truck is not supported by the evidence. Sumrall took out insurance for more than his own interest in the truck. He intended this excess to cover something. When he discovered that the truck was without insurance, he went to the vendor, who introduced him to the agent of the defendant. He told the agent he desired insurance to the amount of $4,500 on the truck, that he was buying it on contract, referred the agent to Haydis for further information, was told that it would be covered, and left. Sumrall testified:

"Q. And if you had known it you would not have warranted in that policy that it was bought from the Kleiber Motor Truck Company when you didn't know it, would you? A. I would have found out. * * *

"Q. Well, would you, if you didn't have any knowledge that the Kleiber Motor Truck had any interest in it? A. If it had to be in there to get insurance on the truck I'd allow him to do it, no matter who I bought it from, or anything else, if it had to be covered by insurance, that was my view of the thing.

"Q. If as a matter of fact—you would then permit Mr. Aveldson to put anybody's name that he wanted to as to ownership? A. It had to be insured, if he said it was legally done—

"Q. Yes.

"By the Court: Q. You would let him write anything at all in there that he wanted to write, as long as he stated it was legal? A. Yes, sir, he was writing the policy, not me. * * *

"Q. Did he ask you any other questions? A. He asked me what was due on the truck, I referred him to Mr. Haydis."

There can be no doubt he intended to insure both his own interest and that of his vendor. He referred the agent to Haydis, and, based on information given him by Haydis, the agent stated in the policy that it was being bought from the Kleiber Motor Truck Company, and inserted a clause making loss, if any, payable to that company and to Sumrall, as their respective interests should appear. At that time Sumrall's contract provided that the vendor's interest should be covered and that all of the provisions of the contract should inure to the benefit of any one to whom Haydis might assign the contract. And the contract had then been assigned to the Kleiber Motor Truck Company. At that time the Kleiber Motor Truck Company was the owner of both contracts, and, while Haydis may not have been relieved of his liability under his original contract, he had no real interest in the truck, as Sumrall owed $2,400, while he owed over $2,800. Haydis having assigned all his interest in the Sumrall contract to the truck company and having no equity from the purchase price of the truck coming to him, the agent of the defendant was not very far from the actual facts in inserting the statement in the policy that the truck was being purchased by Sumrall from the Kleiber Motor Truck Company. The agent having so expressed the situation without the knowledge of Sumrall, as found by the court, we cannot feel that the technical difference between setting out the actual facts in relation to the two

contracts of purchase as they existed, and setting out that the truck was being purchased on contract from the Kleiber Motor Truck Company, is either sufficiently erroneous or of sufficient materiality to make this policy of insurance void. We feel that the real intention of Sumrall was to comply with the terms of his contract and insure the interest of his vendor as well as himself, rather than to insure the interest of Haydis personally. He was bound by his contract to protect the interest of the assignee of Haydis, and he gave general directions to the agent as to where information could be obtained, and trusted him to issue the insurance in proper form. The insurance as issued specifically provided that the loss, if any, should be payable to the Kleiber Motor Truck Company and to Sumrall, as their respective interests appeared, and we think there was sufficient meeting of the minds of the parties to this contract of insurance, under the established rules of law, to protect the interests of both plaintiffs. We therefore think, if there is any insurance at all, it is payable to the Kleiber Motor Truck Company to the extent of their interest, and then to the plaintiff Sumrall. It has been held that an oral contract for insurance to take effect immediately binds the company, although the policy is not issued until later. Harron v. City of London F. Ins. Co., 88 Cal. 16, 25 P. 982; Gold v. Sun Insurance Co., 73 Cal. 216, 14 P. 786. The general circumstances of this case appeal more strongly to a court of justice than do the circumstances of the cases just cited.

[7] A further consideration is that, after the fire had occurred and after proof of loss had been furnished to the agent of the defendant, which proof of loss sets forth that the Kleiber Motor Truck Company and Sumrall each had an interest in the property, and that no other person had any interest therein, the defendant, through its agent, demanded and accepted the payment of the premium. While the defendant may not be estopped from setting up breaches of warranty, if any, it must be held to have waived this particular representation of ownership of which it then had full knowledge. Curtiss v. Ætna Life Insurance Co., 90 Cal. 245, 27 P. 211, 25 Am. St. Rep. 114; Baker v. Fireman's Fund Insurance Co., 79 Cal. 34, 21 P. 357.

[8] Still another consideration is that the answer did not raise the issue that there had been no meeting of the minds of the parties, and this defense did not appear in any part of the trial until it appeared in the opinion of the trial judge. The defendant admitted the execution of the policy in its answer and sought to defend upon the ground of misstatements in the application and breach of warranties. Not having been alleged in the pleadings and not having been raised at the trial of the case, this defense should not now be available to the defendant. 24 Cal. Jur. at page 977, and cases there cited.

We are therefore of the opinion that the conclusion of the trial court upon this branch of the case was erroneous, and that, under the circumstances shown by the evidence and found by the court, there was a mutually binding agreement and policy of insurance as to the plaintiff Kleiber Motor Truck Company, as well as to the plaintiff Sumrall, and that the insurance on the truck in question inured, first, to the benefit of the Kleiber Motor Truck Company, and then to Sumrall.

We then come to the question as to whether the contract of insurance was rendered void by misrepresentations or by breach of warranties. The policy in question provided as follows: "This entire policy shall be void if the assured has concealed or misrepresented any *material* fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud, attempted fraud, or false swearing by the assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

No question is raised of the good faith of either of the plaintiffs. Under the terms of the policy, however, if any misrepresentations were of material facts, the plaintiffs may be bound by them. Porter v. General Accident Assurance Corporation, 30 Cal. App. 198, 157 P. 825.

"Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries." Civ. Code § 2565.

Aside from the statement as to the ownership and parties interested in the truck, which we have already covered, the only false statements claimed and relied upon by the defendant are three, which we will take up in order.

[9] First, it is claimed that this truck was in fact a 1923 model, and that the statement in the policy that it was a 1924 model is false. The court found that this statement was untrue, but we think this finding is not supported by the evidence. The assistant manager of the defendant testified as follows: "An automobile may be turned out in December and be 1927, be called 1927, and in January, that car is a year old with us for insurance purposes, it is still a 1927 car."

[10] He also testified that the insurance value of a truck would vary in an amount he could not say, when it was a year older. This is a plain statement that there would be a variance between the insurable value of a car built in December of one year from that

of another car built in January of the next year. No evidence appears, however, that any such question was ever asked of the plaintiff Sumrall, or of any one else, in issuing this insurance, and the statements set forth in the policy contain no reference to what year or month the car was built, but refer only to the year model. Not only is it a well-known fact that many manufacturers of automobiles put out, for instance, what is known as a 1930 model which is built and actually sold in the later months of 1929, but the evidence in this case shows that the manager of the Kleiber Motor Company testified that he registered this particular truck with the state motor vehicle department as a 1924 model, and that his company regularly registered machines built in December, 1923, as 1924 models. Also, a representative of the state motor vehicle department testified it was the usual practice in December, 1923, for manufacturers of cars built in December, 1923, to register them as 1924 models, and that the department at that time registered them as designated by the manufacturer. The transcript contains 635 pages, and we have been unable to find in it anything to contradict this testimony, or to contradict the fact that this truck was actually a 1924 model. While there was evidence that the truck was built in December, 1923, as we have seen, nothing contained in the policy went to that point. The only other evidence having any bearing on that question is that the number of the motor originally placed in the truck is embraced in numbers on motors put out in 1923, but this truck was especially built for the buyer, and, if it be assumed that such a numbered motor might affect whether or not the car as a whole was a 1924 model, the evidence shows that the motor was taken out before this insurance was issued, and a new motor installed which was of a number not embraced in those put out in 1923. We do not regard this of great importance, as the only evidence in the case shows that the year model was determined by the designation given by the manufacturer and not by the precise date when it was built. That the policy could have been so written as to cover a representation as to the time it was built, rather than the year model it might be called, is, of course, true, but this was not done in the instant case. The circumstances of this case are very different from an actual misrepresentation of the age of a car, such as was present in the case of Solomon v. Federal Insurance Co., 176 Cal. 134, 167 P. 859. Not only is this finding not sustained by the evidence, but, under the wording of this policy, and under the rule laid down in National Bank v. Union Ins. Co., 88 Cal. 497, 26 P. 509, 22 Am. St. Rep. 324, we do not think this statement would have been material had it been untrue, under the circumstances here shown. Under the rule laid down in section 2565 of the Civil Code, and under the statement of the defendant's manager that they regarded as important the year in which the machine is built, the statement in the policy that it was a 1924 model cannot be deemed of materiality when no information was sought or given as to the year or month in which the car was built. It may also be remembered that, when the insurance was applied for, the car stood in front of the agent's office, that Sumrall had no knowledge or information on the subject, and that he merely, at the agent's request, went out and brought in the engine number and the year model from the registration slip in the car. We are unable to find anything in the evidence to support the finding that the statement was untrue, but, on the other hand, we agree with the conclusion of the trial court that, even if the statement was untrue, it was immaterial, and under the wording of the policy would not void the insurance.

[11] The second misrepresentation complained of was the statement that the truck was purchased from the Kleiber Motor Truck Company instead of from M. Haydis, and that the date of said contract of purchase was not August, 1924, but May 6, 1924. We have already treated the first part of this statement, and we are of the opinion that the misstatement as to the date of purchase is not material. The mistake was apparently made by the agent who made the policy, it was never actually brought to the attention of either of the plaintiffs, and the difference in date of purchase could have had no possible effect on the insurance applied for.

[12] The third misstatement was that no insurance had previously been canceled within three years. The evidence shows that a previous policy had been canceled within four months for the nonpayment of the premium. In Victoria S. S. Co. v. Western Assurance Co., 167 Cal. 348, 139 P. 807, 811, the court says: "Under these provisions, no right to avoid or rescind a subsisting policy occurs from the violation of any provision thereof, whether technically a warranty or not, unless such provision is material, except in cases where the policy itself declares that such breach shall avoid it."

The policy here in question particularly provides that the sort of misrepresentation which shall void it is a representation of a material fact, and the plain meaning is that this shall be a material fact which affects the insurance applied for. The plaintiff Sumrall testified that, when he was notified that some preceding insurance had been canceled, he thought it meant the insurance had expired, and, having thought he had paid for a full year's insurance, he went to his vendor and asked for an explanation. The evidence

further shows that this entire conversation took place in the presence of the defendant's agent, and anything material was thus known to the defendant when the policy was issued. It does not appear that Sumrall knew that the previous insurance had been canceled, as distinguished from an expiration, and the statement in the policy was not brought to the attention of either plaintiff, until after the fire. The cancellation in question was not because of any defect in the truck or anything that affected its insurability, and any delinquency in failure to meet the premiums was not that of the plaintiffs or either of them, but of some one else. We cannot see how this could possibly have affected the desirability of this risk, and, whether the misstatement in the policy was due to a mistake on the part of the agent or to misinformation given him by Haydis, it was not made by either of the plaintiffs, was entirely immaterial and any facts that were binding upon the plaintiffs were known to the agent of the defendant when the insurance was applied for. Where the cancellation is for a reason not affecting the nature of the risk, it is not material. Hawley v. Liverpool, London, & Globe Insurance Co., 102 Cal. 651, 36 P. 926.

We are of the opinion, therefore, that, under the circumstances disclosed by the evidence in this case, the misstatements appearing in the policy and relied on by the defendant, cannot be held sufficient to avoid liability on the policy.

[13] One other matter remains to be considered. Even if the trial court was correct in its conclusion that the plaintiff Kleiber Motor Truck Company could not recover in this action, we do not agree with the reasoning of the court in fixing the amount of plaintiff Sumrall's recovery. The judgment for $1,875 was based upon the proposition that, since the insurance company was told that Sumrall's interest in the truck amounted to $2,500, he should recover such proportion of the $4,500 insurance as $2,500 bears to $6,000, the value of the truck, which is five-twelfths, or $1,875. If there was a meeting of the minds of the parties as to insuring the interest of Sumrall only, the interest of Sumrall at the time of the fire was covered. It is conceded that this was $3,600. It is conceded that the truck was worth $6,000 and that it was insurable for $4,500. Under the terms of the policy he was insured "as his interest may appear," and this refers to the time of the fire. In any view of the case, the amount of the judgment is not correct.

For the reasons stated, the judgment is reversed, with directions to the trial court to enter a judgment in favor of both plaintiffs, in accordance with their respective interests as shown by the evidence on the preceding trial, to wit, $2,897.67 in favor of the Kleiber Motor Truck Company, and the balance of the $4,500 in favor of Sumrall.

We concur: MARKS, Acting P. J.; AMES, Justice pro tem.

LIEBELT v. CARNEY.*

Civ. 7153.

District Court of Appeal, First District, Division 2, California.

June 18, 1930.

Rehearing Denied July 15, 1930. Hearing Granted by Supreme Court Aug. 11, 1930.

1. Usury ⟹134.

Right to recover treble damages for usury is purely statutory and dependent upon statute (St. 1919, p. lxxxiii).

2. Usury ⟹141.

Borrower cannot recover treble amount of usury paid from lender when payments were to lender's assignee and contract was nonnegotiable (St. 1919, p. lxxxiii, § 3).

Usury Law (St. 1919, p. lxxxiii, Deering's Gen. Laws 1923, Act 3757) § 3, authorizes persons paying usurious interest to recover in action against person who shall have taken or received the same, treble the amount of the money so paid, or value delivered.

3. Usury ⟹128.

Defense of usury is available in action on nonnegotiable contract by lender's assignee.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by E. H. Liebelt against Thomas Carney, sometimes known as Thomas Carney Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

Edison MacLeod, of Oakland, for appellant.

John M. Dvorin, of Los Angeles, for respondent.

SPENCE, J.

Appellant brought an action against respondent for treble damages for alleged usury. This appeal is taken from a judgment in favor of respondent.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing granted 295 P. 815.

The evidence showed that appellant was purchasing two motor trucks under conditional sales contracts from General Motors Corporation and was unable to make his final payment. The respondent was in the business of automobile financing and selling of used cars. Appellant called at respondent's office in December, 1926, and it was arranged that respondent should "take the contracts over from General Motors." Respondent paid General Motors Corporation the amount due and obtained the certificates of ownership. A new conditional sales contract covering these trucks payable in one year in installments was made between respondent and appellant for an amount considerably in excess of the amount paid by respondent to General Motors Corporation. After the execution of the contract respondent assigned the contract to the Commercial Securities Corporation, to which corporation appellant made all installment payments with the exception of the final payment, which he was unable to make. Appellant again called at respondent's office in November, 1927, and at his request respondent "bought that contract back" from the Commercial Securities Corporation and a new conditional sales contract was entered into between appellant and respondent for an amount considerably in excess of the amount paid by respondent to the Commercial Securities Corporation. Thereafter this contract was assigned by respondent to the Merchants' Security Company, which company collected from appellant all of the payments due thereunder.

This action was prosecuted by appellant on the theory that these transactions were not sales, but loans at usurious rates of interest, and that the Usury Law permits a recovery of treble damages against the lender, even though all of the payments on these transactions were made to the assignees of the lender. These are, in substance, the contentions made by appellant on this appeal. For the reasons hereinafter stated, we deem it unnecessary to determine whether the transactions constituted sales or loans, but will assume they were loan transactions at usurious rates of interest. The question then is whether under our Usury Law the borrower may recover treble damages from the lender for usurious interest paid by the borrower to the assignee of the lender upon a non-negotiable contract.

[1] The right to recover treble damages for usury is purely statutory, and the same may be said of the entire subject of usury. At the time the Usury Law (St. 1919, lxxxiii, Act 3757, Deering's Gen. Laws) was enacted there was no general Usury Law in this state, and the borrower could neither defend against alleged usury nor recover back alleged usurious interst paid. Since the enactment of the Usury Law all of the lender's rights depend upon the construction to be placed upon the statute. Section 3 of the act provides: "Every person * * * who for any loan or forbearance of money * * * shall have paid or delivered any greater sum or value than is allowed to be received * * * may * * * recover in an action at law against the person, * * * who shall have taken or received the same, * * * treble the amount of the money so paid or value delivered * * *." In construing section 3 it should be noted that, in the absence of statutory provisions for the recovery of usurious interest paid, the borrower may not recover back such interest when he has voluntarily paid the same. 14 Cal. Jur. p. 686; Matthews v. Ormerd, 140 Cal. 578, 74 P. 136; London & S. F. Bank v. Bandmann, 120 Cal. 224, 52 P. 583, 65 Am. St. Rep. 179; Harralson v. Barrett, 99 Cal. 607, 34 P. 342. The primary purpose of all usury laws is to provide a defense to the necessitous borrower against a claim for interest in excess of the amount allowed by law. In most jurisdictions, if the borrower fails to assert that defense and voluntarily pays the usurious interest, he has no remedy. There is an apparent exception to this rule, where the lender assigns a negotiable instrument not usurious on its face to a bona fide purchaser for value before maturity. In that case the borrower may recover from the lender the usurious interest paid to the assignee for the reason that the borrower could not interpose the defense of usury against the assignee, and the payment of the usurious interest is therefore considered involuntary. Culver v. Osborne, 231 Ill. 104, 83 N. E. 110; Harbaugh v. Tanner, 163 Ind. 574, 71 N. E. 145; Kock v. Block, 29 Ohio St. 565.

In some jurisdictions, in addition to declaring the agreement void as to the interest in excess of the amount allowed by law or declaring the agreement void as to all interest therein provided, the statutes contain provisions for the recovery of the usurious interest after payment. Some of the statutes provide for a double or treble penalty. The purpose of these provisions is incidental to the main purpose of the statutes which is to prevent the exacting of usurious interest by giving the borrower his defense against its collection.

[2, 3] In the present case the appellant was not urging the Usury Law as a defense, but was seeking to recover from respondent treble the amount of interest which he had paid to respondent's assignees. He alleged in his complaint that respondent received the usurious interest, but his evidence showed that all the interest was received by the assignees. Under such circumstances the respondent is not the person who had "taken or received" the interest within the meaning of section 3 of the Usury Law. It may well be, as contended by appellant, that he had no cause of action

for treble damages against the assignees, as there was no proof that they had any knowledge of the usury. Nevertheless, the mere making of the contracts did not entitle the appellant to treble damages against the respondent under our statute. Duke v. Levy (Cal. Sup.) 281 P. 496; Haines v. Commercial Mortgage Co., 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A. L. R. 725; Coulter v. Collins, 71 Cal. App. 381, 235 P. 465. Nor did the assignment of these nonnegotiable contracts deprive him of his defense if the contracts were in fact usurious. Appellant could have asserted the defense of usury in any action involving his rights under the contracts, but, having failed to avail himself of the defense provided, and having voluntarily paid the interest to respondent's assignees, we find nothing in section 3 warranting the conclusion that appellant is entitled under the circumstances to recover treble damages against respondent. Some statutes, like that of Kentucky, specifically provide for recovery "from the lender or forbearer, although the payment thereof was made to the assignee." Kentucky Stats. § 2219—2. We find no similar provision of the Usury Law of this state.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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106 Cal. App. 702

HOWLAND v. MEXIMERICAN CO., S. A., et al.

Civ. 7049.

District Court of Appeal, First District, Division 2, California.

June 27, 1930.

1. Fraud ⟹25.

Fraud and damage must both concur to constitute actionable fraud.

2. Vendor and purchaser ⟹343(3).

Cause of action founded on warranty of title to land and dependent on plaintiff's performance must fail, where parties agreed warranty was not intended as such, and plaintiff failed to perform.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Roy G. Howland, administrator of the estate of Fred G. Howland, deceased, against the Meximerican Company, S. A., and another. Judgment for plaintiff, and defendants appeal.

Reversed.

Goldman, Nye & Spicer and Vincent Surr, all of San Francisco, for appellants.

Carnahan & Clark, of Los Angeles, and Pillsbury, Madison & Sutro, of San Francisco, for respondent.

PER CURIAM.

Plaintiff sued for damages for fraud and for breach of warranty. Plaintiff had judgment for $19,000, and defendants appealed on a bill of exceptions. The transcript was filed in January, 1928, and appellants' brief was filed in February of the same year. An order was issued and duly served requiring respondent to show cause on June 9, 1930, why the judgment should not be reversed. The respondent failed to appear and to date has made no effort to defend the judgment.

While litigation was pending between the parties in Los Angeles county they executed a written agreement wherein the defendants agreed to assign whatever interest they might have in certain lands situated in the Republic of Mexico in consideration of the plaintiff's dismissing the pending actions. In the instant case the plaintiff proceeded on the theory in his first cause of action that the agreement to dismiss the litigation was procured by defendants' fraudulent representations as to their title and as to the acreage involved. The trial court found that there was no fraud, and the parties stipulated that there were no false representations, that the plaintiff was more familiar with the conditions than defendants, that plaintiff did not rely upon any representations made, and that he did not perform his part of the contract.

The second cause of action was founded upon an alleged warranty of title to 8,000 acres located in the tract of land covered by the agreement. The parties have stipulated that the so-called warranty was not relied on as such, but was merely a statement of what defendants believed to be the facts and was made in good faith by them.

[1] Fraud and damage must both concur to constitute actionable fraud. 12 R. C. L. p. 239. Here the record discloses neither. The trial court found there was no fraud, and the evidence demonstrates that there was no damage.

[2] As to the second cause of action, recovery upon the alleged warranty was dependent upon performance by plaintiff. As the parties agree that the alleged warranty was not intended as such, and that the plaintiff failed in performance, this cause of action fails.

Judgment reversed.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

KAISER v. KAISER et ux.

Civ. 3867.

District Court of Appeal, Third District, California.

June 25, 1930.

Rehearing Denied July 24, 1930. Hearing Denied by Supreme Court Aug. 21, 1930.

1. Appeal and error ⟹994(3).

Fact that plaintiff's witness was not on friendly terms with defendant *held* matter for trial court, in passing on witness' credibility.

2. Appeal and error ⟹1009(3).

Finding of trial court on conflicting evidence in action for accounting *held* conclusive on appeal.

3. Landlord and tenant ⟹331(1).

Evidence, in action against landlord for accounting under lease after latter ejected tenant, *held* to show tenant performed terms of lease until ejected.

Plaintiff leased land from defendant for cropping season, agreeing to pay as rental one-third of crop, plaintiff to pay all expenses of producing and harvesting crop. In addition to raising crop, plaintiff was to perform certain personal services for defendant in care of pasture stock, doing chores, and otherwise caring for other property and premises of defendant adjoining property leased, for which plaintiff was to be paid stipulated sum per month.

4. Landlord and tenant ⟹330(1).

Contract between landlord and tenant suing for accounting under lease, if separate from lease, *held* proper set-off to landlord's counterclaim for room and board.

5. Appeal and error ⟹1039(13).

Variance, if any, between complaint and evidence in action for accounting *held* immaterial, where evidence was admitted without objection, and complaining party introduced evidence bearing upon ultimate facts found (Code Civ. Proc. §§ 469, 470).

Code Civ. Proc. § 469 provides that no variance between allegation in pleading and proof is to be deemed material, unless it has actually misled adverse party to his prejudice in maintaining his action or defense upon merits, and section 470 provides that where variance is not material court may direct fact to be found according to evidence, or may order immediate amendment without costs.

6. Appeal and error ⟹1011(1).

Where evidence is substantially conflicting on every issue in controversy, trial court's determination will not be disturbed on appeal.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by Ernest J. Kaiser against Henry Kaiser and wife for an accounting. From the judgment rendered, defendants appeal.

Affirmed.

Louttit & Marceau, of Stockton, for appellants.

Berry & Watson, of Stockton, for respondent.

FINCH, P. J.

The complaint alleges that the defendants leased 160 acres of land to the plaintiff for the cropping season of 1927 and 1928 for the raising of wheat thereon, the defendants to receive as rental one-third of the crop and the plaintiff to receive two-thirds thereof, he to pay all the expenses of producing and harvesting the crop; that the plaintiff planted the land to wheat and, "in all respects, duly complied with the terms and requirements of said lease upon his part"; that about March 2, 1928, "and shortly before said wheat crop was ready to harvest and before the same was harvested, the defendants, wrongfully and without the consent and against the will of the plaintiff, ejected plaintiff from said premises and took possession of said premises and said crop and thereafter proceeded to harvest said crop and refused to acknowledge any interest therein on the part of the plaintiff and declared that the plaintiff had no interest therein and refused to account to plaintiff for any part or proceeds of said crop, or to repay or reimburse him in any manner whatsoever in the premises." The prayer is for an accounting of the proceeds of the crop and for judgment for the amount found upon such accounting to be due to the plaintiff.

The answer denies the allegations of the complaint, and alleges as a counterclaim that the "plaintiff is indebted to the defendants in the sum of $780 for board, room and laundry furnished by defendant to plaintiff."

The court found that the land involved is the separate property of the defendant Henry Kaiser, who will be referred to as the defendant; that the plaintiff and the defendant entered into a verbal agreement of lease as alleged in the complaint, and "that in and by said agreement it was further agreed that the plaintiff should perform certain labor, to-wit, the care of pasture stock, the doing of certain chores and otherwise caring for certain other property and premises of said defendant adjoining said property leased, * * * for which the plaintiff was to be paid" $25 a month; that the plaintiff performed the terms of the agreement on his part; that he performed such labor for 11 months; that the defendant advanced all of the money used in the "production and haul-

ing of said crop," and "it was agreed between the said parties that defendant should be repaid by the application of the wages due plaintiff from said defendant and out of the proceeds of said crop"; that the defendant took possession of the crop "against the will and without the consent of the plaintiff"; and that the plaintiff was indebted to the defendant in the sum of $500 for board and room.

The court charged the defendant with two-thirds of the market value of the wheat produced, and with the wages due the plaintiff, and credited him with all sums of money advanced or paid out by him in producing and harvesting the crop, and also the amount found to be due him from the plaintiff for board and lodging. Judgment was entered in favor of the plaintiff for the difference between the amounts of such charges and credits. The defendant has appealed from the judgment.

[1, 2] There is no conflict in the evidence in relation to the employment of the plaintiff by the defendant, the performance by the plaintiff of labor as found by the court, or the agreed compensation to be paid therefor. The plaintiff testified positively that he and the defendant entered into an agreement of lease on the terms found by the court. The defendant testified that no lease whatever was agreed upon, but that the only agreement between the parties was the one for personal services by the plaintiff at $25 a month. The defendant's brother gave testimony strongly corroborating that of the plaintiff relating to the agreement. It appears that the brother was not on friendly terms with the defendant, but that was a matter for the sole consideration of the trial court in passing on the credibility of the witness. The finding of the trial court from this conflicting evidence is conclusive on appeal.

At the time the lease was agreed upon the plaintiff was without financial or other means of farming the land, but he testified that that matter was then discussed and considered by the parties, and that the defendant agreed to advance the money required to produce a crop. In this testimony, also, the plaintiff was corroborated by the defendant's brother. There is no blood relationship between the parties, but the plaintiff was an intimate friend of the defendant's son, and had been living in the defendant's home for more than a year. The land held under the alleged lease is only a part of a larger tract owned by the defendant, the remainder and greater part thereof being leased to Henry Weirhauser.

[3] Appellant contends that the respondent did not perform his part of the contract. The plaintiff testified that he and the defendant "talked about who would do the plowing and he said he thought that time Henry Weirhauser would just as well do it"; that in a later conversation Weirhauser asked, "Who is going to do Ernest's plowing, is he going to buy an engine?"; that the defendant replied, "No, he will have to do as all the others have done. * * * You can do the plowing;" that Weirhauser "plowed and harrowed. * * * I did the seeding. I used his outfit, his seeder;" that he also "worked on his (Weirhauser's) outfit for fourteen and one-half days," for which Weirhauser gave credit on his bill for plowing and harrowing to the extent of $72.50; that the plaintiff bought and hauled the seed wheat and the defendant paid for it. Weirhauser testified that after he had finished the plowing and harrowing he told the defendant that the bill therefor was $400, and that he owed the plaintiff $72.50 for labor, leaving a balance of $327.50, which the defendant thereupon paid. This payment by the defendant, under the circumstances stated, tends to corroborate the plaintiff's testimony. After the planting of the wheat was completed there was nothing further to be done in the farming operations up to the time the plaintiff left, about March 2, 1928. At that time the defendant, for personal reasons which need not be stated, refused to permit the plaintiff to remain on the place. The defendant thereafter harvested the crop and refused to account to the plaintiff for any part thereof. The plaintiff testified that it was his plan to hire all the work to be done in his farming operations, and that the defendant agreed to advance the money needed for that purpose. Under such circumstances it cannot be held that the foregoing evidence is insufficient to show performance of the terms of the lease on his part up to the time that the defendant prevented any further performance thereof.

[4, 5] Appellant contends that there is a fatal variance between the allegations of the complaint and the evidence, and that some of the findings based on that evidence are outside the issues. Such evidence, however, was admitted without objection, and the defendant introduced evidence bearing upon all the ultimate facts found by the court. It may fairly be stated, therefore, that the case was tried on the theory that such facts were in issue, and neither party was misled to his prejudice. If the employment of the plaintiff to perform labor for the defendant be treated as a separate contract, proof of the amount due therefor without pleading it was proper as a set-off to the defendant's counterclaim. 23 Cal. Jur. 280.

"No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." Code Civ. Proc. § 469.

"Where the variance is not material, as provided in the last section, the court may direct

the fact to be found according to the evidence, or may order an immediate amendment, without costs." Code Civ. Proc. § 470.

[6] The evidence is substantially conflicting on every issue in controversy on this appeal, and therefore it is sufficient to sustain findings and a judgment for either party. Under such circumstances it is beyond the power of this court to interfere with the determination of the case by the trial court.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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106 Cal. App. 553

NEILL et ux. v. CITY OF GLENDALE et al.

Civ. 4070.

District Court of Appeal, Third District, California.

June 19, 1930.

Rehearing Denied July 18, 1930. Hearing Denied by Supreme Court Aug. 18, 1930.

1. Dedication ⚷15, 31.

To constitute common-law "dedication," there must be intent to dedicate and acceptance shown by some formal act of competent legislative body or public user.

Intention to dedicate must be made by some person legally entitled to make dedication, and user to constitute acceptance by public must be in such manner and for such length of time as clearly to indicate intention of public to accept offer on terms and conditions upon which it was made.

[Ed. Note.—For other definitions of "Dedication," see Words and Phrases.]

2. Dedication ⚷44.

Evidence *held* insufficient to show common-law dedication of 30-foot strip as avenue together with trees adjoining for ornamentation and shade.

Evidence merely showed that road in controversy was a private one used in connection with ranchhouse of owner and merely used to drive back and forth from owner's residence.

3. Dedication ⚷16(1).

Clause in contract of sale *held* not common-law dedication of trees to public use for ornamentation and shade.

Contract provided that purchaser agrees and promises not to destroy or remove any of ornamental trees or shade trees along designated avenue upon land conveyed, and that purchasers will, in case any trees should die during existence of agreement, replace such trees with others.

4. Dedication ⚷19(2).

Filing map showing subdivision into lots and designating streets and containing dedication clause accepted by board of supervisors *held* common-law "dedication" of described avenue as public street.

Owner of property for itself and record owner under power of attorney filed with county recorder map showing subdivision of property into lots upon various streets and along designated avenue shown to be of uniform width of 60 feet. On map was indorsed clause purporting to acknowledge and declare that tract had been subdivided and map showed lots, blocks, avenues, and streets, and reciting that "we hereby dedicate for public use all of said alleys and streets shown on the foregoing map." Map after being filed was accepted by board of supervisors by order reciting that all streets, lanes, alleys, roads, etc., upon map therein offered for dedication be and the same are hereby accepted as public highways.

5. Principal and agent ⚷99.

Agent's authority is not necessarily confined to performance alone of act authorized by words conferring authority.

6. Principal and agent ⚷100(6).

Power of attorney from owner to agent *held* to authorize attorney on subdividing property to dedicate streets and alleys to public use.

Power of attorney authorized agent in owner's name and as his act "to execute and deliver deeds of grant bargain and sale conveying any of lots shown on" described map, and further provided that all acts of attorney in fact "done in pursuance of the authority hereby created we will well and truly ratify and confirm with the same effect as if done by us in person."

7. Dedication ⚷19(2).

Provision in offer of dedication referring to "alleys and streets" *held* to include designated avenue.

[Ed. Note.—For other definitions of "Alley," see Words and Phrases.]

8. Dedication ⚷55.

Representations to purchaser of lot on designated avenue that trees could not be destroyed by city *held* not to limit or abrogate statutory dedication.

9. Municipal corporations ⟹678.

Municipality may remove shade trees in public streets when necessary for street improvement without liability to abutting owner (St. 1911, p. 730, as amended).

10. Constitutional law ⟹70(3).

Contention that destruction of shade trees for street improvement should be deplored and prevented for "æsthetic contributions to the comfort of habitation" *held* purely matter of legislative concern.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by James Neill and wife against the City of Glendale and others. Judgment for plaintiffs, and defendants appeal.

Reversed.

Bernard C. Brennan, Ray L. Morrow, Frank M. Moody, and W. Turney Fox, all of Glendale, for appellants.

Bert P. Woodward, of Glendale, and Frank H. Snyder, of Los Angeles, for respondents.

TUTTLE, Justice pro tem.

This is an action brought to enjoin appellants, city of Glendale, from proceeding with the improvement of an avenue within said city, under the Improvement Act of 1911 (St. 1911, p. 730, as amended). The trial court granted a permanent injunction, and this appeal is prosecuted from the judgment.

Lomita avenue, at the time this action was brought, was improved (by the city) with a concrete roadway thirty feet in width. This improved strip lay equally on each side of the center line of a sixty-foot strip of land, with lots abutting upon said sixty-foot strip. The traveled roadway is thirty feet in width, and on each side thereof is a row of large eucalyptus trees, which occupy a ten-foot space between the roadway and the sidewalk. The sidewalks are five feet in width.

Under the proposed improvement, a strip forty feet wide, lying equally on each side of the center line of said sixty-foot strip, will be paved with concrete. It is conceded that such improvement will necessitate the destruction of the trees. Plaintiffs are the owners of a lot abutting upon said sixty-foot strip of land, and their contention is that the strip of real property, upon which these trees are situated, is not a part of the street, and hence the city had no jurisdiction to improve the same under the Improvement Act of 1911. Using the language of plaintiffs and respondents, "the plaintiffs, as owners of abutting property, claim an easement" in and to the use of said trees for ornamentation and shade, and they "claim the legal right to protect themselves in the enjoyment of the same, without interference." The findings of the court are in accord with this contention. The following finding of the trial court is assailed as unsupported by the evidence:

"That prior to March 19, 1895, said Lomita avenue was opened to public use and travel by common law dedication. That by said dedication the roadway for travel upon said avenue was limited to a width of 30 feet; that is to say, a width of 15 feet on either side of the center line of said avenue. That the said parkways, together with the rows of eucalyptus trees then standing thereon, were dedicated to the specific public uses of ornamentation and shade, and were restricted to such uses by the acts, conduct, and declarations of the then owners of the fee in said avenue, in which restricted use the plaintiffs, as abutters upon said block, have an easement to the user of said parkways and trees for said purposes of ornamentation and shade, as intended by said dedicators.

"That the intent of said dedicators was later expressed in writing by Oliver S. Bond, and Clara A. Bond, then owners of the fee in said avenue subject to the uses thereof theretofore dedicated to the public, in an agreement with Henry C. Goodell, and A. J. Hechtman, as follows:

" 'The parties of the second part hereby agree and promise not to destroy or remove any of the ornamental trees or shade trees along Lomita avenue upon the land hereby agreed to be conveyed; and said second parties also agree that in case any trees on said land shall die during the existence of this agreement, said second parties agree to replace said trees with other trees.' "

It appears that the tract of land upon which these trees are situated was a ranch prior to and for some time after the year 1895, and was owned by one Crow. Only one witness, Rowan, was called by plaintiff to prove the dedication relied upon in said finding, and his testimony was as follows:

"Q. What did you observe in those times, if anything, as to the use made at that time of the space between those gum trees? A. That was Mr. Crow's driveway. He used to drive back and forth to his residence. I could not state where his residence was, except to look down the driveway where his residence was.

"Q. At that time was there a highway there along the course that is now the course of Central avenue? A. That I could not state because our travels were mostly down what I think they call Glendale boulevard now. Let me see, I think that is the way, yes, where Glendale boulevard is. My travels were mostly down that way. I could not make a statement to the court that there was a roadway in the vicinity of Central avenue, that I could not say.

"Q. Was that driveway at that time an open one or was it closed, if you remember? A. You mean Lomita drive?

"Q. Yes. A. Why, it was open. When you wanted to go and see Mr. Crow, why you drove in there. That was Mr. Crow's passageway."

On March 19, 1895, Oliver S. Bond and Clara A. Bond, the owners of the ranch, executed an agreement for the sale of the same with Goodell and Hechtman. There was a clause in this agreement as follows:

"The parties of the second part hereby agree and promise not to destroy or remove any of the ornamental trees or shade trees along Lomita avenue upon the land hereby agreed to be conveyed; and said second parties also agree that in case any trees on said land should die during the existence of this agreement, said second parties agree to replace said trees with other trees."

[1] The rules of law concerning the fundamental requirements of a common-law dedication of private property to public use are well established.

1. There must be an intent to dedicate (commonly referred to as the animus dedicandi) by a person legally entitled to make a dedication.

2. There must be an acceptance of the property on behalf of the public.

(a) This acceptance may be shown by some formal act of acceptance made by a competent legislative body; or (b) by user on the part of the public in such a manner and for such a length of time as clearly to indicate the intention of the public to accept the offer on the terms and conditions upon which it was made.

These principles are clearly stated and exhaustively discussed in the following leading authorities: 4 McQuillin on Municipal Corporations (2d Ed.) §§ 1686-1707, incl.; 9 Cal. Jur. pp. 15–59, incl.; 1 Elliott on Roads and Streets (4th Ed.) §§ 138 and 165–171.

The court, in Harding v. Jasper, 14 Cal. 642, 647, said:

"The general question now arises, what constitutes a dedication of land for the purpose of a rural highway? We qualify the proposition by the latter words, because it is held by authority and upon reason, that it requires stronger proof of dedication in the cases of roads in the country, than that of streets or lanes in a town or city. * * * 'An intention to dedicate must be obvious, and the same acts which would warrant the inference in cities and towns, would be quite insufficient in sparsely settled agricultural districts.'" See, also, Quinn v. Anderson, 70 Cal. 454, 11 P. 746.

The testimony of witness Rowan and the said contract is all the evidence in the record bearing upon the finding and urged by respondent in support thereof.

[2] We are of the opinion that such evidence, under the rules stated, is insufficient to support the finding in question. There is no evidence of a user upon the part of the public, such as would justify a finding of a dedication. On the contrary, the evidence referred to indicates that the road was a private one, and used in connection with the ranch house of the owner. Says the witness: "That was Mr. Crow's driveway. He used to drive back and forth to his residence."

[3] The clause in the agreement of sale certainly cannot amount to a dedication of the trees to a specific public use. It was simply a private agreement between the parties. The public was not concerned in any manner. The agreement was to be in force for ten years from the date thereof. There is no evidence that the deed, given pursuant to said agreement, contained any reference to the trees. We do not believe it can be argued that because the Bonds required Goodell and Hechtman to promise not to destroy any of the trees along this roadway, they (the Bonds) manifested a previously existing intent to dedicate the road to the public, and reserve the trees for ornamentation during all future time. If an easement in respect to said trees was created at any time in favor of subsequent purchasers of portions of said ranch, why was there no mention of that fact in any of the deeds? Plaintiffs are successors in interest of Goodell and Hechtman, but nowhere in any of the mesne conveyances do we find any reference to these trees. If it is conceded that the thirty-foot roadway was a public road prior to 1895, there is absolutely no evidence to uphold a finding that the trees were dedicated to a "specific public use" and that by reason thereof plaintiffs, as abutting owners, have an easement therein.

[4-6] Between 1895 and January 30, 1905, the road continued to be used by the owners of homes upon the tract. There is no testimony, directed to a time between said dates, which will support a finding that the trees were dedicated to a "specific public use," nor were any facts proved which would give subsequent owners of portions of the tract any easement in maintaining the trees adjacent to the road. As witness Shattuck testified, orange trees grew very close to these eucalyptus trees. The center of the road, he says, was used as a sidewalk.

On the 29th day of November, 1904, Goodell conveyed his interest in said real property to State Bank & Trust Company.

On January 30, 1905, State Bank & Trust Company filed with the county recorder of Los Angeles county a map, purporting to be a "Map of Grider and Hamilton's Lomita Park," showing a subdivision of the property

hereinbefore mentioned into lots with frontages varying from one hundred to eighty feet upon the various streets and also along Lomita avenue. The latter was shown on this map as being of a uniform width of sixty feet. At the time this map was filed the bank was the attorney in fact for the record owners of said tract, acting under a power of attorney which read as follows:

"Know All Men by these Presents that we Oliver S. Bond and Clara A. Bond his wife both of the City of Toledo County of Lucas State of Ohio do hereby nominate constitute and appoint State Bank and Trust Company of Los Angeles a corporation having its principal place of business in the City of Los Angeles County of Los Angeles, State of California our true and lawful attorney in fact, with power and authority as follows to wit:

"In our name and as our act to execute and deliver deeds of grant bargain and sale conveying any of the lots shown on that certain map to be recorded in the office of the County Recorder of Los Angeles County and entitled A Map of Grider & Hamilton's Lomita Park. Said real property is situated near Glendale in the County of Los Angeles California and is the same property referred to in two certain agreements respectively recorded in Book 1030 of Deeds page 278 and in Book 1063 of Deeds, at page 116 in the office of the County Recorder of Los Angeles County California.

"We also hereby grant to and confer upon our said attorney in fact power and authority to receive as our agent and give receipts for the purchase price of any real property sold by said attorney in fact in pursuance of the authority hereby created.

"And all the acts of our said attorney in fact done in pursuance of the authority hereby created we will well and truly ratify and confirm with the same effect as if done by us in person.

"In Witness Whereof we have hereunto set our hand and seals this 7th day of January, 1905.

"Oliver S. Bond. [Seal.]
"Clara A. Bond. [Seal.]"

Upon the map was indorsed the following clause, signed by the bank in its own behalf, and also as attorney in fact for Oliver S. Bond and Clara A. Bond:

"The undersigned hereby acknowledge and declare that they are the owners of the foregoing tract of land enclosed within the red colored border lines; that said tract has been subdivided at our request, and this map clearly shows the subdivision of said tract within lots, blocks, avenues and streets and we hereby dedicate for public use all of said alleys and streets shown on the foregoing map and enclosed within the red colored border lines."

Upon the same day that the map was filed it was accepted by the board of supervisors, the following order of acceptance being indorsed upon the face of the map:

"In re: Acceptance of streets, alleys, etc., in Lomita Park * * * it is ordered that all streets, lanes, alleys, roads and other portions of land shown upon said map (surveyed December, 1904) and therein offered for dedication be and the same are hereby accepted as public highways."

Several months after this map was filed the predecessor in interest of plaintiffs purchased a lot under the following description, said lot abutting upon Lomita avenue: "Lot number ninety of 'Grider and Hamilton's Lomita Park' as per map recorded in Book 6, page 105 of Maps, in the office of the Recorder of Los Angeles County."

The deed to said lot was executed by the bank in its own behalf and also as attorney in fact for the Bonds.

The court found that the said power of attorney contained no grant of authority to dedicate, and this finding is attacked by appellant. There is also a finding "that the dedicatory clause endorsed upon the map omits to dedicate any avenue delineated upon said map."

We are of the opinion that the proceedings with reference to said map constitute a valid dedication of Lomita avenue as a public street. When the map was filed for record the bank was the equitable owner of the property, and the attorney in fact for the legal owners. The power of attorney gives authority to the bank to execute and deliver deeds conveying "any of the lots shown on that certain map to be recorded—entitled a Map of Grider and Hamilton's Lomita Park." The authority with which an agent is invested is not necessarily confined to the performance of those acts alone which are authorized by the bare words in which an authority is conveyed. On the contrary, it is rarely so confined. Goldtree v. Swinford, 74 Cal. 586, 16 P. 493. Considering all the facts and circumstances surrounding the transaction, we are of the opinion that there was a legal dedication of Lomita avenue to public use, as said avenue is delineated upon the map.

[7] It is contended by respondents that as the offer of dedication indorsed upon the map refers only to alleys and streets, it does not apply to Lomita avenue. The latter is one of the main thoroughfares appearing in the proposed subdivision, and it is obvious that the word "streets" was intended to include Lomita avenue. The contention is without merit.

As there was no evidence upon which the court could base its finding that the predecessors of plaintiffs, prior to the filing of the map, had any easement in the use and preservation of a parkway bordering upon said avenue, and as there was a legal dedication of a sixty-foot avenue, which included the so-

called parkway, the findings upon such issues cannot stand.

[8] Plaintiffs are hardly in a position to appeal to the equity side of the court. For many years prior to the time that they purchased their lot this map was a public record. The sixty-foot strip which constitutes this avenue was laid out upon the ground, and the lot which plaintiffs purchased was described in their deed by reference to this map. These trees were out in this avenue, some twelve feet from their property line. It is true that some representations were made to plaintiffs when they purchased their lot, to the effect that the trees could not be destroyed by the city; but such representations could not be set up for the purpose of limiting or abrogating a statutory dedication, nor could they have impressed plaintiffs seriously, in view of the fact that the map by which they purchased showed a dedication of the entire avenue, without any restrictions whatever.

[9] The right of a municipality to remove shade trees in public streets when necessary for the improvement of said streets, and without liability to an abutting owner, is not open to question. Vanderhurst v. Tholcke, 113 Cal. 147, 45 P. 266, 35 L. R. A. 267; 44 C. J. 923. The evidence in this case shows, without contradiction, that the parkway (upon which the trees were planted) was part of a public street at the time this action was commenced, and the attempt of plaintiffs to show any special interest or easement in the maintenance of said parkway, or the trees thereon, has utterly failed.

[10] The appeal of respondents that the destruction of these trees should be deplored and prevented because they are "useful as well as æsthetic contributions to the comfort of habitation" is one that might seriously engage the legislative branch of the city government. On the other hand, the demands of rapidly growing traffic may make the removal of the trees a paramount necessity. In any event, it is purely a matter of legislative concern.

The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

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107 Cal. App. 7

PEOPLE v. TOSSETTI.

Cr. No. 24.

District Court of Appeal, Fourth District, California.

June 28, 1930.

1. Criminal law ⟹90(2).

Fact of population specified by statute gives justice court jurisdiction in criminal cases (Pen. Code, § 1425, as amended by St. 1929, p. 861).

Pen. Code, § 1425, as amended by St. 1929, p. 861, gives justice courts in judicial townships, having population of 30,000 or more, jurisdiction in all criminal cases amounting to misdemeanor only. No provision is made in the statute for determining population.

2. Criminal law ⟹304(6).

Judicial notice should be taken that township has population specified in jurisdictional statute when matter of common knowledge (Pen. Code, § 1425, as amended by St. 1929, p. 861).

San Bernardino township includes city of San Bernardino, and it was matter of common knowledge that city had population so greatly in excess of 30,000 that no adult person in such city reasonably conversant with the most general affairs would question it.

3. Criminal law ⟹304(2).

In construction of statutes, courts will take judicial notice of what is general knowledge within limits of their jurisdiction.

4. Criminal law ⟹304(1).

Failure of trial court to take judicial notice of fact does not prevent appellate court from giving proper effect thereto.

5. Criminal law ⟹304(6).

That defendant requested appointment of referee to determine population of township for jurisdictional purposes, and that trial court attempted to do so, did not prevent court from taking judicial knowledge when population was matter of general knowledge.

6. Criminal law ⟹304(6).

That appellate court in prior case appointed referee to determine population of township does not preclude it from taking judicial notice as to population.

7. Criminal law ⟹304(1).

Courts may receive evidence regarding fact about which they have judicial notice.

8. Criminal law ⟹1017.

When defendant was prosecuted by information, District Court of Appeal has jurisdiction under Constitution, though trial court was without jurisdiction (Const. art. 6, § 4).

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Harry Tossetti was convicted of possessing intoxicating liquors, and from the judgment and an order denying a new trial, he appeals.

Reversed, with directions.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Hert & Mussell, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and George H. Johnson, Dist. Atty., and James L. King, Deputy Dist. Atty., both of San Bernardino, for the People.

BEAUMONT, Justice pro tem.

Defendant was charged by an information filed in the superior court of San Bernardino county with a misdemeanor, possessing intoxicating liquor. Upon trial he was convicted. Motions in arrest of judgment and for a new trial were made in his behalf. These were denied, and judgment pronounced. From the judgment and from the order denying motion for new trial, he has now appealed.

[1] Appellant bases his plea for reversal solely upon the ground of lack of jurisdiction of the trial court. Section 1425 of the Penal Code, as amended in 1929 (St. 1929, p. 861), defines the jurisdiction of justice courts in criminal cases. It provides that in "judicial townships, having a population of thirty thousand or more, said courts shall have jurisdiction in all criminal cases amounting to misdemeanor only. * * *" Appellant's contention is grounded on the foregoing statute and the population of San Bernardino township, in which said township the evidence shows the offense was committed shortly after the 1929 amendment became effective. Although his position was at the time of the hearing upon the motions, that it was a matter of common knowledge that the population of said township was in excess of thirty thousand, he offered certain affidavits in support thereof. These were received in evidence over the objection of incompetency and that they were merely expressions of opinion. These affidavits, although including certain opinions of affiants, contain statements of probative facts from which the inescapable conclusion of ultimate fact is that the township had upon the date in question a population in excess of thirty thousand.

[2, 3] Without consideration of the affidavits, we are convinced that the motion in arrest of judgment should have been granted. No provision was made in the statute for the method of determining the population. In County of Los Angeles v. Justice's Court, Beverly Hills Tp. (Cal. Sup.) 281 P. 611, 612, the consent of the parties was given to the appointment of a referee, whose report, upon stipulation, was affirmed and the fact found. This was attempted to be done herein upon the hearing of said motion, but was objected to by the district attorney. It is the fact of population that gives jurisdiction. Immediately the township exceeds in population the limit fixed by statute jurisdiction exists. With that fact proved in a judicial proceeding, the court must exercise its jurisdiction. In the Beverly Hills Case, supra, the court said: "The jurisdiction of the respondent courts depends upon the fact of there being the specified number of inhabitants within their respective territorial boundaries, and not upon any report or proclamation of the fact. People v. Wong Wang, 92 Cal. 277, 280, 28 P. 270; Puterbaugh v. Wadham, 162 Cal. 611, 618, 123 P. 804. That being true, it would seem to follow that, when it is found by any proper mode of ascertainment that the various political subdivisions in which the respondent courts are located have the required population, the respondent courts must entertain, consider, and act in all those matters and causes falling within the jurisdiction prescribed by the present law." We are of the opinion that "a proper mode of ascertainment" of the fact of population in this case is judicial notice. Judicial notice is but a species of evidence, and when a fact is such a matter of common knowledge as hereinafter referred to, the court takes judicial notice thereof. San Bernardino township includes the city of San Bernardino and certain outlying territory. In construction of statutes courts will take judicial notice of what is general knowledge within the limits of their jurisdiction. Varcoe v. Lee, 180 Cal. 338, 344, 181 P. 223, 226; Marrow v. Lincoln, 101 Neb. 57, 162 N. W. 138; Riley v. Wallace, 188 Ky. 471, 222 S. W. 1085, 11 A. L. R. 337. It was a matter of common knowledge of the people within the jurisdiction of the court that the city of San Bernardino alone had at the date in question more than thirty thousand inhabitants and that the population of the township was so greatly in excess of that number that no adult person within its borders and reasonably conversant with the most general affairs would question it. Indeed, general knowledge of such a condition is evidenced by the following discussion:

"Mr. Hert (during the course of argument by counsel): I presume you cannot and will not produce any counteraffidavits that this township has not 30,000?

"Mr. King: I cannot do that, and if I did do that it would be nothing more than my opinion. I am not saying to anybody that this township has not 30,000 inhabitants. I know it has, and we all know it has.

"Mr. Hert: I would suggest, that inasmuch as the district attorney admits that this township has a population of over 30,000, that it would be right and proper to enter into a stipulation in this court and settle this question once for all.

"Mr. King: I am not stipulating. I am simply stating a fact that we all know.

"Judge Leonard: I think we have reached the conclusion that the jurisdictional fact must appear, and that the motion in arrest of judgment ought to be granted. The evidence submitted by the affidavits shows that there

is in San Bernardino township a population of over 30,000, and we feel under counsel's statement that he has admitted that to be a fact, that it puts the case in exactly the same condition as the case that went before the Supreme Court where it was stipulated to. I don't know as there could be any difference between a stipulated fact and the statement of counsel in an argument that it is a fact."

The foregoing colloquy is not referred to as proof of the fact of population. The district attorney did not enter into any stipulation, nor did he intend to bind respondent by any expression of his opinion, as he made clear in further discussion, but it is indicative of the notoriety of the fact.

A search of authorities and text-books reveals that the scope of judicial notice has been widened in recent years. Prof. Wigmore says, "The doctrine of judicial notice contains the kernel of great possibilities, as yet not used, for improving trial procedure in the courts of today" (5 Wigmore on Evidence, § 2583); and, after discussion of certain phases thereof, courts are advised as follows: "With these aspects of the principle in mind, a large field opens for reducing the tedious proof of notorious facts. The principle is an instrument of usefulness hitherto unimagined by judges. Let them make a liberal use of it; and thus avoid much of the needless failures of justice that are caused by the artificial impotence of judicial proceedings." "Judicial notice is a judicial short cut," states Mr. Justice Olney in the case of Varcoe v. Lee, supra, "a doing away * * * with the formal necessity for evidence, because there is no real necessity for it." The case of Varcoe v. Lee, supra, is most illuminating on the doctrine of judicial notice and its application. In that case it is said, after quotations from Ruling Case Law: "The three requirements so mentioned—that the matter be one of common and general knowledge, that it be well established and authoritatively settled, be practically indisputable, and that this common, general, and certain knowledge exist in the particular jurisdiction—all are requirements dictated by the reason and purpose of the rule, which is to obviate the formal necessity for proof when the matter does not require proof." And thereafter is the following: "What may be a proper subject of judicial notice at one time or place may not be at another. It would be wholly unreasonable to require proof * * * in the city of San Francisco of its city hall before a judge and jury made up of residents of that city and actually sitting in the building. But before a judge and jury in another county proof should be made. The difference lies in the fact being one of common knowledge in one jurisdiction and not in the other."

This case meets all the above-mentioned tests. That the population of San Bernardino township upon the date in question was greatly in excess of thirty thousand was well known to the inhabitants thereof. It was a matter of common, everyday knowledge in that jurisdiction, which every one of average intelligence and knowledge of things about him could be presumed to know (Varcoe v. Lee, supra), and one about which there could be no dispute.

[4] That "an appellate court can properly take judicial notice of any matter of which the court of original jurisdiction may properly take notice," was stated in Varcoe v. Lee, supra; and the opinion of the court further is: "In fact, a particularly salutary use of the principle of judicial notice is to sustain on appeal, a judgment clearly in favor of the right party, but as to which there is in the evidence an omission of some necessary fact which is yet indisputable and a matter of common knowledge, and was probably assumed without strict proof for that very reason." We take it that it is just as important that a judgment should be reversed when it is rendered by a court having no jurisdiction of a cause. This was done in People v. Wong Wang, 92 Cal. 277, 28 P. 270. There a motion in arrest of judgment was made, and the only ground noticed in the opinion was that the lower court had no jurisdiction of the offense charged. While other matters were discussed therein, the court invoked the doctrine of judicial notice, and there, as here, it was the "fact" of population that was involved and which determined jurisdiction. The failure of a trial court to take judicial notice of a fact does not prevent an appellate court from giving proper effect thereto. 10 Cal. Jur. 698; Rogers v. Cady, 104 Cal. 288, 38 P. 81, 43 Am. St. Rep. 100.

[5-7] The fact that appellant requested that a referee should be appointed in accordance with the method followed in the Beverly Hills Case, and that this was attempted to be done by the trial court, did not prevent that court from taking judicial knowledge of what was a matter of general knowledge within its jurisdiction. Neither does that fact, nor does the fact that in People v. Justice's Court of San Bernardino County, 283 P. 854, wherein this court appointed a referee who found that the population of San Bernardino township on December 1, 1929, was in excess of forty thousand, preclude this court from taking judicial notice herein. (In that proceeding the parties did not question the correctness of the findings of the referee.) Courts may receive evidence regarding a fact about which they have judicial notice and there is no impropriety in their so doing. Varcoe v. Lee, supra.

Section 2580, Wigmore on Evidence (2d. Ed.), states: "Applying the general principle, especially in regard to the element of notoriousness, courts are found noticing from time

to time a varied array of unquestionable facts. * * *" Said section concludes with the following: "It is the spirit and example of the rulings rather than their precise tenor, that is to be useful in guidance." While we recognize that it is generally not profitable to cite cases wherein judicial notice has been exercised, for each case depends upon its particular facts, still to show the trend of modern decisions and "the spirit and example of the rulings," we present the following: "In September, 1907, the city of Seattle had a population of 242,000 according to the 'review of the resources and industries of Washington' issued under the auspices of the state. At the time of the acceptance of the bid [1909] it had a population of *about 275,000.*" (Italics ours.) In that case (Times Printing Co. v. Star Pub. Co., 51 Wash. 667, 99 P. 1040, 1042, 16 Ann. Cas. 414) the court apparently did not have any published report for the basis of the approximate population in 1909. In re Simpson, 62 Cal. App. 549, 217 P. 789, 792, states: "As shown by the record on appeal, the only fact proven or of which this court can take judicial notice which has been altered since the former proceeding is that the population of Bakersfield has increased from approximately 12,000 inhabitants in 1913 to 18,000 in 1920." Some of the many instances wherein common knowledge is the basis for judicial notice follow: In the Varcoe v. Lee case the court took judicial notice that a certain section of the city of San Francisco was a business district and said: "The character of Mission street is as well known to San Franciscans as the character of Spring street to residents of Los Angeles, or of State street to residents of Chicago, or of Forty-Second street to residents of New York, or of F street to residents of Washington." "It is a matter of common knowledge that a zoning plan of the extent contemplated in the instant case cannot be made in a day, therefore we may take judicial notice of the fact that it will take much time to work out the details of such a plan and that obviously it would be destructive of the plan if, during the period of its incubation, parties seeking to evade the operation thereof should be permitted to enter upon a course of construction which might progress so far as to defeat in whole or in part the ultimate execution of the plan," was said in Miller v. Board of Public Works, 195 Cal. 477, 496, 234 P. 381, 388, 38 A. L. R. 1479. Trial and appellate courts will judicially notice, as being a matter of general knowledge, regions from which bubonic plague originally came. Spreckels v. San Francisco, 76 Cal. App. 267, 244 P. 919. "We may take judicial notice * * * that Chino is a farming district of limited area, and only sparsely settled," was the statement of the court in Johnson v. Ulrey, 201 Cal. 467, 257 P. 505, 510. In Collom v. Bloch, 70 Cal. App. 33, 232 P. 486, 488, the court said regarding a statute requiring reduction of speed at street intersections when the driver's view is obstructed and in a business district that "the court will take judicial notice of the fact that both of these conditions existed at the point of the collision." Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125, 127, notices judicially that certain streets in Los Angeles at certain hours of the day are "usually congested with pedestrians and vehicular travel of all kinds." Watkins v. Pension Board, 91 Cal. App. 548, 267 P. 323, takes judicial notice of the growth of the city of Sacramento and the rapid increase of the use of electrical appliances.

Where exact figures as to population are not essential to the determination, but where jurisdiction depends upon the fact that the population of a political subdivision is in excess of a certain limitation and that "fact" is so clearly beyond the limitation as to be indisputable, and where it is a matter of common knowledge, as herein defined, we are of the opinion that the proof is before the court and we should take judicial notice thereof. We do take judicial notice that the population of San Bernardino township on the date of the offense alleged in the information herein was in excess of thirty thousand.

[8] Respondent urges in furtherance of upholding the judgment herein that if the superior court had no jurisdiction, the appellate court had none. This is without merit. The appellate jurisdiction of this court in criminal matters does not depend upon the jurisdiction of the trial court, but on the fact that a defendant was prosecuted by indictment or information. Article 6, Cal. Const. § 4; People v. Pingree, 61 Cal. 141.

The judgment is reversed, and the superior court is directed to dismiss the action and discharge appellant.

We concur: MARKS, Acting P. J.; BARNARD, J.

J. & W. C. SHULL v. BROOKE et al.

Civ. 4112.

District Court of Appeal, Third District, California.

July 2, 1930.

Rehearing Denied Aug. 1, 1930. Hearing Denied by Supreme Court Aug. 28, 1930.

1. Mechanics' liens ⟹173.

If materials furnished or labor performed are under general contract, liens relate back to commencement of work by general contractor.

2. Mechanics' liens ⟹170.

Where owner builds without general contractor, materialmen's lien dates from furnishing of materials.

In the present case, the building was not constructed under a general contract, but was being built by the owner himself, who made separate contracts with materialmen and laborers.

3. Mortgages ⟹151(3).

Absent general contractor, test regarding priority of mechanic's lien was whether, prior to recording of trust deed, lien claimant had become obligated to deliver materials making up lien.

The question was whether the mechanic's lien in this case was superior or inferior to a deed of trust, there being no general contractor.

4. Mechanics' liens ⟹173.

There being no general contractor, where two deliveries of material are under separate contracts, second lien does not relate back to first delivery.

5. Mortgages ⟹151(3).

Absent general contractor, where materials were delivered under one contract in several lots, whole lien was prior to trust deed recorded after first, but before second, delivery.

The first delivery was made on March 27th, the deed of trust was recorded on March 30th, and subsequent deliveries were made thereafter. The written contract between the owners and materialmen, according to the court's finding upon sufficient evidence, was entered into on or about March 27th, but bore date of April 6th, and deliveries thereunder were made prior to the recordation of the deed of trust.

6. Mortgages ⟹173.

Where court, upon conflicting testimony, found that materialmen had no knowledge of unrecorded trust deed, they were not chargeable with notice (Code Civ. Proc. § 1186).

Code Civ. Proc. § 1186, provides that mechanics' liens are preferred to any lien of which the mechanics' lienholder had no notice, and which was unrecorded at the time the structure was commenced or the material commenced to be furnished.

7. Mortgages ⟹173.

Knowledge that owner has financed building *held* not sufficient to put lien claimant upon inquiry as to existence of unrecorded trust deed (Code Civ. Proc. § 1186).

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by J. & W. C. Shull against W. S. Brooke, the Golden State Securities Company, Title Insurance & Trust Company, Alhambra Hardware Company, and others. From a judgment in favor of plaintiff, named defendants, other than W. S. Brooke, appeal.

Affirmed.

Newby & Newby, of Los Angeles (Dee Holder, of Los Angeles, of counsel), for appellants.

Leslie H. Kranz, of Los Angeles, for respondent.

PULLEN, Justice pro tem.

This is an action to foreclose a mechanic's lien. Judgment was rendered in favor of the lien claimant, J. & W. C. Shull, a corporation, from which judgment Title Insurance & Trust Company, as trustee, and Golden State Securities Company and Alhambra Hardware Company have appealed.

[1, 2] Defendants W. S. Brooke and Blanche E. Brooke were the owners of a parcel of land in the city of Alhambra, and contemplated the erection of an apartment house thereon. To that end they entered into negotiations with respondents J. & W. C. Shull Corporation to furnish certain lumber, doors, hardware, cement, and other building materials. On March 27, 1925, respondents J. & W. C. Shull delivered on the job, upon the order of defendant Brooke, certain lumber which was, prior to the recordation of the trust deed hereinafter referred to, actually used in the building of forms for the concrete foundation of the building, amounting to $78.29. Three days later, or on March 30, 1925, a deed of trust in favor of appellants was placed of record. On April 6, 1925, a so-called written contract was entered into between defendants Brooke and respondents, designating certain described lumber which was to be used in the building, which also included the materials previously furnished on March 27, 1925. The list in the so-called contract totaled some $2,740, and in addition thereto there was purchased from respondents, at the reasonable market value, between March 27 and August 1, 1925, an additional amount of building materials to the

value of $1,830. The apartments were not constructed under a general contract for their erection, but were being built by Brooke, as owner.

The first question raised by appellants under the foregoing facts is one of priority. They contend that their rights, arising under and by virtue of the trust deed, are superior to respondents' as to all material delivered after the date of the recordation of the deed of trust, but inferior to the lien of respondents for all materials delivered by it prior to that date. If the materials furnished or labor performed are under a general contract, then the materialmen and laborers have their liens under the contract, and these liens relate back to the time the building was commenced by the general contractor. On the other hand, as was the situation in the instant case, when the construction of an improvement is at the instance of an owner, as distinguished from a general contractor, then every person furnishing material for the building does so under a separate and distinct contract, and his lien dates from the time he actually furnished the materials or performed the labor. McClain v. Hutton, 131 Cal. 132, 61 P. 273, 63 P. 182, 622.

Appellants contend that at the time of the recordation of the deed of trust respondent was bound by no contract of any kind to deliver to the owner any materials. They urge that the only contract then in existence was the oral contract to deliver the form lumber, which had been done, and therefore, as to any future deliveries, respondent would do so either under a new contract or as a volunteer, and in either position, any claim for materials so delivered would be subordinate to the lien of the deed of trust.

[3-6] The test is whether, prior to the recording of a deed of trust, the lien claimant had become obligated under some contract or agreement, either oral or written, to deliver the materials which went to make up his lien. If the first delivery of form lumber on the job, by respondent, was under an agreement, separate, independent, and distinct from the deliveries subsequent to March 30th, then the lien of respondent could not attach as of the earlier delivery. But the court found, upon sufficient evidence, that on or about March 27, 1925, respondent and defendant entered into a written agreement for certain materials, including the form lumber first delivered upon the job, which agreement bore the date of April 6, 1925, and that deliveries had been made under said agreement prior to the recordation of the deed of trust.

The explanation of the manager of the respondent company, as to the date of the contract, is that the respondent had agreed to supply the building materials prior to March 30th, and when the completed list of materials required were definitely ascertained, he submitted the same, with the prices extended, which was referred to as the "estimate" or contract; and it was upon that testimony the trial court found as already indicated.

Appellants also contend that respondent had actual knowledge or was in possession of information sufficient to put it upon inquiry as to the existence of a deed of trust on March 27th, being three days prior to its recordation. Section 1186 of the Code of Civil Procedure provides: "The liens provided for in this chapter are preferred * * * to any lien, mortgage, or other encumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement, or structure was commenced, work done, or the materials were commenced to be furnished." They claim, as shown by certain testimony in the record, direct knowledge had been brought to the respondent that a deed of trust had been executed, but that testimony is disputed, and the trial court found against that contention, and an examination of the record discloses sufficient testimony to support the findings of the court of lack of actual notice or knowledge.

[7] Appellants urge that knowledge by a lien claimant that an owner of property is compelled to and has financed a building to be constructed upon the premises is sufficient to put such lien claimant on inquiry to ascertain whether or not property which he seeks to hold for payment of materials sold and delivered to the owner is chargeable with any lien, mortgage, or other incumbrance not of record at the time the materials were commenced to be furnished. We do not find the law imposes upon a lienholder any such duty. To argue that the usual or ordinary method of financing construction work is to borrow money upon the premises to be improved, and that such moneys so borrowed will be secured by a mortgage to be thereafter placed of record, and that a materialman with such general information or knowledge is presumed to act at his peril as to the existence of such lien, and cannot safely rely upon the fact that no mortgage is of record in the proper office, would result in delays, uncertainties, and a generally chaotic condition in the building field. A financier about to advance money for the construction of a building can protect himself by inspecting the premises to ascertain if any materials have been delivered on the ground, and, if so, can refuse to make any advances under the contemplated plan, which is far superior to depending upon rumor, custom, or practice.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; THOMPSON, J.

106 Cal. App. 681

In re FELLOWS' ESTATE.

FELLOWS v. FELLOWS et al.

Civ. 7373.

District Court of Appeal, First District, Division 1, California.

June 26, 1930.

1. Husband and wife ⟹262(1).

In absence of contrary evidence, it must be assumed that horses, owned by husband when married 27 years before his death, died, and that tools, implements, etc., then owned by him were discarded, in determining whether his entire estate is community property.

2. Husband and wife ⟹255.

Property partly acquired through separate funds and partly through community funds maintains such classification in proportion to separate and community funds invested.

3. Husband and wife ⟹262(1).

All property so commingled that it is impossible to identify separate and community property will be deemed community property.

4. Husband and wife ⟹270(9).

Proportion of profits from use of separate property and increased values resulting from spouse's ability and activity is for court to determine.

5. Husband and wife ⟹257.

Increased values of separate property, traceable to spouse's ability and activity, is community property.

6. Husband and wife ⟹262(2).

Party contending that property mixed or confused with product of spouse's work or community interests is separate estate has burden of clarifying history thereof and clearly demonstrating that it is separate property.

7. Husband and wife ⟹264.

Widow *held* entitled to deceased's entire estate as community property, in absence of evidence that amount of deceased's bank account when married or amounts subsequently received by devise or descent were used by him in acquiring property of which he died possessed.

8. Landlord and tenant ⟹91.

Renewal of lease is creation of new estate, not mere perpetuation of old one.

9. Husband and wife ⟹262(1).

New leases, created during coverture by renewal of leases to husband before marriage, are presumed to be community property, in absence of contrary evidence.

10. Husband and wife ⟹257.

Income from leased premises from time of lessee's marriage until renewal of leases, which expired after marriage, *held* community property, in absence of evidence that consideration for renewal came wholly or partly from lessee's separate property.

11. Husband and wife ⟹257.

Separate estate of deceased husband, whose separate property was inextricably intermingled with community property, *held* not entitled to apportionment of interest on value of property owned by him at time of marriage and income therefrom during continuance of leases, expiring and renewed after marriage, as profit from capital investment.

12. Husband and wife ⟹276(9).

Administratrix petitioning for distribution of deceased's entire estate to her as widow *held* properly permitted to explain seeming discrepancy in accounts of estate.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

In the matter of the estate of Edmund L. Fellows, deceased. On the petition of Laura E. Fellows, administratrix, for a decree distributing the entire estate to her as deceased's widow, contested by Otis M. Fellows and others. Decree for petitioner, and contestants appeal.

Affirmed.

J. M. Atkinson and F. H. Bloomingdale, both of San Jose, for appellants.

S. G. Tompkins, of San Jose, for respondent.

WARD, Justice pro tem.

This matter came on for hearing in the superior court of Santa Clara county, upon the petition of Laura E. Fellows, administratrix of the estate of Edmund L. Fellows, deceased, praying for a decree of the court distributing the entire estate to herself as surviving wife of the deceased, claiming that all of the said estate constituted community property. Upon the contest to said petition filed on the part of appellants, the claim was made that a substantial portion of the estate consisted of property owned by the deceased at the time of his marriage, and the rents, issues, and profits thereof, thus constituting separate estate, and that contestants were entitled to a distributive share thereof. The court concluded that the entire estate constituted community property of deceased and his surviving wife, Laura E. Fellows, and that she was entitled to have all of it distributed to her.

A decree of distribution was entered accordingly, and it is from this decree that the appeal is taken.

Mr. and Mrs. Fellows were married on the 11th day of July, 1900. Fellows died July 7, 1927. At the time of his death he left estate of the value of over $400,000, as shown by the inventory. At the time of his marriage he owned certain live stock, tools, implements, cash in bank to the extent of $1,311.84, a leasehold interest in certain orchards and ranches, and a small acreage which he subsequently deeded to his wife, and which is not a part of this estate. After marriage he came into possession by devise or succession from relatives of cash in four amounts, aggregating $1,290.92.

[1-7] In the absence of evidence to the contrary, he must be assumed that the horses were lost by death and that the tools, implements, etc., were discarded at some period during the twenty-seven years of married life, as useless. Rough memoranda of various sales of stock, fruit, etc., were kept, but not one of the items comprising the $1,290.92 can be traced to a bank or business venture involving either separate or community property. The cash on hand dwindled from $1,311.84 to $799.51 some eight months after marriage. The leases expired shortly after marriage and subsequently were renewed, though Fellows continued in possession during the period between expiration and renewal. Appellants contend that the leases having been held by the deceased at the date of his marriage in July, 1900, constituted separate property at that time, and that the income from the date of marriage to the dates of the execution of renewals was not community property, and that all incomes from the operation of these various leases constituted separate estate at the time of his death. It is a well-settled rule that property partly acquired through separate and partly through community funds continues to maintain such classification in proportion to the separate and community property invested. If the property is so commingled that it is impossible to determine one from the other, the whole will be deemed to be community property. Estate of Bauer, 79 Cal. 304, 21 P. 759. The proportion of profits arising from the use of separate property and increased values that may occur from the ability and activity of a spouse is a matter to be determined by the court, and whatever may be traced to the latter is community property. If it should appear that separate property has become mixed or confused with the product of the work of a spouse or with community interests of any kind, it is incumbent upon the party contending for the separate estate to clarify the history of the property and to demonstrate, not to an exactitude, but to that degree of proof that clearly and convincingly satisfies an unprejudiced mind, that the property is separate property. Freese v. Hibernia Savings & Loan Society et al., 139 Cal. 392, 73 P. 172. The burden of proof is upon the claimant of the property as separate estate. Applying these rules to the facts in this case, our attention has not been called to any evidence that would warrant the trial judge in finding that the $1,311.84 which deceased had in bank at the time of his marriage or the amounts which were received by devise or descent were used or invested by him in acquiring any of the property of which he died possessed, either directly or by mutation. It is not surprising after twenty-seven years that contestants were unable to trace these items, in view of the condition of the book accounts.

[8-10] The lease interest on the orchard and ranches at the time of marriage was the separate property of the deceased. When these leases were renewed a new consideration was paid, and unless there was evidence to indicate that the consideration came in whole or in part from the separate property, it was impossible for the court to determine what separate estate existed. During the interval between the expiration and renewal of the leases the land was cultivated and the resultant product was in part due to nature and in part to the intelligent application of manual labor to the soil. In the Estate of Pepper, 158 Cal. 619, 112 P. 62, 31 L. R. A. (N. S.) 1092, cited by appellants, the deceased at the time of marriage owned a tract of land. In this case the deceased leased the land and the leases expired shortly after marriage. The renewal of the lease is the creation of a new estate and not a mere perpetration of an old one. In this case the new leases were created during coverture and, unless overcome by evidence to the contrary, are presumed to be community property. The court found, and we think properly, that as to any change or transmutation of the property "which he owned or possessed at the time of his death, the amount thereof cannot be ascertained or determined, and the same, if any, has been so mixed, mingled and confused with the community property as to wholly lose its identity both as to its character and amount."

[11] Appellants contend that if this court should conclude "that the separate property of deceased has become so intermingled with community property that it cannot be definitely traced into the estate left by him at the time of his death, * * * in any event the separate estate should at least be apportioned the interest at lawful rate upon the value of property owned by deceased at the time of his marriage, as well as interest upon income therefrom during the continuance of the leases hereinbefore referred to, and representing capital investment by deceased in carrying on its business," and in support thereof called our attention to the case of Pereira

v. Pereira, 156 Cal. 1, 103 P. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107, in which it was held "where at the time of his marriage a husband has a definite amount of his separate property invested as capital in his business, which he afterwards continues to carry on at great profit, in determining what portion of such profit is community property, it must be presumed, in the absence of evidence to the contrary, that some of the profits were justly due to the capital invested and would constitute his separate property, and that the amount thereof would be equivalent to at least the usual interest on a long investment well secured." In the Pereira Case the husband had a definite amount of his separate property invested as capital in the business.

In this case there was an indefinite, undeterminable interest in a lease that expired and upon which deceased was continuing in possession until a renewal could be obtained. What has been said herein answers appellants' criticism of the findings.

[12] In specifications of errors our attention has been called to certain rulings of the court upon admission of evidence. The witness Scott testified to the sale of an interest in certain leases, but he was not a competent witness to testify as to the value of said leases. The respondent was properly permitted to explain a seeming discrepancy in the accounts of the estate.

The decree appealed from is affirmed.

I concur: TYLER, P. J.; CASHIN, J.

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106 Cal. App. 678

In re HISEY'S ESTATE.

SECURITY-FIRST NAT. BANK OF LOS ANGELES et al. v. HISEY et al.

Civ. 7383.

District Court of Appeal, Second District, Division 2, California.

June 26, 1930.

1. Wills ⚷449.

Court is not permitted, in order to avoid conclusion of partial intestacy, to adopt construction based on conjecture, or to supply omission by rewriting will.

2. Wills ⚷440.

"Intention" to be sought for in construction of will is that which is expressed in language of will, not that in testator's mind.

[Ed. Note.—For other definitions of "Intention," see Words and Phrases.]

3. Wills ⚷577.

Testamentary provision, devising to wife one-half of community property, to which she is entitled "under laws of * * * California," and "remaining one-half" to others, *held* not to include Texas community real property.

It was conceded that, if the will did not apply to Texas community real property, the wife was entitled to the whole proceeds from the sale of timber growing thereon. Testator provided "that my wife shall take a one-half of the community property to which she is entitled under the laws of the State of California, and that the remaining one-half over which I have testamentary disposition be distributed as follows, * * *" and further provided that no bond should be required of the executors "in any jurisdiction."

4. Wills ⚷577.

Community or other real property of California decedent in sister state does not pass "by laws of California", within meaning of testamentary provision.

5. Descent and distribution ⚷4.

Lex rei sitæ governs transmission of land.

6. Wills ⚷579.

Where will devised one-half of real property, passing under California laws, to wife, and then disposed of "remaining one-half," latter disposition applied also to California real estate.

7. Wills ⚷455.

Court cannot expand testator's language to include that which it obviously does not include.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

In the matter of the estate of Allen H. Hisey, wherein the Security-First National Bank of Los Angeles and Minnie Myers Hisey were appointed executor and executrix, respectively.

Petition by Minnie Myers Hisey, opposed by Joseph C. Hisey and others, for distribution to her of certain moneys in the hands of the executors of Allen H. Hisey, deceased. From an order distributing the moneys to her, contestants appeal.

Affirmed.

Arthur Wm. Green, of Los Angeles, for appellants.

Hawkins & Hawkins, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

On July 20, 1927, the last will and testament of Allen H. Hisey was admitted to probate, and the petitioners were appointed executor and executrix thereof. Subsequently the respondent filed her petition for the distribution to her of certain moneys which had come into the hands of the executors from the sale of timber growing on community real property in the state of Texas. The probate court made its order distributing the proceeds of the sale to her, and the devisees named in the will other than the respondent, having contested the petition in the court below, are here upon an appeal from that judgment.

[1-7] The question involves a construction of the last will and testament, the governing portions of which are as follows: "Third: I desire that my wife shall take a one-half (½) of the community property to which she is entitled under the laws of the State of California and that the remaining one-half (½) over which I have testamentary disposition be distributed as follows: One-sixth to my wife, Minnie Myers Hisey." (Here follows three devises of 5/18 each to a brother and two sisters, the appellants.) "Fifth: I hereby nominate, constitute and appoint my wife Minnie Myers Hisey, and Pacific-Southwest Trust and Savings Bank, a corporation, of Los Angeles, California, as Executrix and Executor of this, my last Will and Testament, and I hereby expressly direct that no bond or other security shall be required of said Executrix, or Executor in any jurisdiction to secure the faithful performance of their respective duties."

The appellants direct our attention specifically to the clause "in any jurisdiction," and argue that, when it is considered in conjunction with the presumption against intestacy which ought to apply, it indicates an intention on the part of the testator to dispose of all of his estate. This is the sole ground of appeal, it being conceded by them that, if the will does not dispose of the Texas property, the order was properly made.

We are not permitted nor inclined, however, in order to avoid a conclusion of partial intestacy, to adopt a construction based on conjecture (Estate of Hoytema, 180 Cal. 430, 181 P. 645), nor to supply an omission by rewriting the will. As was said in Estate of Young, 123 Cal. 337, 55 P. 1011, 1013, and quoted with approval in Estate of Blake, 157 Cal. 448–458, 108 P. 287: "The purpose of construction, as applied to wills, is unquestionably to arrive if possible at the intention of the testator; but the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed in the language of the will." So here, when we look to the property which he disposed of by his will there is no room for construction. He says: "[M]y wife shall take a one-half (½) of the community property to which she is entitled under the laws of the State of California." Obviously she could take no part of the community real property in Texas by the laws of California, nor any part of the real property in Missouri by any such right. The rule is so well established and understood that the laws of the state where realty is located, or the lex rei sitæ, govern the transmission of land within the state that it seems superfluous to make reference to authorities announcing the rule. The testator has therefore, first of all carved out from his entire estate his wife's one-half interest in the community property in California. And he then disposes of what? He desires "the remaining one-half (½) over which I have testamentary disposition" to be distributed to his wife and the appellants. What one-half can the language be made applicable to except that which remains after the wife's one-half, according to the laws of California, is deducted? It is plainly different from a devise of the remainder or the rest and residue, and we cannot by some legerdemain or "black art" expand the language used by the testator to include that which it obviously does not include.

Order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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107 Cal. App. 51

PEOPLE v. LEAVERTON.

Cr. 30.

District Court of Appeal, Fourth District, California.

June 30, 1930.

1. False pretenses ⟹43(1).

In prosecution for theft on ground defendant procured money by assignment of conditional sales contracts covering goods not ordered, admission of assignment *held* not error, where signing thereof was expressly authorized by defendant (Penal Code, § 484).

2. Embezzlement ⟹1.
False pretenses ⟹1.
Larceny ⟹1.

Larceny, embezzlement, and false pretenses are merged under single crime of theft (Penal Code, § 484).

3. False pretenses ⟹4.

To constitute offense of "false pretenses," state must prove attempt to defraud, actual

fraud committed, use of false pretenses, and that false pretenses caused owner to part with his property.

[Ed. Note.—For other definitions of "False Pretense," see Words and Phrases.]

4. False pretenses ⟹49(1).

Evidence *held* sufficient to sustain conviction for theft by false pretenses (Penal Code, § 484).

The evidence disclosed that the defendant dealing in electric refrigerators procured money from a finance company by assigning conditional sales contracts covering goods which had never been ordered. The trial court was justified in finding that defendant never intended to make delivery of the property called for in the contracts.

Appeal from Superior Court, Riverside County; George R. Freeman, Judge.

E. E. Leaverton was convicted of grand theft, and he appeals.

Affirmed.

Paul R. Cote, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

CARY, P. J.

The defendant, accused of grand theft, was tried by the court sitting without a jury and found guilty.

The facts follow: April 27, 1929, defendant and one Leeson entered into a partnership under the name of Leeson & Leaverton for the purpose of selling electric refrigerating equipment. Leeson furnished the capital and the defendant furnished the knowledge of the business. A firm bank account under the name of Leeson & Leaverton was opened, with Leeson alone authorized to sign checks. The partnership sold refrigerating equipment on conditional sale contracts. When a sale was made it was the custom of the partnership to assign the contract to the Peoples' Finance & Thrift Company at a discount, under a form of assignment which, in addition to the words of assignment, contained the following: "The undersigned warrants that this agreement was executed in connection with the sale and delivery to, and the acceptance by, the buyer named therein, of the property therein described and that there is now owing thereon the amounts as set forth therein." June 29, 1929, Leeson and defendant agreed orally that the partnership be dissolved as of July 1, 1929. On July 1, 1929, Leeson signed a number of checks in blank to be used in the future, and thereafter had no further connection with the business. Beginning July 9, 1929, Mrs. Bayrich, a clerk in defendant's office, was authorized to sign checks on this account still carried in the name of Leeson & Leaverton.

The acts leading up to the defendant's prosecution were as follows: July 5, 1929, the defendant took to the Peoples' Finance & Thrift Company two conditional sales contracts for refrigerating equipment. These were each dated July 3, 1929, and on the back of each was the form of assignment which included the words quoted above. The assignment on one contract bore the signature of defendant, while on the other the signature of defendant had by his direction been written by a clerk in his office. The Peoples' Finance & Thrift Company purchased these contracts from defendant, giving the defendant two checks made out to Leeson & Leaverton, totaling $502.84, in payment therefor. The checks received were deposited in the bank account of Leeson & Leaverton, the name of the account not having been changed upon the dissolution of the partnership. This money was disbursed by checks drawn against the account signed by Mrs. Bayrich for the payment of bills against the business, and it was also used in part to pay some personal expenses of the defendant. The Peoples' Finance & Thrift Company in due course notified the purchasers under the two conditional sales contracts that the installment payments provided for should be paid directly to the finance company. Upon failure to receive the payment an investigation was made by the finance company, which developed the fact that, while each of the contracts was genuine, yet the property described in the contracts had never been delivered to the purchasers, nor had the property called for ever been ordered by defendant from the distributors in Los Angeles. The purchasers under these contracts were both called as witnesses. One of them, who had made the initial payment on his contract to defendant when the contract was signed, testified that after waiting some three weeks for the goods he called up defendant, who informed him they were on the floor of defendant's office being tested. The purchasers visited the defendant's office in the defendant's absence and found that the goods were not there. Defendant, on the stand, attempted to explain his failure to order the goods from the distributor in Los Angeles and his failure to deliver the goods to the purchasers, but when pressed for direct explanations his answers were such as amply to sustain the conclusion reached by the trial court that defendant had never intended to make delivery of the property called for in the contracts.

[1] The two points raised by appellant are that the court erred in admitting in evidence the assignment signed by the defendant's

clerk, and that the evidence is insufficient to sustain the judgment.

As to the admission of the assignment, the signing of his name having been expressly authorized by defendant, a sufficient foundation was thus laid for its introduction in evidence.

[2] The definition of the crime of theft as given in section 484 of the Penal Code in effect merges under the single crime of theft the former separate crimes of larceny, embezzlement, and obtaining money by false pretenses. People v. Plum, 88 Cal. App. 575, at page 582, 263 P. 862, 265 P. 322.

[3, 4] The facts here constitute what was formerly known as obtaining money by false pretenses. The essential elements of that crime are set forth in People v. Rose, 42 Cal. App. 540, at page 546, 183 P. 874, 876, as follows: "'To constitute the offense charged, four things must concur and four distinct averments must be proved: (1) There must be an intent to defraud; (2) there must be actual fraud committed; (3) false pretenses must be used for the purpose of perpetrating the fraud; and (4) the fraud must be accomplished by means of false pretenses made use of for the purpose, viz.: They must be the cause which induced the owner to part with his property.'"

We have carefully read the entire transcript and are satisfied that all of the essential elements are shown in the evidence. The judgment is, therefore, affirmed.

We concur: MARKS, J.; AMES, Justice pro tem.

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106 Cal. App. 507

In re LLOYD'S ESTATE.

RUTHERFORD et al. v. LLOYD et al.

Civ. 7186.

District Court of Appeal, Second District, Division 2, California.

June 17, 1930.

Rehearing Denied July 16, 1930. Hearing Denied by Supreme Court Aug. 11, 1930.

1. Wills ⟹439.

Will must be construed according to testator's intention (Civ. Code, § 1317).

2. Wills ⟹450.

Testator's intention must be gathered by construing all parts of will in relation to each other so as to form consistent whole, if possible (Civ. Code, § 1321).

3. Wills ⟹527.

Where will provided that excess over legacies should be "divided and distributed among" legatees named in certain numbered subdivisions, *held*, distribution must be to such legatees in proportion to amounts of their legacies.

The will provided, inter alia, that, "if there shall remain for distribution after my wife shall have received her share of my estate * * * a sum in excess of the aggregate amount of all other legacies, * * * the residue shall be divided and distributed among the legatees named under subdivisions fourth, fifth, seventh, tenth and twelfth." Some of these legatees were brothers and sisters, some nephews, some cousins and their children, and some strangers. The legacies varied in amount from $500 to $25,000.

[Ed. Note.—For other definitions of "Divide" and "Distribute," see Words and Phrases.]

4. Taxation ⟹856.

Inheritance Tax Act is purely taxation statute (Deering's Gen. Laws 1923, Act 8443).

5. Taxation ⟹895(9).

Proceeding for taxation of estates under inheritance tax act *held* not conclusive on questions other than taxation, as regards construction of will (Deering's Gen. Laws 1923, Act 8443).

Some of the legatees contended that the court, in ordering distribution of the estate of testator, is bound by its construction of the will in making an order determining the inheritance tax.

6. Judgment ⟹632.

Bar of former adjudication can only be raised between parties in former suit.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Petition by Charles E. Rutherford and others for partial distribution of the estate of Charles Lloyd, deceased, opposed by James A. Lloyd and others. From a decree directing partial distribution, Charles E. Rutherford and others appeal.

Affirmed.

Fry & Jenkins, of San Jose, for appellants.

Farrand & Slosson, of Los Angeles, for respondent Marine Refining Corporation.

Lee D. Mathews, of Los Angeles, for respondents James A. Lloyd, Robert P. Lloyd, and Jemima Elliott.

Jackson Hayes, of Los Angeles, for respondent Charles Lloyd.

Gibson, Dunn & Crutcher, of Los Angeles, for respondent Pan American Petroleum Co.

Barker & Keithly, of Los Angeles, for executors.

IRA F. THOMPSON, J.

[1-3] This is an appeal from a portion of a decree of partial distribution. The construction put by the probate court upon the fourteenth paragraph of the last will and testament of the decedent is the subject of appellants' attack. The latter part of the paragraph reads as follows: "If there shall remain for distribution after my wife shall have received her share of my estate, as above provided, or provision shall have been made therefor, a sum in excess of the aggregate amount of all other legacies, then and in such event, after the payment of all debts, expenses of administration and federal estate taxes and the discharge of all other bequests, the residue shall be divided and distributed among the legatees named under subdivisions fourth, fifth, seventh, tenth and twelfth." The question concerned whether the distribution should have been made to the legatees named in these paragraphs equally or in proportion to the amounts of legacies given to them in the subdivisions mentioned. The trial court determined that the latter method was the one intended by the testator. The legacies of paragraphs 4, 5, 7, 10, and 12 vary in amounts from $500 to $25,000. By the fourth the testator gave $10,000 to one of his sisters and $25,000 to each of two brothers. In the fifth he left $25,000 to a nephew, the son of a deceased brother. Under the provisions of paragraph 7, decedent bequeathed to thirteen cousins sums ranging from $1,000 to $5,000 each, and to two daughters of one and four children of another the amount of $500 each. The legatees named in the paragraph just mentioned, or their representatives, are the appellants here, while the respondents are the sister, two brothers, and nephew of a deceased brother and his assignees. By paragraphs 10 and 12 the testator gave $5,000 to each of three strangers to the blood, one of whom was an employee. Altogether by virtue of these five paragraphs $137,500 was to be distributed, $85,000 to four persons (one sister, two brothers, and a son of a deceased brother), and $52,500 to twenty-two people (thirteen cousins, six children of cousins, and three strangers).

Section 1317 of the Civil Code says in part that "a will is to be construed according to the intention of the testator," which intention is arrived at by construing all of the parts of a will in relation to each so as to form, if possible, a consistent whole. Civ. Code, § 1321. That this is the primary purpose of all interpretation of wills there can be no possible doubt. Estate of Peabody, 154 Cal. 173, 97 P. 184; Estate of Henderson, 161 Cal. 353, 119 P. 496; Estate of Spencer, 203 Cal. 424, 264 P. 765. The trial court evidently applied this rule to the present will, with the result already noticed. There is nothing in the particular language under consideration which compels us to the conclusion that the testator desired all of the residuary legatees to share equally or otherwise in the residue, but, when we look to the remainder of the will, his intention is unmistakable. Had he desired that they should share alike in his bounty, why he did he fix the specific bequests in such varying sums? It is obvious that he doubted whether there would be a residue after payment of the bequests already provided, because he says: "If there shall remain for distribution * * * a sum in excess of the aggregate amount of all other legacies, then and in such event * * * the residue shall be divided," etc. Why, if he was in doubt concerning any balance remaining, and he was desirous of placing these relatives and strangers on the same basis, did he not consider the amount of the specific legacies a residue and divide it share and share alike? He fixed in his own mind the relative nearness to him of the objects of his bounty by designating a specific amount which each should have, and, unless we are to do violence to his intention, we must follow the measurement laid down by him for the disposal of that which he doubted would remain. As a further indication of the intention of the testator to make bequests to the legatees in proportion with the amounts designated, we also direct attention to the first portion of paragraph 14, reading as follows: "If the one-half of my estate remaining after the payment of debts, expenses of administration and federal estate taxes should be insufficient for the payment in full of all of the legacies for which provision is hereinbefore made, then and in such event the amount necessary to make up the full sum of four hundred thousand dollars for my said wife shall be first taken in full from the part of the estate over which I have testamentary disposition, *and the amount of each other legacy hereunder* shall be proportionably reduced."

Here is unmistakable evidence of the mind of the testator. It is to be noted that the testator's wishes and the proportional method of distribution coincide with what we may assume were his natural affections; the sister and brothers being given a much larger share than his cousins. This construction, we think, is in accord with a similar one in Estate of Morrison, 138 Cal. 401, 71 P. 453. In that case the testatrix had given to a sister, two daughters of the sister, and a brother, each $5,000. The residue, according to the will, was "to be divided between my sister Mrs. Wann and her daughters and my brother. * * *" The argument made

was that the sister and daughters should take one-half and the brother one-half. But the court rejected this contention in this language: "Not only were these bequests of specific amounts to persons specifically named, but the amount given to Mrs. Wann, and to each of her daughters and her brother, was the same; and having thus given these four persons, as distinct individuals, the same amounts, we may fairly infer that in disposing of the residue she did not intend to disturb that equality, but did intend that they should share equally." Paraphrasing these words by way of applying them to the instant cause, we can say: "Having thus given these 26 persons, as distinct individuals specific amounts, we may fairly infer that in disposing of the residue the testator did not intend to disturb the proportion thus fixed, but did intend that they should share in the residue in the same proportion that they shared the specific bequests."

Our attention has been directed to the cases of Haskell v. Sargent, 113 Mass. 341, and Angus v. Noble, 73 Conn. 56, 46 A. 278, 279, both of which support the view we entertain. In the first of these, the testatrix had devised a parcel of property to a niece, and another piece of realty was given to two children of a nephew. Another clause in the will read that she gave "to the legatees heretofore named in the first and second articles of this will, all of the land I own north of the rear house, and north of the lane, to be equally divided between said legatees." The question was, Did the children of the nephew take one-third or one-fourth of this last devise. In disposing of the contention that they shared equally with the niece, the court said: "The reference to the first and second articles of the will, we think, must be taken to signify some other purpose than merely to point out the individuals to be benefited. It indicates that this gift is something additional to the former one; and that *the testatrix had in mind the relations and order of disposition which had before been set forth.*" (Italics ours.) In the second case the testatrix provided certain specific legacies in the form of annuities differing in proportion from the rule provided by the statute of distribution, and then said that, if there were any surplus, it was "to be divided among the heirs." The opinion uses these words: "She had given her brothers much less than was to go to a niece, and to two of her nephews much more than to two others. In this way one of the four collateral stocks of descent, between which her estate, had she left no will, would have been equally divided, is annually to receive more than the other three put together. *This general intention* must control the effect of the provision in clause 8 for a division among the heirs. Taking, not as heirs, but as purchasers, and having been treated as purchasers unequally in the previous clauses of the will by which the bulk of her property was distributed among them, it must have been her intention that the annual surplus, if any there was, should be divided in similar proportions; and we think, taking the whole will together, that this intention is sufficiently expressed." (Italics ours.) We are not impressed with the argument of appellants that the trial court must have constructed and written into the will a formula or mathematical proportion in order to adopt the construction it did. Rather the testator fixed the proportion and the court applied it in accordance with his apparent intention.

[4-6] The appellants also assert that the court could not adopt the construction resulting in the partial decree of distribution, because, having previously made an order determining the inheritance tax on the basis of a one twenty-sixth or equal distribution of the residuum to the residuary legatees, the manner of distribution was res judicata. A reference to the "Inheritance Tax Act" (Deering's Gen. Laws 1923, p. 3501, Act 8443) demonstrates that it is purely a taxation statute, and, while the inheritance tax appraiser, for the purpose of making his report as therein provided for, must of necessity determine the several interests in the estate of the decedent for the purpose of computing the tax upon "any property passing" therein, it can hardly be said that the proceeding should be conclusive upon any question other than that of taxation. Certainly the Legislature never had such a thought in mind, and it is to be doubted if any of our courts ever entertained such an opinion. While the question has not, to our knowledge, been raised heretofore in California, it has been discussed by the New York courts, where there exists a statute very similar to our own. In Re Burger's Estate, 123 Misc. Rep. 308, 205 N. Y. S. 220, 223, the tax appraiser reported that certain legatees could not take under the will, as a matter of law, and hence the legacies became a part of the residuary estate. This report was confirmed by the order of the court fixing the tax, and the executors contended that the order stood as the settled law of the case, "irrespective of who was a party thereto." The court replied: "It is obviously necessary to determine this question first, and it is my opinion that the claim is untenable, and that the order in a transfer tax proceeding is binding on questions of taxation only, and is not conclusive upon the right of a legatee or devisee named to have the question of the validity of a bequest or devise determined upon a proceeding to judicially settle the estate. Matter of Ullmann, 137 N. Y. 403, 33 N. E. 480; Amherst College v. Ritch, 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305." In the cited case of Amherst College v. Ritch, where a similar contention was under consideration, the

court said: "The decree of the surrogate should be construed solely with reference to that object, and, as thus construed, the adjudication was that, for the purposes of taxation under the act in question, a certain amount of property passed to the residuary legatees under the will. Legitimate inquiry necessarily stopped at that point; for it was immaterial, so far as that statute was concerned, whether the fund became impressed with a trust after it reached the residuary legatees, as the tax would be the same whether it did or not. They took the legal title, as we have held; and hence their legacy was subject to taxation, without reference to what it became their duty to do with it. The adjudication was necessarily limited to the subject of taxation, and, if conclusive at all as a bar, it was not conclusive upon the rights of the parties arising from matters outside of the will. The surrogate was acting simply as an assessing and taxing officer, and represented the state for those purposes. In re Wolfe, 137 N. Y. 205, 211, 33 N. E. 156." This further reason should be noted for our conclusion that the order fixing tax should not be held to be controlling. The proceeding which culminated in the order was not one in which the parties here were adversaries. It is a well-recognized principle of law that the bar of former adjudication can only be raised between those who were parties in the former suit. Robson v. Superior Court, 171 Cal. 588, 154 P. 8, and Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243.

Decree of partial distribution affirmed.

We concur: WORKS, P. J.; CRAIG, J.

PETERSEN v. BECKWITH.

Civ. 6937.

District Court of Appeal, First District, Division 2, California.

June 27, 1930.

Rehearing Granted July 25, 1930.

1. Limitation of actions ⟹180(7).

Nonsuit was properly granted as to cause of action manifestly barred by limitations.

2. Limitation of actions ⟹100(1).

Statute of limitations could not support nonsuit as to cause of action for fraud discovered only within few months of institution of action.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Alfryda Petersen against Ward M. Beckwith. Judgment of nonsuit, and plaintiff appeals.

Reversed.

Resleure & Hill, of San Francisco, and W. H. Hollander, of Oakland, for appellant.

Ford, Johnson & Bourquin, of San Francisco, for respondent.

PER CURIAM.

Plaintiff sued for damages in a complaint setting up two separate causes of action. Trial was had before a jury, and, at the close of plaintiff's case, the trial court granted defendant's motion for a nonsuit. The plaintiff appealed and filed her transcript on May 31, 1929. Her opening brief was filed on November 27, 1929. No brief having been filed by the defendant the cause was placed upon the calendar of this court for June 9th of this year, and notice was served upon the defendant to appear at that time and show cause why the judgment should not be reversed. The defendant to this date has not appeared to defend the judgment.

[1] The first cause of action was for damages for malpractice, the second was for damages for fraud. In May, 1924, plaintiff fell and broke her leg. She called in defendant who had been her family physician for some six or seven years. He so negligently treated and advised her that the bone failed to heal and she suffered a permanent injury. Though the evidence conclusively showed negligence on defendant's part the first cause of action was manifestly barred by the statute of limitations and the nonsuit was properly granted as to the first cause of action. See Johnson v. Nolan (Cal. App.) 288 P. 78.

[2] The second cause was based upon allegations of fraud and misrepresentations. The complaint alleged, and the evidence showed, the confidential relation existing between plaintiff and defendant, the reliance of plaintiff in the judgment and advice of the defendant, and the misrepresentations made to plaintiff by defendant as to the treatment which had been given her injured limb. It was alleged and proved that defendant knew that these representations were false, also that they were made for the purpose of deceiving plaintiff and to keep her from calling in other physicians who would discover defendant's negligence. The injury arising from the alleged fraud was shown to be the permanent deformity and pain in the leg which could not be properly cured because of the long delay in treatment—a delay which it was shown was caused solely by plaintiff's reliance upon the misrepresentations of the defendant. To forestall the plea of the statute of limitations as to this cause of action, the plaintiff pleaded and proved her discovery

of the fraud within a few months of the institution of the action, hence the statute could not support a nonsuit as to this cause.

Upon the ground specified in the motion, the failure of the evidence to show fraud on defendant's part in concealing the condition of plaintiff's leg, the evidence proves every essential element of the complaint.

The judgment is reversed.

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106 Cal. App. 686

PEOPLE v. FIDELITY & DEPOSIT CO. OF MARYLAND.

Civ. 101.

District Court of Appeal, Fourth District, California.

June 26, 1930.

Bail ⟹55.

Where magistrate held accused to answer, and bail bond was approved twelve days later, surety was liable for accused's nonappearance (Pen. Code, §§ 875, 883, 1277, 1278).

Pen. Code, § 875, provides that if offense is bailable, order fixing bail must be added by magistrate to order holding defendant to answer, and section 883 requires magistrate to return undertakings of bail, etc., to clerk of court at which defendant must appear. Under section 1277, admission to bail, which is defined by section 1268, may be by magistrate by whom defendant is held to answer; and form of undertaking is prescribed by section 1278. Other statutes referred to by the court were sections 869, 872, 1269, and 1273, subd. 2.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the People of the state of California against the Fidelity & Deposit Company of Maryland. From an adverse judgment, defendant appeals.

Affirmed.

Curtis Hillyer, of San Diego, for appellant.

Stephen Connell, Dist. Atty., and E. I. Kendall, Deputy Dist. Atty., both of San Diego, for the People.

MARKS, J.

On May 19, 1927, one J. M. Macbeth was held to answer to the superior court of San Diego county on a charge of grand larceny by a justice of the peace of San Diego township, sitting as a committing magistrate, and his bail fixed at $1,000. On May 31, 1927, and before the filing of the information in the superior court, appellant executed a bail bond for Macbeth in the form prescribed in section 1278 of the Penal Code, which was presented to the committing magistrate, who approved the same and ordered the release of Macbeth on the same day. He was released from custody by the sheriff of San Diego county. The bond was filed with the county clerk on June 1, 1927. Macbeth was regularly arraigned in the superior court and entered a plea of not guilty. He did not appear for trial, and the bond was forfeited.

This action was instituted in the court below to recover the principal sum named in the bond as its penalty. The answer admitted all of the material allegations of the complaint, except the indebtedness of appellant to respondent, and set up the affirmative defense that the committing magistrate had no jurisdiction to accept the bond. Judgment was rendered for respondent on the pleadings, and the case comes before this court on the judgment roll. The sole question to be determined here is whether the acceptance and approval of the bond by the committing magistrate, twelve days after he had held Macbeth to answer, rendered the undertaking void.

If, at a preliminary examination, it appears that a public offense, coming within the jurisdiction of the superior court, has been committed, and that there is probable cause to believe the defendant guilty thereof, he must be held to answer. Section 872, Pen. Code. If the offense is bailable, an order that the defendant be admitted to bail in a fixed amount must be added by the magistrate to the order holding him to answer. Section 875, Pen. Code. Where a defendant is held to answer it is the duty of the magistrate to "return * * * to the clerk of the court at which the defendant is required to appear, the warrant, if any, the depositions, and all undertakings of bail." Section 883, Pen. Code. Where the proceedings at the preliminary examination are taken by a reporter, he is given ten days in which to transcribe his notes and file such transcription with the county clerk. Section 869, Pen. Code. It is clear that the order admitting to and fixing the amount of bail is made after the defendant is held to answer. It also follows that the approval of a bail bond and the order of release must occur after fixing the amount of bail.

Admission to bail is the order that the defendant be discharged from custody upon bail. Section 1268, Pen. Code. The taking of bail is defined by section 1269 of the Penal Code, and the nature of the bail, applicable to this case, by subdivision two of section 1273 of the same Code. The form of the undertaking is prescribed by section 1278 of the Penal Code, which provides that the surety must undertake that the defendant "will appear and answer the charge above mentioned, in whatever court it may be prosecuted, and will at

all times hold himself amenable to the orders and process of the court." Section 1277 of the Penal Code provides as follows: "When the defendant has been held to answer upon an examination for a public offense, the admission to bail may be by the magistrate by whom he is so held, or by any magistrate who has power to issue the writ of habeas corpus."

From the foregoing we can find no reason for holding that the committing magistrate cannot take and approve a bail bond after the defendant was held to answer and before an information be filed in the superior court. In the case of People v. Follette, 74 Cal. App. 178, 240 P. 502, 520, two defendants were held to answer by a magistrate on March 5, 1923, and their bail was fixed. On April 17, 1923, purported bonds were presented to the magistrate, approved by him, and the defendants released. Under these circumstances the court held: "Section 1277 of the Penal Code provides that 'the admission to bail may be made by the magistrate by whom he is so held, or by any magistrate who has power to issue the writ of habeas corpus.' Section 1280 provides that 'the bail must in all cases justify by affidavit taken before the magistrate,' etc. And the provisions of section 1281 are that 'upon the allowance of bail and the execution of the undertaking, the magistrate must, if the defendant is in custody, make and sign an order for his discharge.' From these sections of the Code it is apparent that it is the intent of the law that the magistrate admitting the defendant to bail is the only one before whom the bail may justify, and the only magistrate authorized to make and sign the defendant's discharge upon the allowance of bail and the execution of the undertaking."

The case of State v. Lagoni, 30 Mont. 472, 76 P. 1044, is directly in point. Section 2350 of the Penal Code of Montana is similar in language to section 1277 of our Penal Code. In this case the Supreme Court of Montana held that the committing magistrate could approve a bail bond after he had certified his proceedings to the district court.

The action before us is based upon contract. The consideration for the contract was the release of Macbeth from custody. One of the conditions of the contract was his appearance before the superior court for trial. In case of a breach of this condition, appellant promised to pay the principal sum of the bond. Macbeth did not appear for trial and under the terms of this contract appellant became indebted to respondent in the sum of $1,000. The obligation of appellant must be measured by the terms of its contract. Hill v. New Amsterdam Casualty Co. (Cal. App.) 286 P. 1103. "Moreover, the examination of sureties or formal approval of a bond is not a part of the contract entered into by the sureties. 3 Cal. Jur. 1059; Carpenter v. Furrey, 128 Cal. 666, 61 P. 369." County of Los Angeles v. Grannis, 88 Cal. App. 391, 263 P. 835, 836. Under the facts of this case appellant must be held to the terms of its contract.

Judgment affirmed.

We concur: CARY, P. J.; AMES, Justice pro tem.

LAUCHERE v. LAMBERT et al.*

Civ. 6909.

District Court of Appeal, First District, Division 2, California.

June 19, 1930.

Rehearing Denied July 17, 1930.

Hearing Granted by Supreme Court Aug. 18, 1930.

1. Appeal and error ⟹854(6).

On appeal from order granting new trial, not specifying any grounds, if any ground specified in motion would justify order, it must be affirmed.

2. Appeal and error ⟹1078(6).

On appeal from order granting new trial, failure of respondents to mention grounds which might sustain order justifies assumption that they have been abandoned.

3. Appeal and error ⟹933(4).

Order granting motion for new trial "as prayed" did not exclude statutory presumption as to ground of order (Code Civ. Proc. § 657).

Under Code Civ. Proc. § 657, it is presumed that order granting new trial was not based on ground that evidence was insufficient to sustain verdict unless order so specifies.

4. Appeal and error ⟹933(4).

Where order granting new trial specified no grounds, nunc pro tunc order *held* not to exclude statutory presumption (Code Civ. Proc. § 657).

The nunc pro tunc order recited that court stated in open court that evidence was insufficient to justify the verdict.

5. New trial ⟹163(1).

Where order granting new trial specified no grounds, court could not, more than seven months after order was made, amend it without notice (Code Civ. Proc. § 473).

Code Civ. Proc. § 473 authorizes court to relieve party from judgment, order, or proceeding, taken against him through mistake, inadvertence, surprise, or excus-

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 291 P. 412.

able neglect, but provides that application must be made within a reasonable time and in no case exceeding six months.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Jules Lauchere against Charles G. Lambert and another, doing business as Lambert & Walter, for damages for fraud. From an order granting a new trial after a verdict for plaintiff, plaintiff appeals.

Reversed, with directions.

See, also, 282 P. 978.

Jackson & Peterson and Clell H. McCredie, all of San Francisco, for appellant.

Ross & Ross, of Redwood City, for respondents.

NOURSE, P. J.

Plaintiff sued for damages in fraud. The cause was tried before a jury and resulted in a verdict in favor of plaintiff for $1,500. The defendants' motion for a new trial was granted, and from that order the plaintiff has appealed on typewritten transcripts.

Briefly, the facts upon which the verdict was returned are that in July, 1922, plaintiff entered into a written agreement with one Waterman for the purchase by plaintiff of real property situated in Redwood City; in April, 1924, plaintiff executed a written agreement to sell his interest in the property to Diehl; that, at some time between these two dates, Waterman transferred all his interest to the defendants; that, from May, 1924, under arrangements made at the time, defendants collected the installment payments from Diehl and applied them to plaintiff's contract with Waterman; that, after these collections had been made and applied in this manner for about two years, the defendants, without notice of any kind to the plaintiff, purchased Diehl's interest in the contract, and then, the defendants being both seller and purchaser, all payments ceased. The plaintiff having failed to place of record his contract of purchase, the defendants deemed the title clear and sold the property for a consideration to a third party. During the trial the plaintiff offered to prove a tender of the balance due under the contract, but, upon objection of the defendants, the court rejected the evidence.

[1, 2] Following the verdict for the plaintiff, the defendants moved for a new trial on all the statutory grounds. They did not support their motion with affidavits or otherwise, and, on this appeal, they do not defend the order on any ground other than the one covering the sufficiency of the evidence. Manifestly, if any single ground would justify the order granting the new trial, that order must be affirmed, but we have examined the record with care and are satisfied that (except for the matter of the evidence) the record is free from error, and that the order cannot be sustained upon any of those grounds. We may add that from respondents' failure to even mention any one of these grounds which in their opinion might sustain the order we may assume that they have abandoned them.

The order granting a new trial was made on February 21, 1929, and read as follows: "It is ordered that said motion be and the same is hereby granted as prayed." It appears undisputed in the record that, at the time the order was made, counsel for appellant in open court requested the court to specify the grounds upon which the motion was granted, and that the court replied: "I will not specify any grounds and will let the order stand as it is." Thereafter, and on September 20, 1929, without notice to appellant and without giving him an opportunity to be heard, the court made a new order to be entered nunc pro tunc as of February 21, 1929, reading: "The court in open court stated its views in said matter and particularly stated that the evidence was insufficient to justify the verdict."

[3, 4] The difference between the parties on this appeal hinges upon the validity of this new order. Its importance is manifest because, under the provisions of section 657, Code of Civil Procedure, it will be presumed that the order granting a new trial was not based upon the ground that the evidence was insufficient to sustain the verdict unless "the order shall so specify." It is manifest that neither the first nor the second order did "specify" that the motion was granted on that ground. The uncontradicted evidence that at the time the order was made the trial court expressly refused to specify the grounds and the recital seven months later in the nunc pro tunc order that the court merely expressed the view that the evidence was insufficient does not bring the case within the rule of the Code section. The order which was made and entered at that time recited that the motion was "granted as prayed for." It may be that, because the insufficiency of the evidence was one of the grounds mentioned in the motion, the trial court deemed its order "as prayed for" was sufficient to indicate that the motion was granted on that ground, but the Code section requires that this ground must be specified in the order, and that has not been done.

[5] Aside from this, we are convinced that the trial court was without jurisdiction to amend its order at the time. Seven months had passed since the original order was made. Less than two months after the original order the transcript on appeal containing that order was presented to the trial judge and he certified it to be correct. At the same time the order was called to the attention of counsel for respondents, but they made no move to

correct it until after the six months' period had expired.

The rule of law involved is stated in Scamman v. Bonslett, 118 Cal. 93, 97, 50 P. 272, 274, 62 Am. St. Rep. 226: "Any error or defect in a record, occurring through acts of omission or commission of the clerk in entering, or failing to properly enter, of record the judgment or proceedings of the court,—in short, what may be termed 'clerical misprisions,'—may, the record affording the evidence thereof, be corrected at any time by the court upon its own motion, or on motion of an interested party, either with or without notice. Where, however, an inspection of the record does not show the error, and resort must be had to evidence aliunde, courts will require notice to be given of a motion to amend a judgment to the parties to be affected thereby; and a motion for the amendment of a judgment in such last-mentioned case must, under section 473 of the Code of Civil Procedure, be made within six months. * * * People v. Greene, 74 Cal. 400, 16 P. 197, 5 Am. St. Rep. 448; Hegeler v. Henckell, 27 Cal. 495; Bostwick v. McEvoy, 62 Cal. 502; Wharton v. Harlan, 68 Cal. 422, 9 P. 727." If the nunc pro tunc order is to be treated as a correction of the judge's certificate to the transcript (in lieu of a bill of exceptions or statement of the case), the same rule would apply. Fountain Water Co. v. Superior Court, 139 Cal. 648, 651, 73 P. 590. Respondents do not attempt to defend the order of September 20th on any other ground than that every court has the inherent right to cause its records to correctly set forth its proceedings. There is no quarrel with this position, if, as pointed out in the Scamman Case, the error is the error of the clerk and is apparent in the record. But, if the error is the error of the court, then the record speaks the truth when it discloses the error, and the order then can be modified only on motion in the manner stated.

The reason for the rule is emphasized by the case at hand. If appellant had been given notice of the motion and had been given an opportunity to demonstrate to the trial court that there was no inadvertence on the part of the clerk, then the motion to modify the original order should have been denied. When the law specifies the rights of the parties which cannot be altered except by a day in court, an ex parte order, made without notice or hearing, which deprives one of those parties of his substantial rights, is beyond the jurisdiction of the court to make.

The order is reversed, with directions to the trial court to enter judgment on the verdict.

We concur: STURTEVANT, J.; BURROUGHS, Justice pro tem.

107 Cal. App. 55

MONSON et al. v. FISCHER.

Civ. 7457.

District Court of Appeal, First District, Division 1, California.

July 1, 1930.

1. Appeal and error ⟹891.

Purpose of statute authorizing appellate courts to take additional evidence is not to procure making of findings contrary to those of trial court in order to reverse judgment (Code Civ. Proc. § 956a).

The purpose of Code Civ. Proc. § 956a is "that wherever possible causes may be finally disposed of by a single appeal and without further proceedings in the trial court, except where the interest of justice requires a new trial."

2. Appeal and error ⟹891.

Where findings by trial court were based on conflicting testimony, appellate court denied application to take additional evidence upon issues as to which trial court's findings were against appellant (Code Civ. Proc. § 956a).

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Action by Olof Monson and another, copartners, doing business under the firm name and style of Monson Brothers, against Martha W. Fischer. From the judgment, defendant appeals. On application by appellant for an order to take additional evidence on appeal.

Application denied.

Percy E. Towne, Peter A. Breen, and Richard tum Suden, all of San Francisco, for appellant.

Leicester & Leicester and Norman A. Eisner, all of San Francisco, for respondents.

PER CURIAM.

[1, 2] Appellant has filed an application in this court for an order to take additional evidence upon issues as to which the findings of the trial court were against her.

The motion is based on the provisions of section 956a of the Code of Civil Procedure. The purpose of the section, in conferring upon appellate courts the power to take additional evidence, is "that wherever possible causes may be finally disposed of by a single appeal and without further proceedings in the trial court, except where the interest of justice requires a new trial."

The testimony upon which the findings were based was conflicting, and the object of appellant is to procure the making of findings con-

trary to those of the trial court, in order that its judgment may be reversed. As held in the following cases, this is not the purpose of the section: Tupman v. Haberkern (Cal. Sup.) 280 P. 970; Estate of Wirt (Cal. Sup.) 277 P. 118; First National Bank of Findlay v. Terry (Cal. App.) 285 P. 336, and the application is accordingly denied.

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106 Cal. App. 473

HARDIN v. SUTHERLAND et al.

Civ. 226.

District Court of Appeal, Fourth District, California.

June 16, 1930.

1. Negligence ⚷6.

Failure of person to perform statutory duty is negligence per se.

2. Negligence ⚷82.

Negligence in failing to perform statutory duty proximately contributing to injury precludes recovery.

3. Negligence ⚷121(1).

Presumption of negligence for failure to perform duty imposed by law may be overcome by evidence that failure was justifiable.

4. Automobiles ⚷245(60).

Whether violation of statute regarding distance in following another automobile was proximate cause of collision with automobile stage in rear when stopping *held* fact question (St. 1923, p. 558, § 127, subd. a).

Cal. Vehicle Act, § 127, subd. a (St. 1923, p. 558) provides that driver of motor vehicle shall not follow another vehicle closer than 15 feet. Defendant's motor stage was in rear of automobile in which plaintiff was riding, and, when driver of latter automobile stopped, the motor stage collided with automobile.

5. Appeal and error ⚷197(5).

Objection defendant could not be compelled to combat theory of contributory negligence because not pleaded could not be raised for first time on appeal.

The court's order authorizing an amendment to conform to proof was made without objection.

6. Automobiles ⚷172(6).

Stop light signal on automobile did not excuse motorist for failure to extend hand when stopping, where it was not shown device had been approved (St. 1923, p. 558, § 130, subds. a and b, as amended by St. 1925, p. 412, § 15a).

7. Automobiles ⚷245(60).

Whether driver's failure to extend hand when stopping was proximate cause of collision with motor stage in rear *held* fact question (St. 1923, p. 558, § 130, subd. a, as amended by St. 1925, p. 412, § 15a).

8. Automobiles ⚷172(5).

Where condition of traffic is such that certain change in reduction of speed of automobile will endanger vehicles following, driver must handle automobile with such degree of reasonable care as not to jeopardize their safety (St. 1923, p. 558, § 130, subd. a, as amended by St. 1925, p. 412, § 15a).

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by Mrs. Collins Hardin against Fred A. Sutherland and others for personal injury and property damage. From the judgment, plaintiff appeals.

Affirmed.

Dean Sherry, of San Diego, James Roche, Ivan Kelso, and Clifford P. Grua, all of Los Angeles, for appellant.

Arthur F. H. Wright, of San Diego, for respondents.

AMES, Justice pro tem.

This is an action for personal injury and property damage. On the 5th day of July, 1926, at the hour of about 5 o'clock in the afternoon, appellant was riding in an automobile belonging to the Los Angeles Building Trades Council, and which was being driven by her husband, Collins Hardin, in a northerly direction on a public highway between Tia Juana, Mexico, and the city of San Diego, in San Diego county. The respondent was engaged in operating a line of motor stages between the city of San Diego and Tia Juana. While the Dodge car, in which appellant was riding, was proceeding along the highway in a line of traffic, an automobile stage, operated by an employee of respondent, collided with the Dodge car from the rear, resulting in a personal injury to appellant, damaging her clothing and the automobile in which she was riding. The owner of the car assigned its cause of action for property damage to appellant.

This action is, of course, predicated upon the negligence of the driver of the stage. In its answer, respondent denied negligence on his part and pleaded as an affirmative defense contributory negligence on the part of appellant in several particulars, some of which are hereinafter discussed. The case was tried before the court without a jury, and the court

found that, while the negligence of the driver of the stage was a proximate cause of the accident, the negligence of Collins Hardin, the husband of appellant, was also a proximate cause of and contributed to the accident and the resulting damage to appellant and her assignor. Appellant in her brief attacks five separate findings of the court and argues "that the court erred" in respect to such findings, but she fails to point out whether or not such errors consisted of the insufficiency of the evidence to support such findings, or whether the findings are erroneous as a matter of law. However, we have examined the record in the case for the purpose of ascertaining whether or not the findings are supported by the evidence. Obviously, if any one of the findings of which the appellant complains is supported by the evidence and supports the judgment and is correct as a matter of law, the judgment must be affirmed, and it will only be necessary to discuss such findings as we deem controlling in this respect.

Since the evidence was in sharp conflict it will be necessary to briefly set out what the evidence tending to support the findings, which we will discuss, tended to prove. This we will proceed to do with as much brevity as the circumstances of the case will permit.

R. T. Settle, the driver of respondent's stage at the time of the accident, testified, in substance, as follows: That he was driving northerly in the line of traffic at a speed of from twenty to twenty-five miles per hour. For some distance, prior to the time of the accident, the stage had been following behind the Dodge car at a distance of from twenty to twenty-five feet, both of which vehicles had been maintaining their respective positions in the line of traffic; that there were four or five vehicles proceeding northerly ahead of the respondent's stage; that he had been driving his stage on the right-hand side of the road, while appellant's car was being driven between the edge and the right-hand side "up toward the crown of the road which would be the middle—he (referring to the driver of appellant's car) was not very close to the edge of the road"; that the Dodge car was three or four feet from the right-hand side of the highway. Witness' attention to any deviation in the course traveled by the Dodge car, or any diminution of its speed is described by him as follows: "The first movement that I noticed was a little to my left, I heard the screeching of the brakes—you see—and I noticed this Dodge—it seemed to keep on—I kind of tried to swing over and put on my brakes—jammed on both brakes as quick as I could." At that time he testified that the Dodge car was a little to the left "just a shade over the line." He described the movement of the Dodge car, immediately preceding the accident, in the following language: "The machine was out to one side; it looked to me as though he tried to go around the traffic; the Ford car stopped right in front of me; when I heard his brakes, I came back in front of him; I hit him with the left front fender —the left front corner of my stage, on his right rear." (The Ford car above referred to was preceding the Dodge car in the line of traffic.) He further testified that after the driver of the Dodge car had applied his brakes, he began to pull his machine farther off to the right and at the time of the impact the Dodge car seemed to be going diagonally off toward the right-hand side of the highway and a little to the right of the line of traffic; that the speed of the Dodge car had been reduced to about ten or twelve miles per hour, and that at the time of the impact the speed of the stage had been reduced to not over fifteen miles per hour; that after he saw that a collision was imminent he saw a car in front of the Dodge stop; that he did not see any stop signal and did not see the driver of the Dodge car extend his hand or arm indicating a reduction of speed.

There is some evidence on the part of appellant which tends to show that the respondent's stage had been passing cars and had been "cutting in" and was about to pass the Dodge car in which appellant was riding, but this is denied by witness Settle, and his testimony is corroborated by that of witnesses Silliman and Horall, traffic officers, who passed the two vehicles involved in this collision, while traveling southward but a few seconds before the collision occurred, and testified that both of the vehicles were maintaining their respective positions in the line of traffic and were both traveling at the rate of from twenty to twenty-five miles per hour.

Appellant testified that she did not see the driver of the Dodge car make any signal indicating his intention to stop or retard the speed of the Dodge car, but that the car was equipped with a red stop light upon its rear end which automatically flashed a red light displaying the word "stop" when the foot brake was applied; that she observed such stop light was in good working order when she left Tia Juana a short time before the accident. It is admitted that, immediately prior to the time of the collision, the Dodge car had been following the preceding car in the line of traffic at a distance of from ten to twelve feet. That the negligence of appellant's husband, the driver of the car, is to be imputed to her, if such negligence was a proximate cause of the accident, is not denied by appellant and will require no further discussion here.

Subdivision D of finding 2, which is assigned as error by the appellant, is as follows: "That at the time and place in question said Collins Hardin was driving said automobile in a northerly direction at a point on the public highway in the county of San Diego, California, about two miles south of Palm City, California, and at a place outside of a busi-

ness or residence district; and that at said time and place said Collins Hardin negligently and carelessly drove, managed and operated said automobile in that he then and there, with his said automobile, negligently and carelessly followed another automobile. which was at said time being driven in a northerly direction upon said public highway, closer than fifteen feet; and that said Collins Hardin then and there negligently and carelessly drove, managed and operated his said automobile along said highway at a distance less than fifteen feet behind said other automobile proceeding in a northerly direction."

In view of the admissions of appellant and the uncontradicted evidence in the record that the Dodge car was following the preceding car a distance at less than fifteen feet, it cannot be contended that the evidence does not support this finding. But appellant contends that, even though this is true, it was not the proximate cause of the accident. Section 127, subd. a of the California Vehicle Act (St. 1923, p. 558), is as follows: "The driver of a motor vehicle shall not follow another vehicle or an animal or person closer than fifteen feet when upon any public highway outside of a business or residence district."

Had the respondent, so argues the appellant, maintained a distance of fifteen feet from the preceding car, as prescribed by law, that the distance between the appellant's car and the stage would have been materially reduced, and that the hazard of the collision would have been increased. But the argument assumes that the stage driver would have proceeded at the same rate of speed which he was then maintaining and would have placed his stage within an unsafe distance in the rear of the Dodge car. There is no evidence in the record that the driver of the stage was, at any time, preceding the accident, driving his vehicle in too close proximity to the preceding one, and such an assumption is, we believe, unwarranted by the evidence.

[1-3] A long line of decisions in California has established the rule that the failure of a person to perform a duty imposed upon him by law is negligence per se; and, if such negligence proximately contributes to his injury, he cannot recover. This presumption is not conclusive, but may be overcome by evidence that the failure was excusable or justifiable under the circumstances and not inconsistent with the exercise of due care. McKune v. Santa Clara Valley Mill & Lumber Co., 110 Cal. 480, 42 P. 980; Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675; Shimoda v. Bundy, 24 Cal. App. 675, 142 P. 109.

Appellant contends that this court should hold, as a matter of law, that appellant was not guilty of contributory negligence with respect to the finding now under discussion, and, referring to the cause of Giorgetti v. Wollaston, 83 Cal. App. 358, 257 P. 109, says: "In a recent case where the appellant stopped his car on the paved portion of the highway at night and negligently failed to have the tail-light burning, such violation of the law was held not to be such negligence as contributed to the injuries received when plaintiff's car was struck from the rear by an approaching machine."

But this case does not hold under the evidence that the act of the defendant (in Giorgetti v. Wollaston) can be construed as negligence as a matter of law. The court says: "Whether the failure to remove the vehicle entirely from the pavement was excusable under the circumstances, or if not, whether such failure or the omission to maintain a tail-light proximately contributed to the injuries, were questions which in view of the evidence were properly submitted to the jury."

In the case of Gornstein v. Priver, 64 Cal. App. 249, 221 P. 396, 399, involving a rear-end collision, the Vehicle Act, in effect at that time that the accident occurred, contained a provision similar to section 127, subd. a, of the act, now in effect, and the court in that case says: "The mere fact that he does run down the vehicle ahead of him furnishes some evidence that he either was traveling at too high a rate of speed for a highway crowded with other vehicular travel or that he was following too closely the machine ahead of him. See O'Connor v. United Railroads, 168 Cal. 47, 141 P. 809. True, the mere fact that a vehicle is moving in close proximity to another one ahead of it, and keeping up with it, does not of itself constitute negligence per se; but whether in any particular case the operator of the rear vehicle is negligent if he drives his machine so as to cause a collision with the one ahead depends upon all the circumstances surrounding the happening of the accident, and almost invariably presents a question of fact for the decision of the jury or of the trial judge where, as here, the case is tried without a jury."

[4] We are of the opinion that, in view of all the circumstances in this case, the position of the respective vehicles in the accident, and the movements of the Dodge car immediately preceding the accident, the question as to whether the violation of section 127, subd. a, of the California Vehicle Act was a proximate cause of the accident becomes a question of fact for the court, and the finding will not be disturbed.

[5] As a further attack upon this finding, the appellant contends that it does not correspond to any defense which was pleaded in the answer or to the original amendment thereto, but that at the conclusion of the trial the court upon its own motion permitted a second amendment to the answer to be

filed in which the defense of contributory negligence embraced in subdivision D of finding 2 is pleaded and was then for the first time introduced into the pleadings in the case. The appellant argues, in effect, that, since the defense of contributory negligence is an affirmative one and was not embraced in any of respondent's pleadings prior to the trial, appellant should not have been compelled to combat that theory of the defense. But it appears from the record that all of the evidence with respect to the proximity of the Dodge car to the vehicle preceding it was introduced at the trial without objection as to its competence or relevancy, and that the amendment to the answer, which was authorized by the court, was so authorized for the purpose of conforming the pleadings to the proof adduced at the trial. The order authorizing the amendment was made without objection on the part of appellant, and we are of the opinion that this objection cannot be raised for the first time on appeal.

[6] Appellant next attacks finding subdivision E of finding 2, which is as follows: "That the said Collins Hardin, then and there, negligently and carelessly stopped the automobile he was driving without giving any notice, warning or signal of an intention to do so, and at a time when it was unsafe and dangerous so to stop the same."

That the husband of appellant retarded the speed of the automobile prior to the collision without extending his hand, as required by section 130, subd. a, of the California Vehicle Act (as amended by St. 1925, p. 412, § 15a), is not denied by appellant, but she contends that the failure of the driver of said car to extend his hand, as required by section 130, subd. a, of the California Vehicle Act, did not contribute proximately to the accident. She further contends that the signal, which she contends was displayed by the stop light with which the Dodge car was equipped, was a sufficient signal to the driver of the stage of his intention to retard its speed, but the evidence is conflicting as to whether or not the "stop light" flashed its signal at the time of the accident; however, assuming that the "stop light" did convey its signal to the driver of the stage, there is no evidence in the record that it was such a mechanical or electrical device which had been examined and approved by the division of motor vehicles of the state of California as required by subdivision (b) of section 130 of the California Vehicle Act (as amended by St. 1925, p. 412, § 15a), and will therefore not excuse appellant for failure to observe subdivision (a) of that section.

[7] The driver of the stage testified that his attention to any change in the course of the Dodge car, and any reduction of its speed was first called to his attention by the noise produced by the application of its brakes. But we cannot say, in view of all the circumstances surrounding the accident, that, had the driver of the Dodge car extended his hand as required by law at the instant when he saw that a reduction of speed was necessary, the driver of the stage would not have had a more timely warning. We think that the question as to whether or not the failure of the driver of the Dodge car to extend his hand was a proximate cause of the accident is, like other questions of fact in this case, one to be determined by the court. Appellant, quoting from Forrest v. Fink, 71 Cal. App. 34, 234 P. 860, 861, says: "A practical and reasonable construction of this provision [referring to a provision of the Vehicle Act then in force similar to the provision now under discussion] would not require the driver of a vehicle upon every deviation from a direct course ahead to look back to ascertain the condition of traffic behind him."

But the evidence in that case was in sharp conflict as to whether or not the plaintiff, who was preceding the defendant on the highway, slowed down sharply or reduced his speed gradually and failed to give the signal required by law. And the court approved an instruction given to the jury that it was the duty of a driver about to stop a motor vehicle, or to abruptly or suddenly check its speed, to extend his hand and arm as provided by law, and that a failure so to do is prima facie evidence of negligence when an accident results. Under the conflicting evidence in that case it was held that the question of fact was properly left to the jury. And to the same effect is the case of State Compensation Insurance Fund v. Jorn, 186 Cal. 782, 200 P. 624. This finding, for the reason herein given, will not be disturbed.

[8] What we have said with respect to the other findings complained of applies to appellant's attack on finding 2b, which is as follows: "That the said Collins Hardin, then and there, negligently and carelessly drove, managed and controlled said automobile, and negligently and carelessly caused and allowed it to be struck by the automobile stage of said defendants."

Apparently it is the contention of appellant that the driver of respondent's car owed no duty to keep a lookout for the safety of traffic in the rear of his automobile. Whatever duty a motorist may owe to drivers of other vehicles which may be following him would be governed, to a large extent, by the surrounding circumstances, and particularly with reference to the condition of traffic on the highway. Subdivision (a) of section 130 of the Vehicle Act enjoins upon the driver of any vehicle upon a public highway a duty of first seeing that the act of starting, turning or stopping the same can be made in safety before proceeding to do so, and, if such a movement cannot be made in safety, it is

his duty to wait until the same can be so accomplished. In support of this contention appellant quotes from O'Connor v. United Railroads, supra, as follows: "Naturally in the exercise of ordinary care his duty would be to look ahead of him so as to avoid collision with those in advance of him. They have the right to expect that he shall do so and as all travelers owe reciprocal rights to each other, he, too, has a right to expect this from those approaching from behind, no matter in what capacity they are using the street."

But following that portion of the opinion from which appellant quotes, the court further says: "The fact that he did not look back again did not per se constitute negligence. What amount of vigilance was requisite to constitute reasonable care upon the part of the plaintiff, and whether he exercised it while driving along the street was to be determined by the jury not alone from what he did in the way of looking, but from a consideration of the reciprocal rights of the parties on the highway."

Our courts have held that, where the condition of traffic upon a highway is such that a sudden change in course or reduction of speed of an automobile will endanger vehicles following the same, the driver of such automobile owes to the occupants of the following vehicles the duty of handling his own with such a degree of reasonable care as not to jeopardize their safety.

In the case of Putnam v. Pickwick Stages, Northern Division (Cal. App.) 276 P. 1055, 1057, the court instructed the jury that it was the duty of the driver of defendant's stage "to have kept a vigilant look out for vehicles ahead for the purpose of preventing driving against or striking same." Appellant complained of this instruction because "it suggested to and left with the jury the impression that a higher degree of care in that respect was required of defendant than of plaintiff"; but the court says: "Although we agree with the contention of defendant to the effect that, while the instruction in itself is not improper, and while the defendant's driver was in duty bound to keep a vigilant lookout for vehicles ahead to avoid striking them, there was a corresponding duty so to do on the part of plaintiff, in view of the fact that the rule as thus declared was in effect given to the jury by the court in other instructions, coupled with the further fact that defendant did not ask for an instruction that such duty also applied to plaintiff, defendant cannot complain that none was given." To the same effect is Noce v. United Railroads, 53 Cal. App. 512, 200 P. 819.

In the case of Collins v. Marsh, 176 Cal. 639, 169 P. 389, it was held that the jury in passing on the issue of negligence must take into consideration all of the facts and circumstances surrounding the particular transaction. That one of such facts and circumstances was whether or not the accident occurred in a secluded district where there was little traffic, or in a business district where it was more congested. The finding will not be disturbed.

The judgment appealed from is affirmed.

We concur: MARKS, Acting P. J.; BARNARD, J.

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106 Cal. App. 701

ORNDORFF v. SCHARLIN.

Civ. 4787.

District Court of Appeal, First District, Division 2, California.

June 27, 1930.

Pleading ⟹225(1).

Where complaint stated cause of action, sustaining demurrer without leave to amend was error though some grounds of special demurrer were well taken.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Mabel Orndorff against Abe Scharlin. Judgment for defendant, and plaintiff appeals.

Reversed.

O. N. Hilton and Soren X. Christensen, both of San Francisco (Jacob W. Ehrlich, of San Francisco, of counsel), for appellant.

Frank M. Silva, of San Francisco, for respondent.

PER CURIAM.

Plaintiff sued for breach of promise to marry. Defendant filed a demurrer which was both general and special. The demurrer was sustained without leave to amend, and judgment was then entered for defendant. Within due time plaintiff moved to set aside the judgment, and sought leave to amend her complaint, but these applications were denied.

The appeal is taken from the judgment. The transcript was filed in September, 1923, and appellant's brief was filed in October of the same year. No brief has been filed by respondent, and, though notice was given to appear on June 9, 1930, and show cause why the judgment should not be reversed, no appearance has been made.

The complaint states a complete cause of action in breach of contract, and, though some of the grounds of the special demurrer seem

to be well taken, it was error to sustain the demurrer without leave to amend. Payne v. Baehr, 153 Cal. 441, 447, 95 P. 895; Schaake v. Eagle, etc., Can Co., 135 Cal. 472, 480, 63 P. 1025, 67 P. 759; Blodgett v. Rowlet, 86 Cal. App. 32, 36, 260 P. 324.

The judgment is reversed.

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107 Cal. App. 54

FREUND v. HAMILTON CONST. CO. et al.

HAMILTON v. FREUND.

Civ. 7487.

District Court of Appeal, First District, Division 1, California.

July 1, 1930.

Appeal and error ⟹627(2).

Motion to dismiss appeals must be denied where record fails to show that proceedings for transcript in trial court had terminated (Supreme Court Rule 6, § 1).

Actions by Martha Freund against the Hamilton Construction Company and another, and by John E. Hamilton, individually, and doing business under the name and style of Hamilton Construction Company, against Martha Freund. On motion by Martha Freund to dismiss appeals of the Hamilton Construction Company and John E. Hamilton, individually, and doing business under the name and style of Hamilton Construction Company.

Motion denied.

George B. Harris, of San Francisco, for appellant.

Harry S. Whitthorne and Twain Michelsen, both of San Francisco, for respondent.

PER CURIAM.

A motion by Martha Freund, a party to the above-entitled actions, for an order dismissing the appeals of Hamilton Construction Company and John E. Hamilton, and John E. Hamilton, individually, and doing business under the name and style of Hamilton Construction Company, taken therein, upon the ground that said appeals have not been prosecuted with due diligence.

It appears there has been delay in the filing of the transcript on appeal in this court, but the record fails to show that the proceedings for a transcript in the court below have been terminated and the motion must, for that reason, be denied. Rule 6, sec. 1, Rules of the Supreme Court; Crocker v. Crocker, 76 Cal. App. 606, 245 P. 438; Smith v. Jaccard, 20 Cal. App. 280, 128 P. 1023, 1026.

The motion is denied.

107 Cal. App. 92

BARKER v. PHILLIPS et al.

Civ. 4115.

District Court of Appeal, Third District, California.

July 2, 1930.

Trial ⟹400(1).

Where court enjoined sale of land under execution and stated it was unnecessary to rule on status of title, findings relating to title should be stricken.

The action was brought by wife to enjoin sale under execution under judgment against husband on ground that property was her separate property, and that on date of husband's conveyance to her she had executed a declaration of homestead. After plaintiff presented her case in chief, court said that question regarding validity of homestead could only be properly determined upon application of execution by proceeding under Civ. Code, § 1245, and that it was unnecessary to rule upon status of title, and that in any event sale could not proceed, and directed that permanent injunction be issued. The findings prepared by plaintiff and signed by judge attempted to adjudicate separate character of property, and find that husband had no right, title, or interest therein.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Roberta E. Barker against M. J. Phillips and others, copartners, trading as the Phillips Furniture Company, and another, to enjoin sale under a writ of execution. From the judgment, defendant partners appeal.

Findings amended, and, with such amendment, judgment affirmed.

J. Allen Frankel and A. V. Kaufman, both of Los Angeles, for appellants.

J. S. Le Page, of Long Beach, for respondent.

PULLEN, Justice pro tem.

On or about the 17th day of November, 1924, appellants herein, as plaintiffs, filed an action in the superior court of Los Angeles county against George S. Barker, and at the same time levied an attachment upon all the right, title, and interest of George S. Barker in and to certain described real property, which property at that time stood in the names of George S. Barker and Roberta E. Barker, as joint tenants. Thereafter, plaintiffs in said action recovered judgment and caused an execution to be issued against the property in question for the purpose of proceeding with the sale of said property.

Thereupon, plaintiff herein, Roberta E. Barker, filed a complaint praying that the sheriff of the county of Los Angeles be enjoined from selling or otherwise proceeding under said writ of execution, and alleging in her complaint that the property in question was her separate property, and that on or about the 17th day of March, 1925, her husband had conveyed to her all his right, title, and interest in the property, and that on the same day she had executed a declaration of homestead upon her property.

At the trial of the action the court rendered judgment for plaintiff. Thereafter defendants moved for a new trial, which was denied, and, from that order and from the judgment, defendants appeal.

Appellants' principal ground for reversal is based upon the statement of the trial court, which they claim precluded them from presenting their defense. It appears from the record that after plaintiff had presented her case in chief, the court said: "The question as to the validity of the homestead can only be properly determined upon the application of the execution by proceeding under section 1245 of the Civil Code. It is unnecessary in this case to rule upon the status of the title, whether it was community property or separate property of the wife or separate property of the husband. In any event this sale cannot proceed, and a permanent injunction is directed to be issued against the sheriff." Plaintiff therein (respondent here) was directed to prepare findings, which were in due time presented and signed, and a judgment in accordance therewith entered. Then for the first time appellants learned that the findings attempted to adjudicate the separate character of the property and to find that the defendant in the action, George S. Barker, did not own, and had no right, title, or interest therein.

We believe that the statement of the trial court quoted above misled appellants as to the nature of the findings the trial court would adopt, and that as a result thereof they did not offer any proof upon the question of title. Whether or not they could have adduced such evidence is not before us, but an opportunity should have been extended them, if they had so desired, to meet the issues that were later found by the trial court.

It is therefore the direction of this court that the findings be amended by striking therefrom all portions thereof pertaining to the separate character of the property of the wife, or the want of title thereto in the husband, leaving only the issue as to the injunction remaining therein, and, with such amendment, the judgment to stand affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

107 Cal. App. 83

COMMERCIAL DISCOUNT CO. v. HOLLAND et al.

Civ. 5897.

District Court of Appeal, Second District, Division 2, California.

July 2, 1930.

Rehearing Denied July 30, 1930. Hearing Denied by Supreme Court Aug. 28, 1930.

1. Sales ⟹479(1).

Seller on default by purchaser may treat contract as involving conditional sale and retake possession or ratify contract and sue for balance.

2. Sales ⟹479(11).

Purchasers of automobile on conditional sale contract were not liable for unpaid balances accruing after property was retaken.

An essential part of the conditional sale contract was that, in the event seller elected to take possession of personal property, all of the rights of the purchaser under contract should immediately terminate, and all payments theretofore made belong absolutely to seller, provided that such termination should not release purchaser from any payments due and unpaid at time of such termination.

3. Sales ⟹475.

Assignors of conditional sale contract were liable to assignee thereunder for unpaid installments on default of purchaser.

The assignment provided that assignee might sell property without notice of any kind for such price as it could secure, and, in event that property did not sell for enough to pay balance owing by purchaser under the terms of contract, together with expenses of sale on demand, to pay any deficiency, there being no doubt that the parties meant by the phrase "balance owing" any unpaid installments on the contracts, and not the amount for which buyer might be held legally responsible.

[Ed. Note.—For other definitions of "Balance," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by the Commercial Discount Company against W. R. Holland and others, a copartnership, doing business under the fictitious name and style of Holland & Pierce. Judgment for plaintiff, and defendants appeal.

Affirmed.

C. O. Bacon and George De Forrest Home, both of Los Angeles, for appellants.

Dryer, Castle, McConlogue & Richards, of Los Angeles, for respondent.

GATES, Justice pro tem.

This action was tried upon an agreed statement of facts. The plaintiff and respondent is engaged in the business of handling automobile contracts—commercial paper. Appellants, who are dealers in automobiles, entered into five conditional sales contracts with various customers. For a valuable consideration they sold and transferred these contracts and the title thereof to the cars to respondent corporation. These transfers were evidenced by an assignment and agreement, to both of which we shall presently allude. The purchasers failed to make the payments called for by the contracts, and respondent repossessed the cars and sold them. The amounts alleged to be the balance due were the amounts still unpaid by the purchasers at the time of repossession. The several deficiencies alleged to be due were unpaid by appellants; respondent having demanded payment thereof.

The essential part of the contract is as follows: "* * * In the event the seller elects to take possession of such personal property, all of the rights of the purchaser under this contract shall immediately terminate and all payments theretofore made hereunder shall belong absolutely to the seller; provided, however, that such termination shall not release the purchaser from any payments due and unpaid at the time of such termination, and the purchaser hereby agrees to pay to the seller any and all sums which may be so due and unpaid to said seller at the time thereof."

The salient parts of the assignment are as follows: "For value received, we hereby sell, assign, transfer and set over to Commercial Discount Company (hereinafter called the assignee), all of our right, title and interest in and to all moneys due and to become due and payable thereunder, and we hereby sell, assign, transfer and set over to the assignee all of our right, title and interest in and to the property in said contract described * * * and agree that should the assignee take possession of said property, for failure of the purchaser to perform any of the conditions of said contract, to at once pay to the assignee the balance owing by the purchaser under the terms of said contract, upon the conveyance of said property to us, or we agree that the assignee may sell said property without notice of any kind, for such price as it can secure for the same, and in the event that said property does not sell for enough to pay the balance owing by the purchaser under the terms of said contract, together with the expenses of sale, upon demand, to pay any deficiency; we further agree that as to the assignee our rights and privileges shall not be those of a surety, guarantor, or indemnifier, but that our obligations to the assignee are absolute and unconditional and shall be enforceable even though the assignee's right to enforce the contract, or any provisions thereof, be suspended or impaired by any statute or otherwise."

Upon the stipulation of facts thus made the trial court rendered judgment in favor of respondent and against appellants and each of them in the sum of $1,960.66 and costs. From this judgment the latter appeal.

It is appellants' contention that respondent succeeded only to the rights of the seller under the sales contract, and that as successor it had two remedies: Either to repossess the automobile, thereby terminating the liability of the buyer thereunder, or to affirm the contract, treating it as a valid sale with title to the property conveyed to the purchaser, and sue for the balance of the purchase price. The gist of appellants' contention is that, after a repossession of the property, there is no balance owing by the purchaser under the terms of the conditional sales contract; the reason being that such repossession wiped out any further liability on the part of the seller.

[1] The general rule is well settled that it is optional with the seller, upon default by the purchaser in complying with any of the vital terms of the agreement, either to treat the contract as involving a conditional sale and retake possession of the property or ratify the contract as one involving an absolute sale of the property, and so sue for the recovery of all moneys then payable thereunder. In other words, the seller in such case is vested with the right to exercise an election as between the two remedies suggested. Johnson v. Kaeser, 196 Cal. 686, 694, 239 P. 324; Parke & Lacy Co. v. White River L. Co., 101 Cal. 37, 40, 35 P. 442; Elsom v. Moore et al., 11 Cal. App. 377, 379, 105 P. 271; George J. Birkel Co. v. Nast, 20 Cal. App. 651, 654, 129 P. 945.

[2] Respondent contends that the purchasers are liable for all unpaid balances that may accrue after the termination of the agreement. The agreement does not so provide, and such a construction cannot be given it. In the instant case the extent of the liability of the purchaser, after the contract had been terminated, was to pay to the seller such installments that had accrued prior to the date of the termination of the agreement and that then remained unpaid. As to this phase of the case respondent's contention cannot be sustained, for the reason that there is no further liability on the part of the various purchasers in the contracts before the court, other than heretofore stated. It therefore follows that appellants are not liable for them, the purchasers, to respondent.

[3] Appellants also contend that, as there is no further liability on the part of the purchaser to the seller after the repossession, the contract then being terminated, there could be no "balance owing by the purchaser

under the terms of said contract." There being no balance owing by the purchaser, there is nothing upon which the plaintiff can predicate any liability of the defendants. Aside from any rights secured by respondent against the purchasers of the cars by the assignment executed by appellants, respondent acquired and obtained other, further, and distinct rights against appellants. And the latter, by their agreement with respondent, created liabilities to respondent over and above the liabilities of the purchasers to it. The assignment provides that "the assignee may sell the property without notice of any kind for such price as it can secure for the same, and in the event that said property does not sell for enough to pay the balance owing by the purchaser under the terms of said contract, together with the expenses of sale, upon demand, to pay any deficiency." There can be no doubt that the parties meant by the phrase "balance owing" any unpaid installments on the contracts, and not the amount for which the buyer might be held legally responsible. The word "balance" is often used in the sense of residue or remainder. Lopez v. Lopez, 23 S. C. 258. The word "balance," in a general sense, may be defined as what remains or is left over (Lynch v. Spicer, 53 W. Va. 426, 428, 44 S. E. 255)—remainder (Prairie Grove Cheese Mfg. Co. v. Luder, 115 Wis. 20, 26, 89 N. W. 138, 90 N. W. 1085). It has, in law, no technical signification, but is a word which is in popular use. 6 C. J. 1170. It likewise has been held that the word "owing" is synonymous with "remaining unpaid." Fowler v. Hoffman, 31 Mich. 215, 219.

After a careful reading of the assignment, we conclude that there is an unconditional promise upon the part of appellants to pay any deficiency to respondent. The amount thereof has been correctly determined by the trial court.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

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107 Cal. App. 49

NORTON et al. v. VROMAN et al.

Civ. 6742.

District Court of Appeal, Second District, Division 1, California.

June 30, 1930.

1. Bills and notes ⟹396.

Where note payable on certain date was not presented at maturity, motion for nonsuit as to indorser should have been granted, absent waiver of demand (Civ. Code, § 3152).

Civ. Code, § 3152, provides that the instrument, unless payable on demand, must be presented on the day it falls due. This is a re-enactment of section 3131, subd. 5, which was repealed.

2. Bills and notes ⟹526.

Evidence showing no demand or presentment on maker of note at maturity *held* insufficient to support judgment against indorser (Civ. Code, § 3152).

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Walter W. Norton and another against Maurice A. Vroman, E. W. Show, and others. From a judgment in favor of plaintiffs, second named defendant appeals.

Motion to take additional evidence denied. Judgment against named defendant reversed.

Minor Blythe and Hugh M. Bole, both of Los Angeles, for appellant.

John J. Craig, of Los Angeles, for respondents.

YORK, J.

The plaintiffs and respondents brought an action against defendants based upon nonpayment of a promissory note for the sum of $1,700, dated April 3, 1926, due one year after date, without grace, with interest at 7 per cent. per annum. This note was signed by defendant Vroman, as maker, and by appellant, Show, as indorser.

The evidence adduced at the trial showed that no demand or presentment was made upon either of said defendants, except a demand for payment made by letter addressed to both defendants, dated April 15, 1927, being twelve days after the date of maturity of said note. Upon conclusion of plaintiffs' case, the appellant made motion for a nonsuit on the ground that the note did not bear a waiver of demand, notice, or protest, and that, presentment not having been made on the day the note fell due, appellant, as indorser, could not be charged with liability for the amount due on said note. This motion was denied, and, after further evidence taken, judgment was rendered in favor of the plaintiffs for the sum of $1,700 principal, $357 interest, and $250 attorney's fees.

Upon appeal appellant contends that error was committed by the trial court in denying the motion for a nonsuit, and, further, that the evidence is insufficient to support the findings and judgment.

[1, 2] At this time the question before this court is whether or not appellant is liable for

the amount due on the note; presentment not having been made on the day it fell due.

The case of Rauer v. Broder, 107 Cal. 282, 40 P. 430, holds that, where a note is payable at a specified date, and there is no waiver of demand and notice, in order to charge an indorser who has indorsed the note before maturity, it is essential to his liability that a demand should be made upon the maker upon the very day upon which the note falls due; and, where it is not made until the following day, and no excuse therefor is claimed or proved, the effect is to discharge the indorser from liability.

This decision is based upon the provisions of section 3131, subdivision 5, Civil Code, which provided: "5. The instrument must be presented upon the day of its maturity. * * *" This provision, after repeal of above-named section, was re-enacted by section 3152 of the Civil Code, as follows: "Where the instrument is not payable on demand, presentment must be made on the day it falls due. * * *"

In view of the rule laid down by the cited case and Code sections, the motion for a nonsuit should have been granted as to appellant Show. And, for like reasons, the evidence is not sufficient to support the findings and judgment. Motion to take additional evidence is denied.

The judgment against appellant, Show, is reversed.

We concur: CONREY, P. J.; HOUSER, J.

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106 Cal. App. 609

PEOPLE v. PAYNE.

Cr. 15.

District Court of Appeal, Fourth District, California.

June 20, 1930.

1. Criminal law ⟹1069(6).

Appeal taken four days after judgment of conviction for forgery must be dismissed as too late (Pen. Code, §§ 1239, 1248).

2. Criminal law ⟹1023(3), 1134(10).

Order denying probation before judgment was not appealable because reviewable on appeal from judgment.

3. Criminal law ⟹982.

Granting or refusing to allow defendant to apply for probation and granting or refusing probation was within court's discretion.

4. Mandamus ⟹61.

Refusal by court abusing discretion to permit defendant to apply for probation is subject to correction by writ of mandate, if application is made after judgment.

5. Criminal law ⟹982.

Only right of defendant in matter of probation is to have trial court exercise judicial discretion in lawful manner in granting or refusing probation.

6. Criminal law ⟹982.

Probation officer's report showing defendant in forgery prosecution had been arrested 13 times justified denial of application for probation (Civ. Code, § 1203).

Civ. Code, § 1237, provides that an appeal may be taken by defendant from any order made after judgment affecting the substantial rights of the parties. Probation is not a right of defendant.

7. Criminal law ⟹1134(10).

Defendant, if dissatisfied with order denying application for probation, could have order reviewed by appealing from judgment within time allowed (Civ. Code, § 1237).

Civ. Code, § 1203, gives the defendant the right to apply to the court for leave to file an application for probation.

8. Criminal law ⟹982.

Dismissal of former charge to which defendant pleaded guilty of driving vehicle while intoxicated had no legal effect on his standing before court in forgery prosecution on application for probation (Pen. Code, § 1203, subd. 4, as amended by St. 1927, p. 1493).

Penal Code, § 1203, subd. 4, as amended by St. 1927, p. 1493, provides that, in any subsequent prosecution of defendant for any other offense, prior conviction may be pleaded and proved, and shall have same effect as if probation had not been granted, or accusation or information dismissed.

9. Criminal law ⟹982.

Matter of probation became res judicata by order denying defendant in forgery prosecution probation, so there was nothing for court's consideration on second application.

Appeals from Superior Court, San Diego County; S. M. Marsh, Judge.

Stuart Payne was convicted of forgery, and he appeals from a judgment of conviction and from an order denying a hearing on his motion for probation. On motion to dismiss the appeals.

Appeals dismissed.

Edgar B. Hervey and Edward J. Kelly, both of San Diego, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

MARKS, J.

Appellant was charged with the crime of forgery alleged to have been committed in San Diego county on August 16, 1929. He entered pleas of not guilty and not guilty by reason of insanity. His trial was set for October 17, 1929. Before the trial commenced he withdrew both pleas and entered a plea of guilty and made application for probation. The hearing of this application was had on November 8, 1929. At this hearing it appeared that appellant, in 1925, had been charged with driving a vehicle upon a public highway of the state of California while under the influence of intoxicating liquor. He had entered a plea of guilty to the charge, and had been granted probation for the term of two years. At the hearing on November 8, 1929, the question was raised by the district attorney as to the power of the court to grant probation should he so desire under these circumstances. The court had before it the report of the probation officer of San Diego county, which was very full and complete. On the bottom of this report the following appears: "The foregoing report has been considered on the defendant's application for probation. S. M. Marsh, Judge of the Superior Court." At the conclusion of the hearing the court denied the application for probation, and stated that in doing so he had considered both the merits of the application itself upon the evidence before him and the legal question involved in appellant's prior conviction. The court thereupon sentenced the defendant to imprisonment in the state's prison at Folsom for the term prescribed by law. No notice of appeal was given by appellant, either in open court or in writing, within two days after the pronouncement of judgment.

On November 12, 1929. appellant was again in court with his attorney, who stated that appellant had appeared in another department of the superior court of San Diego county, and that this judge, who had granted him probation, had permitted him to withdraw his former plea of guilty and to interpose a plea of not guilty to the charge of driving while intoxicated, and that thereafter this case against him had been dismissed upon the ground that he had fulfilled the terms of his probation. Thereupon counsel for appellant asked the court below for "leave to make an application for probation for the defendant, Stuart Payne, upon the same grounds heretofore urged, except that that obstacle to granting that probation had been removed." After considerable argument, the court announced that he would have to take into consideration the matters set forth in the report of the probation officer, already referred to, and denied the application for probation upon the same grounds upon which he placed his former denial.

Thereupon appellant for the first time gave oral notice of appeal from the former judgment of the court, and from the order denying probation. On the same day appellant filed a notice of appeal "from the judgment in the above entitled action and from the order of the court denying the defendant a hearing on his motion for probation." The Attorney General has moved this court to dismiss these appeals.

[1] The appeal from the judgment was not taken until four days after the pronouncement of judgment. That it was too late to be of any effect is admitted by appellant. This appeal, therefore, must be dismissed. Sections 1239, 1248, Pen. Code; People v. Walker, 132 Cal. 137, 64 P. 133.

[2] The motion to dismiss the appeal from the order of the trial court denying the defendant a hearing on his motion for probation presents more difficulties. In the case of Lloyd v. Superior Court (Cal. Sup.) 283 P. 931, it was held, under the provisions of section 1203 of the Penal Code as amended in 1927 (St. 1927, p. 1493), that an application for probation might be filed, heard, and determined "at any time prior to the execution of sentence. * * *" Prior to this amendment of the Penal Code, it had been held in many cases that an order denying an application for probation was not an appealable order. People v. Dunlop, 27 Cal. App. 460, 150 P. 389; People v. Laborwits, 74 Cal. App. 401, 240 P. 802. The rule now is, that an order denying probation made before judgment is not appealable because it may be reviewed on the appeal from the judgment. People v. Freithofer (Cal. App.) 284 P. 484; People v. Lovelace, 97 Cal. App. 228, 275 P. 489.

Under this amendment of 1927, it is now held that it is a right of a defendant to apply to the court for leave to file an application for probation.

[3-5] The granting or refusing to allow the defendant to make such an application, together with the granting or refusing of probation, is a matter within the sound discretion of the court. However, if, in refusing to permit the defendant to make an application for probation, the court abuses this discretion, such refusal is subject to correction by writ of mandate, if the application for probation is made after judgment. Lloyd v. Superior Court, supra. The law now seems to be that the only right of the defendant in the matter of probation is to have the trial court exercise its judicial discretion in a

lawful and legal manner in ruling upon the request to file the application, or in granting or refusing probation. Probation itself is not now, nor has it ever been, considered a right of a defendant. It has been defined as an act of grace and clemency granted to a deserving defendant whereby he may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted. People v. Sapienzo, 60 Cal. App. 626, 213 P. 274; Svoboda v. Purkitt, 75 Cal. App. 148, 242 P. 81; In re Nachnaber, 89 Cal. App. 530, 265 P. 392.

[6, 7] Section 1237 of the Penal Code provides that an appeal may be taken by a defendant "from any order made after judgment, affecting the substantial rights of the party." As we have seen, probation is not a right of the defendant. In this case the court permitted appellant to make his application for probation. In this particular the discretion of the trial court was exercised in favor of appellant at the time of making the motion to file the first application for probation. On the 8th day of November, 1929, the court had before it the report of the probation officer showing, among other things, that appellant had been arrested thirteen times prior to this arrest in the case before us. The crimes for which he had been arrested and convicted ranged in degree from that of common drunk to misdemeanor embezzlement. This report alone furnishes sufficient grounds for the trial court's denying appellant's application for probation, and its exercise of a sound judicial discretion in so doing. If appellant were dissatisfied with this order of the trial court, he might have had the same reviewed by taking an appeal from the judgment within the time allowed by law. This he did not do.

Section 1203 of the Penal Code gives a defendant the right to apply to the court for leave to file an application for probation. The right is not given to file a number of such applications, especially where no new facts were to be presented to the trial court. Appellant insists that on November 12, 1929, a change in his status had occurred, in that the charge against him, of driving a vehicle upon the public highway while under the influence of intoxicating liquor, had been dismissed. While the dismissal of this case did change the facts before the trial court in this respect, it did not change the legal status of the appellant. In 1927, subdivision 4 of section 1203 of the Penal Code was amended by the addition thereto of the following:

"Provided, that in any subsequent prosecution of such defendant for any other offense such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed."

[8] With this amendment in effect, the dismissal of the former case in which appellant had entered a plea of guilty had no legal effect upon his standing before the court on his application for probation. People v. Rosencrantz, 95 Cal. App. 92, 272 P. 786.

We believe that the decision in the case of People v. Brattingham, 91 Cal. App. 527, 267 P. 120, 121, is decisive of the question here presented. In the Brattingham Case the defendant moved the trial court for a modification of a judgment before made and entered, and, upon denial of his motion, appealed. The people moved to dismiss the appeal, and, in granting this motion, the court said:

"Appellant contends that an appeal is authorized by subdivision 3 of section 1237 of the Penal Code, which provides that an appeal may be taken from an order after judgment affecting the substantial rights of the defendant. It is also said that the court has inherent power at any time to vacate a void judgment. Generally this is true, but the rule is well established that an order made after judgment is not appealable where the motion merely asks the court to repeat or overrule the former ruling on the same facts. As said in De la Montanya v. De la Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 P. 345, this is so because to permit such an appeal 'would be virtually allowing two appeals from the same ruling, and would, in some cases, have the effect of extending the time for appealing contrary to the intent of the statute.' To the same effect are Kent v. Williams, 146 Cal. 3, 79 P. 527, Alpers v. Bliss, 145 Cal. 565, 79 P. 171, and other cases.

"A number of decisions cited by appellant hold that the trial court has jurisdiction to vacate or modify a void judgment, but they do not mention the question here presented; namely, Will an appellate court entertain an appeal from an order made after judgment, where the appeal from the judgment would present precisely the same question and in every way afford protection to the rights of the defendant? The authorities sustain the contention of the people upon this issue.

"Applying the rule to the record before us, it is apparent that upon an appeal from the judgment alone the judgment roll would contain everything necessary to a determination of the contention of the appellant, and to consider the appeal from the order refusing to modify the judgment would have the effect of allowing the right to two appeals."

[9] In the case before us, it appears that the second application for probation attempted to be made by appellant on the 12th day of November, 1929, presented the same issues which the court had already considered and acted upon four days previously. To

hold in this case that the court must consider successive applications for probation would give to the appellant the right to successive appeals, assuming, but not holding, that an appeal would lie from an order denying probation made after judgment. The matter became res judicata by the first order denying probation, and there was nothing for the court to consider upon the second application made by appellant. People v. Prudencio, 93 Cal. App. 241, 269 P. 698; People v. Martin, 199 Cal. 240, 248 P. 908; People v. Walker, 142 Cal. 90, 75 P. 658; People v. Ingersoll, 21 Cal. App. 763, 132 P. 1052.

Both appeals are dismissed.

We concur: CARY, P. J.; BARNARD, J.

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106 Cal. App. 665

DEWEES v. KUNTZ.

Civ. 6807.

District Court of Appeal, First District, Division 2, California.

June 25, 1930.

Rehearing Denied July 24, 1930. Hearing Denied by Supreme Court Aug. 21, 1930.

1. Negligence ⟹12.

One who in sudden emergency acts according to his best judgment, or omits to act in most judicious manner, is not negligent.

2. Automobiles ⟹159.

Motorist who in emergency turned out on mountain grade to avoid collision, causing automobile to turn over, injuring guest, *held* not negligent.

Evidence showed that defendant was traveling down grade on proper side of road when, on rounding curve, she saw parked automobile on other side of road facing toward her, between 20 and 30 feet away. Almost at same time she saw another automobile approaching from behind parked automobile, and, when she turned aside, wheels sank in soft dirt at edge of road, traveled portion of which was 12 feet wide.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

On rehearing. Former opinion superseded, and judgment below reversed and cause remanded.

For former opinion, see 280 P. 552.

W. I. Gilbert, of Los Angeles, and Lasher B. Gallagher, of San Francisco, for appellant.

M. F. McCormick, of Fresno, for respondent.

BURROUGHS, Justice pro tem.

This is an action for damages for personal injuries.

At a former hearing of this case the conclusion was reached that the negligence of the defendant was the proximate cause of the accident which resulted in the injuries to the plaintiff, which is the subject-matter of this suit.

After a more mature consideration we are of the opinion that we failed to give due weight to the close proximity to each other of the several automobiles and the narrowness of the road over which they were traveling.

The evidence discloses that the plaintiff and defendant are mother and daughter, respectively. At the time of the accident they were returning from a rodeo, being held near a place called Squaw Valley, to their home in the city of Fresno. The defendant was the owner of and operating the automobile, a Chrysler roadster. The plaintiff occupied the right side of the driver's seat. The road was an ordinary unpaved mountain grade, and, where the accident occurred, the traveled portion thereof was twelve feet wide. On the outside there was an extension of the traveled portion of the road which was composed of small rock and boulders and soft dirt on top. The defendant was familiar with the road, having traveled over it many times. The evidence shows that defendant was traveling down grade on her side of the road, and on rounding a curve she saw ahead of her a parked automobile which was on the inner side of the road and facing toward her. When she first saw the car it was between twenty and thirty feet from her. She had ample room to pass this car. After rounding the curve and observing the parked car, almost at the same time she saw another car coming up the grade behind the parked car. The approaching car turned to pass the parked car and entered the defendant's side of the road. The defendant's car was almost at the front of the parked car, and, as the approaching car entered defendant's right of way, defendant turned to the right to pass this on-coming car, and, when her car entered the soft dirt, both right wheels sunk into it and the car toppled over on its right side.

[1] Plaintiff also testified that she could stop her car in about twenty-five feet, but that she was not that distance away when she first saw the approaching car. She thought she could pass the car by turning to the right. In the former opinion we held that the defendant made no effort to stop her car and that had she done so the accident could have been avoided. In so holding we were in error. The

defendant was traveling on her own side of the road at a reasonable rate of speed, when the car coming up the grade behind the parked car, turned to pass, it was within a short distance of defendant, and she testified she could not pass it without turning to the right. She did this, with the result above stated. The distance between defendant's car and the approaching car was less than twenty-five feet and allowed but an instant of time for the defendant to act. Under such circumstances the rule laid down in 20 Ruling Case Law, page 29, and cited with approval in Uhl v. Fertig, 56 Cal. App. 718, 724, 206 P. 467, is applicable. The rule is as follows: "The rule, judicially stated, is that one who in a sudden emergency acts according to his best judgment, or who, because of want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence." In Mitchell v. Southern Pacific R. R. Co., 87 Cal. 62, 25 P. 245, 246, 11 L. R. A. 130, it is said: "The inquiry is, where there has been an unsuccessful attempt to escape danger in an accident, was the attempt which was made an unreasonable or rash act, or was it one which a person of ordinary care and prudence might do under the circumstances? The answer to this inquiry cannot be made to depend upon the result of the attempt to escape, nor upon the result which would have occurred if the attempt had not been made. It would be unreasonable to require a passenger in case of accident to judge with absolute certainty the degree of danger attending him if he made no effort to escape, and the absolute consequences of an effort to escape. He must act upon the probabilities of an effort to escape as they appear to him, and choose that hazard which seems to him as a person of prudence to be the least." See, also, 19 California Jurisprudence, page 598, and the cases there cited for a full discussion of the above rule

[2] Defendant was, without fault on her part, suddenly confronted with a situation that required prompt action on her part. She immediately took the course she deemed best and, so far as the record discloses, it may have been the best one. The course pursued was one that any reasonable and prudent person might have followed, and was, therefore, not negligence.

There has also been presented to this court the effect of section 141¾ of the California Vehicle Act, commonly called the "Guest Act," effective August 14, 1929. Stats. 1929, p. 1580. The point presented is that all actions by guests who are claiming damages for negligence against their host, pending at the time said act took effect, are abated by said section. However, in view of our holding that the defendant was not negligent, it is unnecessary to decide the question.

The judgment is reversed, and the cause remanded for a new trial.

We concur: NOURSE, P. J.; STURTEVANT, J.

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106 Cal. App. 587

YELLOW CAB MFG. CO. v. CITY OF SAN DIEGO.

Civ. 206.

District Court of Appeal, Fourth District, California.

June 19, 1930.

1. Commerce ⟹72.

Property may be subject to regulations of Congress as interstate commerce and yet be subject to local taxation.

2. Commerce ⟹72.

Where taxicabs consigned to shipper had reached destination and were stored in warehouse, interstate commerce *held* completed, and hence taxicabs were subject to city tax.

Evidence disclosed that shipper consigned taxicabs to itself retaining title until drafts were paid by purchaser. Both taxicabs and drafts were sent to city of destination, but sale was not consummated there due to failure of purchaser to pay drafts.

Appeal from Superior Court, San Diego County; J. A. Allen, Judge.

Action by the Yellow Cab Manufacturing Company against the City of San Diego. Judgment for plaintiff, and defendant appeals.

Reversed and remanded, with directions.

James E. O'Keefe and Arthur F. H. Wright, both of San Diego, for appellant.

Sweet, Stearns & Forward and Edwin L. Eckert, all of San Diego, for respondent.

CARY, P. J.

Plaintiff brought this action to recover from defendant a tax in the sum of $558.60 paid by plaintiff under protest. The matter was tried upon the following agreed statement of facts:

"(1) That plaintiff, Yellow Cab Manufacturing Company is a corporation duly organized and existing under and by virtue of the laws of the State of Maine, with its principal place of business in the City of Chicago, State of Illinois, and is and at all times in the complaint mentioned was engaged in the City of

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Chicago, State of Illinois, in the business of manufacturing taxicabs and shipping the same in Interstate Commerce to points in the United States of America outside of the State of Illinois. (2) That defendant, City of San Diego, is a municipal corporation of the State of California, in the County of San Diego. (3) That during the month of December, 1920, the plaintiff, being then and there the manufacturer and owner of nineteen (19) taxicabs delivered the same to the Chicago, Milwaukee & St. Paul Railway Company in the City of Chicago, State of Illinois, for shipment via said C. M. & St. P. Railway Company, the Atchison, Topeka & Santa Fe Railway Company and the San Diego & Arizona Railway Company to San Diego, California, consigning the same to the order of the shipper at the City of San Diego, State of California, and that said taxicabs were consigned by six negotiable bills of lading to the order of said Yellow Cab Manufacturing Company at San Diego, California, said bills of lading being dated and covering taxicabs as follows, to-wit: December 10th, 1920, bill of lading No. 55 covering three taxicabs complete, motor numbers 121450, 122125 and 122167. December 10th, 1920, bill of lading No. 56, covering three taxicabs complete, motor numbers 122133, 121466 and 121451. December 11th, 1920, bill of lading No. 57, covering three taxicabs complete, motor numbers 123131, 122148 and 122130. December 11th, 1920, bill of lading No. 58, covering three taxicabs complete, motor numbers, 121437, 122145 and 122151. December 14th, 1920, bill of lading No. 60, covering three taxicabs complete, motor numbers 121435, 121454 and 122158. December 17th, 1920, bill of lading No. 63, covering four taxicabs complete, motor numbers 121448, 121447, 122143 and 122155. That said bills of lading were duly indorsed by said plaintiff and sent by it to the United States National Bank of San Diego, in the City of San Diego, with drafts drawn by plaintiff on one M. L. Uhler, for the amount of and covering the purchase price of said taxicabs, which said drafts were attached by plaintiff to said bills of lading, and the same were sent to said Bank as aforesaid with instructions to said United States National Bank of San Diego to deliver said bills of lading to said M. L. Uhler only upon payment in full of the amount of said drafts. (4) That said plaintiff retained the ownership of all right, title and interest in and to said taxicabs until such time as the purchase price of the same would be paid in full by said M. L. Uhler. (5) That said taxicabs arrived at San Diego, California, a few days prior to the first day of January, 1921, and on said first day of January, 1921, were in the possession, custody and control of the Atchison, Topeka & Santa Fe Railway Company and the San Diego & Arizona Railway Company; that shortly prior to January 1, 1921, the said Atchison, Topeka & Santa Fe Railway Company and the San Diego & Arizona Railway Company had, without the knowledge and/or consent of plaintiff, caused the said taxicabs to be removed from the freight cars, in which the same had been transported from Chicago to San Diego, and placed the same in storage in the Pioneer Warehouse in said City of San Diego, and the said taxicabs were placed in said warehouse as aforesaid, subject to orders of said railway companies, and that at said time the said bills of lading with the said drafts attached thereto were held by and in the custody of the United States National Bank of San Diego, at San Diego, Calitornia. That no delivery of said bills of lading had been made on or prior to said first day of January, 1921, nor has delivery of said taxicabs or bills of lading ever been made to the said M. L. Uhler or any other person in the City or County or San Diego, for the reason that said drafts or any of them have never been paid, and the said bank, between the first day of January, 1921, and the 14th day of June, 1921, continued to hold the said bills of lading and unpaid drafts in its custody and possession, and the said taxicabs were, between said last mentioned dates, held by said railway companies for the freight and storage charges due thereon by reason of transportation charges growing out of the shipment of the same from said City of Chicago to said City of San Diego, and the storage of the same in the said Pioneer warehouse at the said City of San Diego while waiting for the said Uhler to pay the said drafts and take up said bills of lading and obtain delivery of said taxicabs. (6) That on the first day of January, 1921, while the said taxicabs were stored in the said Pioneer warehouse as aforesaid and while the said bills of lading, with said drafts attached thereto, were in said bank as aforesaid, the city assessor of the City of San Diego assessed said taxicabs for taxation on account of the taxes of the city of San Diego levied and assessed for the year 1921 in the sum of $558.60, and the said city assessor, to enforce the assessment and payment thereof, levied upon the said taxicabs and noticed the same for sale, and was proceeding to sell the same on the 30th day of March, 1921, to pay the said amount of said taxes so assessed against said taxicabs as aforesaid. That the amount of said taxes claimed to be due said city by the said city assessor was the said sum of Five Hundred Fifty-eight and 60/100 ($558.60) Dollars, which amount was on the 29th day of March, 1921, paid by the said plaintiff to said City Tax Collector under protest. That prior to the payment thereof plaintiff duly and regularly protested the right of said city to collect said taxes; that said protest was based upon and alleged the unlawful and unauthorized assessment of said taxi-

cabs for the same reasons as set forth in the complaint in this action; that said protest was not allowed and thereupon plaintiff paid said tax to said City tax collector. (7) That thereafter and on the 14th day of June, 1921, said Uhler, or any other person on his behalf, having wholly failed to pay said drafts representing the purchase price of said taxicabs, and having wholly failed to pay said purchase price, or any part thereof, plaintiff, by reason thereof, caused the said taxicabs to be transported and reshipped without the said City of San Diego and without the County of San Diego, but not without the State of California, and that each and all of said taxicabs have ever since their reshipment as aforesaid from said city, remained without said city and were sold and disposed of by plaintiff without the City of San Diego and without the County of San Diego, State of California. (8) That on the 20th day of September, 1921, and within the time provided by law, plaintiff caused to be prepared and filed with the Common Council of the said City of San Diego its verified claim for the refund to plaintiff of the amount of said taxes, to-wit: the sum of Five Hundred Fifty-eight and 60/100 ($558.60) Dollars, being the sum paid by it to said City of San Diego for said taxes as hereinbefore stated; that said Common Council of said City of San Diego did thereafter and on the 13th day of October, 1921, by unanimous vote of the members thereof reject and disallow and refuse to pay the amount of plaintiff's said claim, or any portion thereof; that the said claim was in due and legal form and properly verified and that the only reason for the refusal by the said Common Council to pay the same was that the said Council believed the said taxicabs were taxable property within the City of San Diego, under the circumstances as herein set forth. That this stipulation is intended to cover all of the facts at issue in this case, leaving the Court to decide only whether under the facts as hereby agreed to, the said taxicabs were taxable by the said City of San Diego on said 1st day of January, 1921, and whether said plaintiff is entitled to a judgment for the recovery of the taxes so paid to said defendant, City of San Diego."

The plaintiff alleged as reasons why the tax was illegal that at all times while the taxicabs were in San Diego they were in transit and had never acquired an actual situs in that city rendering them subject to taxation. The trial court held that the automobiles were still in interstate commerce and not liable for the tax and gave judgment in favor of plaintiff, from which judgment defendant appeals.

[1] Counsel for both parties agree that if, at the time of the assessment, the taxicabs were still in interstate commerce, they are not subject to taxation by defendant. The precise question involved then is: Viewed from the standpoint of taxation by the city of San Diego, were or were not these taxicabs at the time the tax was assessed still in interstate commerce? We say "viewed from the standpoint of taxation by the city of San Diego" advisedly, because property may at one and the same time be in interstate commerce in so far as the power of Congress to regulate it is concerned, and yet be subject to a local tax. This was held in Board of Trade v. Olsen, 262 U. S. 1, 43 S. Ct. 470, 476, 67 L. Ed. 839, at page 849, where, in referring to a contract between a shipper and the railway for hauling grain from the west via Chicago to eastern states, which contract gave to the shipper the right to remove the grain at Chicago for temporary purposes of inspection, weighing, etc., and then continue the shipment on to the eastern states, the court says:

"Such a contract does not prevent the local taxing of the grain while in Chicago; but it does not take it out of interstate commerce in such a way as to deprive Congress of the power to regulate it, as is plainly intimated in the authority cited ([Bacon v. Illinois] 227 U. S. 516, 33 S. Ct. 299, 57 L. Ed. 615), and expressly recognized in Stafford v. Wallace, 258 U. S. 495, 525, 526, 66 L. Ed. 735, 745, 23 A. L. R. 229, 42 S. Ct. 397."

The broad general principles which control the determination of the question before us are laid down in Champlain Realty Co. v. Brattleboro, 260 U. S. 366, 43 S. Ct. 146, 149, 67 L. Ed. 309, at page 314, 25 A. L. R. 1195, as follows:

"When it is shipped by a common carrier from one state to another, in the course of such an uninterrupted journey it is clearly immune. The doubt arises when there are interruptions in the journey, and when the property in its transportation is under the complete control of the owner during the passage. If the interruptions are only to promote the safe or convenient transit, then the continuity of the interstate trip is not broken. * * * In other words, in such cases interstate continuity of transit is to be determined by a consideration of the various factors of the situation. Chief among these are the intention of the owner, the control he retains to change destination, the agency by which the transit is effected, the actual continuity of the transportation, and the occasion or purpose of the interruption during which the tax is sought to be levied."

The Supeme Court of the United States has considered the question here presented in a number of cases.

In 1894 the matter came before it in Pittsburgh & Southern Coal Co. v. Bates, 156 U. S. 577, 15 S. Ct. 415, 39 L. Ed. 538. There plaintiff in error, a Pennsylvania corporation, was engaged in the business of buying coal

in that state, loading it on barges on the Ohio and Mississippi rivers, and carrying it down the river for sale in Tennessee, Arkansas, Mississippi, and Louisiana. A statute of Louisiana provided a $50 penalty for the selling of any coal until it had first been inspected as provided for in the act. Plaintiff having sold one boatload of coal in New Orleans without the required inspection, action was begun against it to recover the penalty and the Supreme Court of Louisiana held plaintiff liable. In the United States Supreme Court it was argued that, as the coal was mined in Pennsylvania and taken on the navigable waters of the United States through several states for the purpose of sale in those states, and as the coal was sold while still on these navigable waters, the Louisiana statute when attempted to be applied to plaintiff's activities was a regulation of interstate commerce, in conflict with the commerce clause of the federal Constitution, and therefore void. The court held contra, using the following language at page 544 of 39 L. Ed., 156 U. S. 577, 15 S. Ct. 415, 419:

"The decision of the court in Brown v. Houston [114 U. S. 622, 5 S. Ct. 1091, 29 L. Ed. 257], thus rendered, seems to be conclusive of the case now before the court. The property in this case, as in that, still belongs to the original owners in Pennsylvania, but is brought on the navigable waters of the United States in boats and barges to Louisiana for purposes of sale, and is subject to taxation and sale as any other property of the citizens of the United States is subject when it becomes incorporated into the bulk of the property of the country, unless there be some special exemption set forth why it should not be thus taxed and sold, of which there is none here."

In Kelley v. Rhoads, 188 U. S. 1, 23 S. Ct. 259, 47 L. Ed. 359, sheep from Utah, destined for Nebraska, were being driven through Wyoming, grazing as they went; the intention being to ship them by rail after they had passed through that state. While the court held that under the circumstances the Wyoming authorities could not tax the sheep, it used the following significant language at page 361 of 47 L. Ed., 188 U. S. 1, 23 S. Ct. 259, 261:

"The law upon this subject, so far as it concerns interference with interstate commerce, is settled by several cases in this court, which hold that property actually in transit is exempt from local taxation, although if it be stored for an indefinite time during such transit, at least for other than natural causes or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities."

In American Steel & Wire Co. v. Speed, 192 U. S. 500, 24 S. Ct. 365, 48 L. Ed. 538, plaintiff, a New Jersey corporation, operated various manufacturing plants in states other than Tennessee. Its common method of selling was to have solicitors canvass the jobbers in Tennessee and adjoining states and receive orders for goods. The articles ordered would then be manufactured at the various plants. To facilitate the delivery of its products, the steel company selected Memphis, Tenn., as a distributing point and made the following arrangement with the Patterson Transfer Company of that city: The products were shipped from these plants to Memphis in plaintiff's name as consignee; the Patterson Transfer Company received, sorted, and stored them and made deliveries to the persons to whom the goods had been sold. The Patterson Company took no part in selling the goods but merely delivered the goods as instructed by the steel company. The steel company contended that the goods had acquired no situs in Tennessee since they were moving in interstate commerce from the place of manufacture for delivery to the persons to whom they had been sold. The court held the products to be taxable in Tennessee, using the following language at page 546 of 48 L. Ed., 192 U. S. 500, 24 S. Ct. 365, 370:

"With these facts in hand we are of opinion that the court below was right in deciding that the goods were not in transit, but, on the contrary, had reached their destination at Memphis, and were there held in store at the risk of the steel company, to be sold and delivered as contracts for that purpose were completely consummated."

In General Oil Co. v. Crain, 209 U. S. 211, 28 S. Ct. 475, 52 L. Ed. 754, oil from wells in Pennsylvania and Ohio was shipped in tank cars to Memphis, Tenn., and there placed in suitable sized containers for reshipment to fill orders in Tennessee and the several states adjacent thereto. The oil already sold and intended for distribution in states other than Tennessee was kept separate, marked "Oil already sold in Arkansas, Louisiana and Mississippi," and remained in Memphis only long enough to be properly distributed and shipped on to its ultimate destination. Oil ultimately to be sold in these same states, but not yet ordered, was kept in a separate tank marked "Oil to be sold in Arkansas, Louisiana and Mississippi," and remained there until orders were sent in. The court overruled plaintiff's contention that the oil already sold was moving in interstate commerce and held it subject to inspection by the authorities of Tennessee and subject to the payment of the fees for such inspection, saying at page 765 of 52 L. Ed., 209 U. S. 211, 28 S. Ct. 475, 482:

"Its oil was not in movement through the state. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as in State, Detmold, Prosecutor v. Engle [34 N. J. Law, 425], supra, but for the business purposes and profit

of the company. It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the state beyond a mere halting in its transportation."

In Bacon v. Illinois, 227 U. S. 504, 33 S. Ct. 299, 57 L. Ed. 615, grain from the West had been shipped via Chicago destined for New York and Philadelphia under contracts with the railway company which permitted the temporary removal of the grain at Chicago for inspection, sacking, etc., after which it was to go on to New York and Philadelphia. Plaintiff had bought this grain and the shipping contracts from the original owners while the grain was still in transit from the west to Chicago, and had had the grain temporarily stored in grain elevators in Chicago for the purpose of inspection, etc., where it was to remain only long enough for that purpose and then to continue its journey to New York and Philadelphia. None of the grain was to be disposed of within the state of Illinois. Plaintiff contended that, since the grain was moving in interstate commerce, it was not subject to personal property tax in Illinois, but the court in overruling this contention said at page 620 of 57 L. Ed., 227 U. S. 504, 33 S. Ct. 299, 302:

"But neither the fact that the grain had come from outside the state, nor the intention of the owner to send it to another state, and there to dispose of it, can be deemed controlling when the taxing power of the state of Illinois is concerned. The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. It was not being actually transported, and it was not held by carriers for transportation. The plaintiff in error had withdrawn it from the carriers. The purpose of the withdrawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not, as he chose. He might sell the grain in Illinois or forward it, as he saw fit. It was in his possession, with the control of absolute ownership. He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping, and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago for his own benefit, and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the state in an assessment for taxation which was made in the usual way, without discrimination."

In Susquehanna Coal Co. v. South Amboy, 228 U. S. 665, 33 S. Ct. 712, 57 L. Ed. 1015, plaintiff, a Pennsylvania corporation, shipped its coal from mines in Pennsylvania via the Pennsylvania Railroad across New Jersey, destined for delivery in New York and states east thereof. The coal arriving at the port of South Amboy, N. J., consigned to plaintiff, was there to be transferred to bottoms and shipped to states east of New York. If, upon its arrival at South Amboy, bottoms were on hand, the coal was immediately transferred from the cars to the bottoms; otherwise it was dumped into a storage yard of the railroad company to be transferred to bottoms as they became available. Overruling the coal company's contention that the coal was in interstate commerce, the court held the coal to be taxable by the city of South Amboy, saying at page 1016 of 57 L. Ed., 228 U. S. 665, 33 S. Ct. 712, 713: "Up to the time of loading the bottoms, the title of the coal was in complainant." And at page 1017 of 57 L. Ed., 228 U. S. 665, 33 S. Ct. 712, 714: "The coal, therefore, was not in actual movement through the state; it was at rest in the state, and was to be handled and distributed from there. Therefore, the principles expressed in General Oil Co. v. Crain, 209 U. S. 211, 52 L. Ed. 754, 28 S. Ct. 475, and Bacon v. Illinois, 227 U. S. 504, 33 S. Ct. 299, 57 L. Ed. 615, are applicable to it. The products in neither of those cases were destined for sale in the states where stored; the delay there was to be temporary,—a postponement of their transportation to their destinations. There was, however, a business purpose and advantage in the delay which was availed of, and while it was availed of, the products secured the protection of the state. In both cases it was held that there was a cessation of interstate commerce and subjection to the dominion of the state."

In Doscher v. Query (D. C.) 21 F.(2d) 521, 526, after stating that the commerce clause of the federal Constitution will not protect property from local taxation after its journey has ended, the court says: "And this is true, notwithstanding the goods have been transported in interstate commerce to the place where they are sought to be taxed, and are intended for shipment into other states, if they have reached the destination of their first journey and are being held by the owner for disposition in the ordinary course of business, and the stoppage be not a mere temporary delay in transportation."

[2] It remains to apply the principles thus enunciated to the facts in the case at bar. Plaintiff here expressly consigned the taxicabs in question to itself, thus retaining title until the drafts had been paid by Uhler. As not only the taxicabs themselves but the drafts likewise had both been sent to San Diego, it is obvious that the sale was to be consummated in that city. The only reason why this was not done was that Uhler failed to pay the drafts. We then have a condition where property consigned to plaintiff in its own name has completed its journey and is stored in a

warehouse in San Diego awaiting a sale in that city. By no course of reasoning could it be said that these taxicabs were but temporarily halted in transit for "lack of facilities for immediate transportation," to use the language of Kelley v. Rhoads, supra. They "on the contrary had reached their destination * * * to be sold and delivered as contracts for that purpose were completely consummated," as said in American Steel & Wire Co. v. Speed, supra. The sole purpose for sending these taxicabs to San Diego was to effect their sale, and that sale was to be effected not at Chicago, where the taxicabs first began their journey, but at San Diego, which was their destination. The idea of shipping these taxicabs out of San Diego to some other part of California was purely an afterthought brought about solely because the first sale failed in consummation. This is clearly indicated by the fact that they remained in that city almost six months before they were started on their second journey. The facts fall squarely within the language used in Susquehanna Coal Co. v. South Amboy, supra: "The coal, therefore, was not in actual movement through the state; it was at rest in the state, and was to be handled and distributed from there."

In none of the cases cited above, except Pittsburgh & Southern Coal Co. v. Bates, had the articles arrived at their ultimate destination. The purposes for which they were temporarily held in the locality assessing the tax were all purposes connected with transporting them to their ultimate destination. And yet these breaks in the continuity of the journey were held to take them out of interstate commerce sufficiently to subject them to local taxation. All the stronger are the facts here presented, where the goods had arrived at their ultimate destination a few days before the assessment date, had been placed in a public warehouse, no further transportation being contemplated and none, in fact, commenced for a period of nearly six months thereafter.

In a well-reasoned and well-considered opinion of the Supreme Court of Idaho, Columbia Motors Co. v. Ada County, 42 Idaho, 678, 247 P. 786, 48 A. L. R. 950, the court had under consideration a state of facts on all fours with the case at bar, and, after reviewing the federal decisions on the subject, reached the conclusion that the automobiles were taxable.

Under the authorities above, we are satisfied that the taxicabs were on January 1, 1921, no longer moving in interstate commerce, and being within the city of San Diego were properly taxable by the authorities of that municipality.

Counsel for plaintiff has cited a number of decisions, in none of which, however, is the taxability of personal property under consideration. The only case involving taxation of any kind cited is Robbins v. Taxing District of Shelby County, 120 U. S. 490, 7 S. Ct. 592, 30 L. Ed. 694, and there the sole question was the validity of an occupation tax imposed by a county on traveling salesmen who represented commercial houses outside the state, and which case is not in point on the subject involved in this appeal.

For the foregoing reasons the judgment is reversed, and the cause remanded to the trial court, with directions to enter judgment for the defendant.

We concur: MARKS, J.; BARNARD, J.

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106 Cal. App. 704

PEOPLE v. SELPH.

Cr. 1923.

District Court of Appeal, Second District, Division 2, California.

June 27, 1930.

Rehearing Denied July 12, 1930.

1. Homicide ⚷253(1).

Evidence *held* to sustain conviction of murder in first degree.

The jury was authorized in believing that defendant, actuated by ill will arising from jealousy and belief that decedent was withholding money from him and that it was her practice to inveigle men into positions where she could profit financially, determined he would have revenge and that she would no longer have opportunity to make herself agreeable to other members of his sex.

2. Homicide ⚷180.

Where issue of insanity in murder case was tried separately, testimony under general plea of not guilty, respecting defendant's intoxication was relevant only as to state at time of crime as indicating intent.

3. Homicide ⚷180.

In murder case, limiting testimony concerning defendant's intoxication to period of three weeks before crime *held* not error.

The issue of insanity was tried separately under the plea of not guilty by reason of insanity, and therefore proffered testimony, introduced in support of general plea of not guilty, was relevant only to state of intoxication at time crime was

committed in order to assist in determining intent.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Herbert N. Selph was convicted of murder in the first degree with life imprisonment, and he appeals.

Affirmed.

Cooper & Collings, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, J.

This is an appeal by the defendant from a judgment sentencing him to life imprisonment upon a verdict finding him guilty of murder in the first degree and from an order denying his motion for a new trial.

There is and can be no question raised concerning the commission of the homicide by him. On the morning of September 3, 1929, the appellant was seen to chase the decedent, Mrs. Georgia Greggins Bowman, out of the house in which they were living together, firing at her with a revolver. She ran out toward her automobile, parked in front of the house, but fell to the ground just before reaching it. After she had fallen, the appellant stood over her and continued to fire shots into the body.

However, the appellant contends that the evidence is insufficient to support the verdict of the jury because it fails to show that the homicide was "malicious, designed or premeditated." He also asserts that the court committed error in precluding him from introducing evidence relative to the intoxicated condition of the appellant for a longer period than three weeks prior to the killing.

The arguments thus advanced render it necessary for us to recite the testimony introduced by the prosecution upon the issue involved, noting in this particular that the defendant entered two pleas in the court below; the one that he was not guilty, and the other that he was not guilty by reason of insanity.

Some time during January, 1929, the appellant went to live with Mrs. Bowman at the place where the tragedy occurred. On April 19, 1929, the decedent and appellant entered into a written agreement whereby they undertook to establish a rabbitry on the same property; she to furnish the money to buy the stock, and room and board to the appellant, and he to perform the labor necessary to construct the hutches, and to breed, raise, and market the increase. The proceeds were to be evenly divided. A third party was named in and signed the agreement as lessor, but, so far as the document discloses, was to receive no money. The agreement contemplated the keeping of 1,000 does, but, after they had secured about 115, the decedent sold them without asking the consent of appellant and kept the proceeds. The appellant demanded his share, according to his statement, approximating $20, together with some money he said Mrs. Bowman had taken out of his pocket. These demands she refused, telling him to pack up and get out, and that, after he had moved, he could come back and get the money. The appellant told the officers, however, that such was her method of getting the money, and that she had made several men love her and had taken money from them. He confessed his infatuation with her, and said that on the morning of the homicide, at about 8 o'clock, some man had come to the house with her who was going to step into his shoes. To the arresting officers the appellant made the statement when asked why he had killed her, that she had made him do it. It is made to appear from his own statement and from the testimony of another witness that they had been quarreling for two or three weeks. On the morning of the tragedy, the decedent renewed her demands that he leave the place, and, according to appellant, kicked the door to his room open for the purpose of inquiring if he was going.

With respect to the state of intoxication of the appellant at the time of the shooting, all of the witnesses who talked with him agree that they smelled alcohol on his breath, but there is ample evidence to support the implied finding of the jury that he was not in such a state of inebriety as to be without the power of forming an intent. There are those who testified that he did not stagger as he walked. There are those who said that he talked coherently, taking plenty of time to answer the questions with which he was plied, and declining to answer questions at times. There is testimony that he was able to sit down and get up without assistance; that he got into the automobile without aid except the opening of the door, which act he could not perform because he was handcuffed; and other evidence that he appeared alert.

[1] Under the circumstances we think the case of People v. Kelley (Cal. Sup.) 281 P. 609, relied upon by the appellant, is not applicable. Here the jury was authorized in drawing the deduction that the defendant, actuated by ill will arising from jealousy and his belief that the decedent was withholding from him money to which he was rightfully entitled and that it was her practice to inveigle men into positions where she could profit financially, determined that he would have revenge and that she would no longer have opportunity to make herself agreeable to other members of his sex. Believing such to be the motive of the appellant, and also believing, as the evidence justified them in doing, that the appellant was capable of forming a deliberate intent to murder, the jury was acting within its province in returning the verdict complained of.

[2, 3] We now turn our attention to the claim that the court erred in limiting testimony concerning the intoxication of the defendant to a period of three weeks prior to the commission of the offense. It will be borne in mind that the issue of insanity was tried separately under the plea of not guilty by reason of insanity, and therefore the proffered testimony, introduced in support of the general plea of not guilty, was relevant only to the state of intoxication at the time of the commission of the crime in order to assist in determining the intent with which it was committed. People v. Malone, 205 Cal. 29, 269 P. 628, 270 P. 196. Let us put the proposition in a different way. Under the authority of People v. Troche, 206 Cal. 35, 273 P. 767, 772, People v. Leong Fook, 206 Cal. 64, 273 P. 779, and People v. Phillips (Cal. App.) 283 P. 821, we are forced to the conclusion that, while the insanity of the defendant is not in issue under the general plea, yet this does not preclude the introduction of evidence tending to establish the mental condition of the accused at the time the offense was committed for the purpose of showing a lack of criminal intent, malice, or premeditation, such evidence to be also considered by the jury, as it undoubtedly was in the instant case, in the exercise of its discretion in fixing the punishment at life imprisonment or the extreme penalty. It will be observed, however, that this testimony has to do with the mental condition of the defendant at the time of the commission of the offense, or, to put it in the language of People v. Troche, supra: "The only evidence admissible for the purpose of enabling the jury to determine whether the death penalty or life imprisonment should be imposed in the event the defendant should be found guilty of murder in the first degree was the evidence which the court did admit, and which concerned 'the circumstances connected with the offense.' People v. Golsh, 63 Cal. App. 609, 613, et seq., 219 P. 456. See, also, People v. Witt, 170 Cal. 104, 110, 148 P. 928. The insanity of a defendant cannot be used for the purpose of reducing his crime from murder in the first degree to murder in the second degree. If responsible at all in this respect, he is responsible in the same degree as a sane man, and if he is not responsible at all he is entitled to an acquittal in both degrees."

In the instant case it is manifest that the action of the trial court in permitting the defendant, on the trial under the general plea, to show his intoxicated condition covering a period of three weeks prior to the time of the commission of the crime, fully protected his right to show the circumstances under which the homicide was committed.

Judgment and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

106 Cal. App. 754

BOEHMKE v. WESTFALL.

Civ. 96.

District Court of Appeal, Fourth District, California.

June 27, 1930.

1. Appeal and error ⟹882(3).

Defendant, in action for money had and received, cannot complain on appeal of finding of account stated, though not within issues, where case was tried and decided upon that theory.

Testimony showing account stated was brought out by counsel for defendant on cross-examination of plaintiff. The findings of trial court showed account stated between parties, notwithstanding action was brought for money had and received.

2. Account stated ⟹4.

Writing is not essential to creation of account stated.

3. Limitation of actions ⟹29(3).

Account stated produced from possession of daughter prefixed with words "mother owes," with other evidence, *held* to sufficiently identify account stated bringing it within four-year limitation (Code Civ. Proc. § 337, subd. 2).

Mother, when sued by daughter, contended that account stated as introduced in evidence lacked essentials of book account within four-year limitation, Code Civ. Proc. § 337, subd. 2. Book was produced from daughter's possession, and she identified book as one in which she kept account with mother, and mother likewise testified that daughter kept such account at her request.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Atcion by Myrtle Boehmke against Marie Westfall. Judgment for plaintiff, and defendant appeals.

Affirmed.

P. M. Andrews, of San Diego, for appellant.

A. T. Roark, of San Diego, for respondent.

CARY, P. J.

From a judgment against her in the sum of $402.82 defendant prosecutes this appeal.

The complaint is as follows: "Plaintiff complains of defendant and for cause of action alleges: (1) That at sundry times between the first day of January, 1924, and the 31st day of December, 1926, the defendant received from plaintiff the sum of Four Hundred Two Dollars and eighty-two cents ($402.-

82) for the use and benefit of the defendant, which sum the defendant agreed to return or to repay to plaintiff upon demand. (2) That before the commencement of this action the plaintiff herein demanded payment from the defendant of said sum of Four Hundred Two Dollars and eighty-two cents ($402.82). (3) That defendant has failed and refused to pay defendant said sum of Four Hundred Two Dollars and eighty-two cents ($402.82) or any part thereof. Wherefore, plaintiff demands judgment against the defendant in the sum of Four Hundred Two Dollars and eighty-two cents ($402.82)."

The amended answer denied all the allegations of the complaint, and alleged that the action was barred by the statute of limitations, Code of Civil Procedure, § 339, subd. 1.

Briefly summarized the evidence is as follows: Plaintiff was the daughter of defendant. She testified that, beginning with November of 1924, she had been loaning defendant money, and that each time as she loaned the money she would immediately enter the amount, etc., in a little book which she kept for that purpose. This account, introduced by plaintiff without objection, is as follows:

Last page:

Mother owes.

1924		
Once	$ 5 00	Nov.
Once	10 00	
Once	20 00	
Once	25 00	
Dec. 2	50 00	
Jan. 17	30 00	 1925
Feb. 25	30 00	
April 6	35 00	
June 11	30 00	
July 20	27 73	
	$262 73	

1925		
W. Bill	$ 1 00	June & July
gas Bill	2 59	
suit	1 50	
cash	35 00	
cash	35 00	
cash	10 00	
cash	5 00	Aug. 12
cash	10 00	Aug. 25
cash	25 00	Sept. 12
		Sept. 14
	$387 82	

Next to last page:

1925	
$387 82	
10 00	Sept. 28th
5 00	Oct.
$402 82	

She further testified that defendant had asked her on three different occasions after the last loan how much she owed, and when informed that the amount was $402.82 had made no objection to that figure and had promised to pay. This latter was brought out on cross-examination by defendant's counsel. Defendant testified that plaintiff had loaned her about $200, although she was not at all clear on the amount, that plaintiff had told her she had the amount marked down in her little book, that she (defendant) had never paid plaintiff back anything, but had trusted plaintiff to keep accurate account; that she (defendant) did not recall just what amount plaintiff said she owed, it might have been a thousand dollars for all that she knew, plaintiff had asked her to sign a note for the amount sued upon and she had refused. In rebuttal plaintiff testified that defendant, when requested to sign the note, had raised no objection to the amount, but had merely said she would not sign any note.

The court found in part as follows: "(1) That at sundry times between the 1st of January, 1924, and the 31st day of December, 1926, the defendant received from plaintiff on a book account the sum of Four Hundred Two Dollars and eighty-two cents ($402.82) for the use and benefit of defendant, which sum the defendant agreed to return or repay to plaintiff upon demand. (2) That before the commencement of this action the plaintiff herein made and presented to defendant her stated account amounting to Four Hundred Two Dollars and eighty-two cents ($402.82), and thereupon demanded payment to her from the defendant of said sum. That defendant did not at the time said account was presented to her by plaintiff as aforesaid or at any other time before bringing this action to trial, dispute the correctness of the amount of said account but acquiesced therein. (3) That defendant has failed and refused to pay plaintiff said sum of Four Hundred Two Dollars and eighty-two cents ($402.82) or any part thereof and the whole of said sum of Four Hundred Two Dollars and eighty-two cents ($402.82) is now due and owing from defendant to plaintiff."

The court concluded that the plaintiff was entitled to judgment against defendant in the sum of $402.82 and rendered judgment accordingly.

[1, 2] Appellant contends that the finding of an account stated is not within the issues. This is true. However, "it has been repeatedly held in this state that where the trial court and the parties to an action proceed to a trial of the cause upon the theory that there is a material issue, and the court, upon evidence addressed to that issue and received without objection, finds in accordance with that evidence, and upon the theory that an appropriate issue was raised by the pleadings, 'the parties will not, nor will either of them, be allowed here for the first time to say there was no such issue,'" as said in Schroeder v. Mauzy, 16 Cal. App. 443, at page 447, 118 P. 459, 461 (citing numerous cases). In the case at bar the testimony regarding the account stated was brought out by counsel for defendant on cross-examination of the plaintiff, and the case thus falls squarely within the rule

announced. Further, there was sufficient evidence to support this finding, it being settled that a writing is not essential to the creation of an account stated. Converse v. Scott, 137 Cal. 239, at pages 241–243, 70 P. 13; Mitchell v. Fleming, 77 Cal. App. 241, at page 245, 246 P. 152; Bennett v. Potter, 180 Cal. 736, at page 743, 183 P. 156.

[3] Appellant further contends that the account as introduced in evidence lacks the essentials of a book account as referred to in Code of Civil Procedure, section 337, subd. 2, which provides four years' time within which to bring an action upon a book account. The reason appellant advances is that neither the name of the debtor nor the creditor appears therein.

The words "Mother owes" are in our opinion sufficient identification, when supplemented by both the testimony of plaintiff and defendant, to identify the account as being against the defendant. Regarding the failure of the account to show the name of the creditor, it is true that plaintiff's name nowhere appears therein. The objection that the name of the creditor was not shown in a book account was raised in Bailey v. Hoffman (Cal. App.) 278 P. 498, but the court, in overruling this contention, remarked: "The book was produced from the possession of the plaintiff, and there was nothing in the evidence showing or tending to show that he kept any accounts in favor of anybody but himself. Therefore it cannot be said that there was not some evidence showing that the account was in his favor."

In the case at bar, not only was the book produced from the possession of the plaintiff, but she identified it as the book in which she kept the account between defendant and herself, and the defendant likewise testified that plaintiff had kept such an account at defendant's request. We therefore hold the point to be without merit.

The judgment is affirmed.

We concur: BARNARD, J.; AMES, Justice pro tem.

TASKER v. NIETO et al.*

Civ. 4121.

District Court of Appeal, Third District, California.

June 17, 1930.

Rehearing Granted July 17, 1930.

1. Taxation ⟹730.

Deed given pursuant to tax sale, if valid, cuts out all prior claims to property.

2. Appeal and error ⟹1078(1).

Where only one failure in chain of title was specified on appeal, reviewing court did not examine challenged deed except as to specified defect.

3. Taxation ⟹755.

Tax deed *held* not invalid because grantee's name did not appear in granting clause, where it appeared five times in instrument.

4. Trial ⟹395(2).

Finding that allegations in conflict with findings were not true *held* void for uncertainty.

> The finding in question stated, "that the allegations of plaintiff's complaint herein, and the answers or cross-complaint of defendants M. M. N. and A. M. N., in conflict with the foregoing findings, are not true."

Appeal from Superior Court, Los Angeles County; Daniel Beecher, Judge.

Action by Dora M. Tasker against Antonio M. Nieto and others. From an adverse judgment, defendants Antonio M. Nieto and wife appeal.

Reversed.

George Baltimore and Robert J. Adcock, both of Los Angeles, for appellants.

John F. Poole, of Los Angeles, for respondents.

PLUMMER, J.

Judgment was entered in this action in favor of the respondent Fanny R. Cunningham, and against the plaintiff and the defendants Nieto. From this judgment, the defendants Nieto appeal.

The plaintiff began this action to quiet title to certain property situate in the city and county of Los Angeles, described as follows, to wit: "The northerly portion of lot 81, Leonis Tract, deed book 824, pages 123–126, records of Los Angeles county, having a frontage of 24.95 feet on the westerly side of Utah street, and being 21 feet at the westerly end, 123.60 feet at the southerly side and 106 feet at the northerly side." The defendants Nieto and the respondents Cunningham answered, claiming title to the property described in the complaint, and respectively praying for judgment in their favor.

At the conclusion of the trial the court made the following findings, omitting such portions as are not material:

Finding No. 1.

"That the defendant Fanny R. Cunningham was, during all the time herein men-

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing granted 291 P. 688.

tioned, and now is, the owner in fee simple and entitled to the possession of the following described real property situate in the County of Los Angeles, State of California, to-wit: 'The northerly one-half of Lot 81, Leonis Tract, as per map recorded in deed book 824, pages 123–126, records of Los Angeles County.' "

Finding No. 2.

"That the claims of said plaintiff Dora M. Tasker, and said defendants Antonio M. Nieto and Magdalena M. Nieto, * * * in and to said real property, are without any right whatever, and that said plaintiff Dora M. Tasker, and said defendants Antonio M. Nieto and Magdalena M. Nieto, * * * have no estate, right, title, interest in, or claim or lien upon said property, or any part thereof."

Finding No. 4.

"That the allegations of plaintiff's complaint herein, and the answers or cross-complaint of defendants Magdalena M. Nieto and Antonio M. Nieto, in conflict with the foregoing findings, are not true."

From these findings the court drew its conclusions of law that the defendant Fanny R. Cunningham was entitled to a decree quieting her title to said property against the claims of the plaintiff and the other defendants in this action, and enjoining and debarring them from asserting any estate, right, title, or interest in and to said property, or any part thereof.

While the answers of the defendants Nieto set up, among other defenses, title by adverse possession, it appears from the transcript that the case was tried upon the theory, also, that the defendants Nieto claimed an interest in said premises by reason of a certain agreement of purchase, to which reference will hereafter be made.

The transcript shows that the defendants Nieto obtained a deed to the property involved some time during the year 1903, and at all times from said date down to the trial, or shortly before the trial, had been in possession of said lot of land, and of the improvements thereon, and had for many years occupied the same as the place of their residence. The transcript likewise shows that neither the plaintiff Dora M. Tasker nor the respondent Fanny R. Cunningham, nor the defendant W. P. Cunningham, ever had any actual possession of the property.

While several other questions have been argued in this case, only one vital question is really tendered for the court's consideration. The record shows that the property was sold on account of delinquent taxes in the year 1914; that W. P. Cunningham was the purchaser thereof, and that W. P. Cunningham thereafter conveyed his interest to Fanny R. Cunningham, and that subsequently to this sale, and in the year 1916, the property was again sold by the city treasurer of the city of Los Angeles, on account of the failure of the owner of the lot to pay the amount due and delinquent on bonds issued for street assessment work, and that at such sale the Empire Securities Company of Los Angeles became the purchaser, which company conveyed to Dora M. Tasker, plaintiff herein, who thereafter entered into an agreement of purchase and sale with the defendants Nieto. This agreement of sale provided for payment in installments. It was claimed by the plaintiff upon the trial that the installments had not been paid as provided for in the agreement of purchase and sale, and that therefore the defendants Nieto had forfeited their interest in the property. The court made no finding upon this issue, and therefore what we have to say relates only to the testimony introduced, touching the question of payments. As set out in the transcript, the testimony is overwhelmingly in support of the contention of the appellants Nieto that everything due upon the contract of purchase, or agreement entered into between the plaintiff and the defendants Nieto, had been paid by the defendants Nieto, including the installments mentioned therein, and all taxes that had subsequently accrued upon the premises. While there is some testimony to the effect that the respondent Cunningham paid taxes upon the lot, it is of such an uncertain character as scarcely to raise a conflict with the testimony of the defendants Nieto and their witnesses, to the effect that the installments due on the contract with the plaintiff, Tasker, were all paid, and that the money to pay the taxes was also paid by the defendants Nieto and the plaintiff, Tasker, and the receipts set out in the transcript indicate that the plaintiff, Tasker, alone paid the taxes after acquiring a deed thereto.

From what we have said, irrespective of the claim of the defendants Nieto of having acquired title to the premises in 1903, they had an interest in the real property involved by reason of the agreement of purchase and sale with the plaintiff, Tasker, and if the deed made by the treasurer of the city of Los Angeles to the Empire Securities Company was a valid conveyance, then and in that case the judgment should have protected the interests of the appellants Nieto, and should have been to the effect that the respondent Cunningham had no title whatever to the premises in dispute.

[1] We do not need to consider any of the questions raised as to the validity of the tax deed delivered to the Cunninghams in 1914, because if the deed to the Empire Securities Company is valid, it cuts out all prior claims to the property.

While it is claimed by the appellants that no judgment should have been entered in fa-

vor of the respondent Cunningham quieting the title as against the appellants, for the reason that the Cunninghams never served any pleadings upon the appellants or in any way indicated that they claimed title as against the appellants, and also that the tax deed to the Cunninghams is void, no particular consideration needs to be given to these points in this opinion by reason of our views to be hereafter stated relative to the deed made by the city treasurer of Los Angeles to the Empire Securities Company.

[2, 3] The attack upon this deed made by the respondent, and which appears to have been successful in the court below, is that there is no grantee named in the instrument. We will quote the language of the respondent; it is: "There are numerous technical statutory reasons why the assessment deed under which Tasker and Nietos claim title, is void on its face, as set forth in the case of Chapman v. Jocelyn, 182 Cal. 298, 187 P. 962, and it should not have been admitted, but its greatest failure is that it has no grantee; attempts to convey to no one." As respondent specifies only one failure in the appellants' chain of title, we do not feel called upon to examine the challenged deed only so far as the alleged failure is set forth.

The granting clause of the deed to the Empire Securities Company is in the following words: "Now, Therefore, this indenture witnesseth: That for and in consideration of the sum of $78.90 in hand paid to N. T. Powell, said City Treasurer, the receipt whereof is hereby acknowledged, I, N. T. Powell, City Treasurer of the City of Los Angeles, have granted, bargained, sold, conveyed and confirmed, and do by these presents grant, bargain, sell, convey and confirm unto the said ——— and to his heirs and assigns forever, the property herein referred to." (Then follows a description of the property involved in this action.)

It is this portion of the instrument of conveyance urged upon our attention as establishing its invalidity. In relying upon this portion of the deed of conveyance to the Empire Securities Company, it appears that not only the respondent, but the appellants and the trial court entirely overlooked the fact that there is a clear distinction between a writing in which no grantee is named and an instrument of conveyance in which no grantee's name appears in the granting clause. In the former case the writing does not rise to the dignity of a conveyance of real estate. On the other hand, the law is well settled that it is not necessary that the name of the grantee appear in the granting clause. If the name of the grantee elsewhere appears, the conveyance is good. No California case has ever held that a deed is invalid because the name of the grantee does not appear in the granting clause. On the contrary, the authorities are legion that, if the name of the grantee elsewhere appears in the instrument, the fact that the name is wanting in the granting clause is wholly immaterial. A few of these cases we will hereafter cite.

First, we will examine the California cases which apparently have led all parties into error in this cause. The first case cited in support of the theory that the grantee's name must appear in the granting clause is that of Wilson v. White, 84 Cal. 239, 24 P. 114, 115. That case, however, did not consider the question here presented, as the issue there was as to the validity of a deed naming a fictitious grantee. The court there said: "It is involved in the very inception of a deed that there must be a grantee, to whom delivery is made, and in whom the title can vest. If there be no grantee, and the deed is to a mere fictitious name, it is obvious that it is a nullity. But if there be a person in existence, and identified, and delivery is made to him, it makes no difference by what name he is called." This case did not consider the particular place in the instrument where the grantee's name must appear.

In Wunderlin v. Cadogan, 75 Cal. 617, 17 P. 713, the name of the grantee claiming the property did not anywhere appear in the instrument. The court there said: "A deed which does not contain the name of the grantee is void as a conveyance." This, of course, is a clear statement of the law, but is not a statement that the grantee's name must appear in any particular portion of the conveyance.

In Winter v. Stock, 29 Cal. 407, 89 Am. Dec. 57, the question simply was in whom a deed of land made to L. B. & Company, vested the property, and it was held that such an instrument conveyed the property to L. B. alone.

In Harris v. Barlow, 180 Cal. 142, 179 P. 682, a writing purporting to be a deed was executed in blank, the party of the second part was not named, and the name of no one appeared in the instrument as the grantee. It appears that the person owning the property executed an instrument in blank, passed it to a second party with oral instructions to insert the name of the purchaser, who would become the grantee. The conclusion necessarily followed that the writing did not constitute a deed of conveyance.

The text referred to in 9 California Jurisprudence, page 121, § 24, sets forth only the general rule without regard to its application to particular cases, to wit: "It is involved in the very conception of a deed that there must be a grantee to whom delivery is made, and in whom title can vest. Hence, a deed which fails to name a grantee, or a grantee who may be ascertained, * * * is a nullity." Citing the authorities which we have above mentioned.

It will thus be seen that none of the cases relied upon as establishing the invalidity of the challenged deed support any such contention. Not one of them indicates that the name of the grantee must necessarily appear in the granting clause. As applied to the cases under consideration, they state the law. As applied to the circumstances involved in this action, they are wholly inapplicable.

Before referring to the cases which show conclusively that if the grantee's name appears anywhere in the instrument of conveyance, or in such a manner as to indicate who the grantee is, the conveyance is valid, even though the name of the grantee does not appear in the granting clause, we will call attention to the challenged deed. A reading of this instrument shows that the grantee's name appears five times in the instrument. In the very beginning of the instrument we find the following: "This indenture made and entered into this 26th day of December, in the year of our Lord, one thousand nine hundred and sixteen, by and between N. T. Powell, City Treasurer of the City of Los Angeles, party of the first part, and Empire Securities Company of the City of Los Angeles, California, the party of the second part." Further on: "And Whereas, the said property hereinbefore described was by C. H. Hance, the then City Treasurer of the City of Los Angeles, in accordance with law and in pursuance of said notice, offered for sale at public auction on the 16th day of October, 1915, at the office of the City Treasurer, City Hall, to pay the amount of said bond due and unpaid, including costs and charges due thereon, and that at said sale the Empire Securities Company was the bidder," etc. (setting forth the amount of the bid). And further on in the same instrument: "Hence, as City Treasurer of the City of Los Angeles, struck off to the Empire Securities Company the property above described, who then and there paid therefor the said sum of Sixty-nine and 97/100 dollars;" being the amount of the unpaid portion of the bond, interest charges, etc. Again: "And Whereas, on the 18th day of December, 1916, the Empire Securities Company, the purchaser of said property at said sale, filed an affidavit in the office of the said City Treasurer," etc. And, finally, after setting forth the granting clause to which we have referred, the habendum clause of the instrument reads as follows: "To have and to hold, all and singular the hereinbefore and last-mentioned and described premises, together with the appurtenances unto said, the Empire Securities Company, party of the second part," etc. In five successive instances it thus appears that the grantee has been named.

There is no dissenting opinion in the long line of cases having to do with the naming of the grantee, which holds that a deed is sufficient in naming a grantee if his name appears as shown by the challenged conveyance.

In the case of Berry v. Billings, 44 Me. 416, 69 Am. Dec. 107, in considering a deed where the grantee's name appeared in the habendum clause, and not in the granting clause, the Supreme Court of Maine held that a "deed of land 'to have and to hold' to B and his heirs, is good, although the grantee is not named in the premises." The word "premises" is then defined as that portion of the instrument which would include the granting clause.

In Henniges v. Paschke, 9 N. D. 489, 84 N. W. 350, 81 Am. St. Rep. 588, the Supreme Court of North Dakota, having under consideration an instrument where the granting clause failed to name the grantee, held as follows: "A deed of real estate, to be effective as a conveyance, must designate a grantee; but it is not indispensable that the grantee's name should be stated, if the instrument so identifies him that there is no reasonable doubt respecting the party constituted grantee. Hence, a deed which recites that the consideration was paid by a named person, sufficiently designates him as the grantee, and is valid."

In Devlin on Real Estate (3d Ed.) volume 1, § 219, the rule we are considering is thus stated: "Where there is no repugnance between the granting clause and the habendum, a party not named in the former may take under the deed if named in the latter. Thus, there is no repugnance between the two clauses when the party who is to take is not named in the grant, but may be ascertained from the habendum."

In Jones on Real Estate, § 224, the same rule is thus stated: "It is not essential that the grantee should be formally named in the granting part of the deed; it is only necessary that taking the whole instrument together, there is no uncertainty as to the grantee. If the instrument shows who he is; if it designates him and so identifies him that there is no reasonable doubt respecting the party constituted grantee, it is not a vital consequence that the matter which establishes his identity is not in the common or best form, or in the usual or most appropriate position in the instrument."

In the case of Weekley v. Weekley, 75 W. Va. 280, 83 S. E. 1005, the Supreme Court of Appeals of West Virginia upheld an instrument as a deed of conveyance which failed to name the grantee in the granting clause, but otherwise designated the grantee so as to leave no doubt as to the person to whom the intended grant was made. The opinion in that case sets forth a rule of construction which is applicable here: "The modern and authoritative rule for construing deeds requires enforcement of the grantor's intention, when manifested by the plain import of the language used; and, to ascertain such intention, the instrument must be examined and considered in its entirety, and not otherwise.

If, when so examined and considered, such intention appears, effect must be given to it," etc.

In Vineyard v. O'Connor, 90 Tex. 59, 36 S. W. 424, 425, the Supreme Court of Texas, having the same question before it, used the following language: "It is not indispensable that the name of the grantee, if given, should be inserted in the premises. If the instrument shows who he is,—if it designates him, and so identifies him that there is no reasonable doubt respecting the party constituted grantee,—it is not a vital consequence that the matter which establishes his identity is not in the common or best form," etc. The opinion in that case cites a number of authorities to the effect that, even though the deed is not in the best form, if the grantee's name appears, and the party to whom the conveyance was intended to be made is shown, without reasonable doubt, it is immaterial where the grantee's name appears.

In Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201, 203, the Supreme Court of North Carolina, having before it an instrument where the grantee's name appeared, but not in the granting clause, thus expressed its views: "It has always been true, both in the case of deeds and of wills, that if the instrument shows who the grantee is, or if it designates and so describes him that there is no uncertainty respecting the party who is intended to take under the will or deed, it is not a vital consequence that the matter which establishes his identity is not in the common or best form." Citing the authorities to which we have heretofore referred, and also 3 Washburn on Real Property, 282.

In the case of Snow v. Gallup, 57 Tex. Civ. App. 572, 123 S. W. 222, 228, the Court of Civil Appeals of Texas, considering the subject of where a grantee's name should appear, followed the law as set forth in the cases which we have cited. As the deed in the Snow Case appears in the opinion, we quote it as showing how a grantee may be ascertained. We take the following from the opinion: "It is urged by the tenth assignment that the deed claimed by defendant to be from Cherry to Farrier, under which defendant claims, is void because it does not name the grantee. The instrument referred to is as follows: 'The State of Texas, County of Liberty. Know all men by these presents that I, Wm. Cherry, of aforesaid county and state, for and in consideration of $600 to me in hand paid, the receipt whereof is hereby acknowledged by H. M. Farrier of aforesaid state and county, do by these presents bargain, sell and guarantee the title of a certain parcel or tract of land being and situate in Tyler county [here follows a description of the land]. I hereby guarantee and forever defend against all claims whomsoever to the said H. M. Farrier, his heirs and assigns forever.'" The court further said that, although not artistically drawn, the instrument was valid. Farrier was named in the habendum clause as the one to hold the property.

[4] In 18 C. J., page 174, § 56, the rule in its various applications to the naming of a grantee, is thus stated: "A deed in order to pass title must designate the grantee without uncertainty, although it is not necessary that the grantee be described by name if otherwise identified or made susceptible of identification by proof aliunde. Further, it is sufficient if the identity of the grantee is made certain by the instrument as a whole, although he is not named in the premises. Where, however, a grantee is named either in the granting clause or in the premises generally, another person who is named in the habendum clause cannot take as a grantee, except in the case of the creation of an estate by remainder, or in the case of a declaration of a use. This rule applies as well to other parts of the instrument as to the habendum where the granting clause expressly names the grantee. These rules, however, do not apply where no grantee is named in the premises. If the deed in its entirety distinguishes the grantee from the rest of the world, it is sufficient. A latent ambiguity as to the name of the grantee may be explained by parol." A reference to the footnotes cited in the text just referred to shows that a list of cases numbering about twenty are cited upholding the rule as stated by the text-writer. It would unnecessarily lengthen this opinion to refer to the cases upon which the rule just quoted from Corpus Juris is based. It is sufficient to say that the authorities are all one way, and the conclusion is unescapable that the deed under consideration sufficiently names and identifies the grantee. And the conclusion is also unavoidable that the findings of the court in this case are not supported by the testimony. We may also add that finding No. 4 is void for uncertainty.

As presented to us the record shows no defect in the appellant's title, the parties shown to have had actual possession of the premises for over twenty years.

The judgment of the trial court is reversed.

We concur: FINCH, P. J.; THOMPSON, J.

BARKER BROS., Inc., v. COATES et al.*

Civ. 4092.

District Court of Appeal, Third District, California.

June 25, 1930.

Rehearing Denied July 25, 1930. Hearing Granted by Supreme Court Aug. 21, 1930.

1. Reference ⟹99(2).

Trial court cannot modify findings of referee appointed to hear entire case or adopt findings independently of referee (Code Civ. Proc. § 639, subd. 1, and § 644).

Code Civ. Proc. § 639, subd. 1, authorizes court, when parties do not consent, on application of either party, or of its own motion, to direct a reference where trial of issue of facts requires examination of long account on either side; and section 644 provides that referee's findings on whole issue must stand as findings of court and that on filing of finding with clerk of court, judgment may be entered thereon in same manner as if action had been tried by court.

2. Reference ⟹35.

Appointment of referee to hear long account did not constitute referee a "pro tempore judge" within repealed statute and repealed constitutional provision (Code Civ. Proc. § 639, subd. 1, and § 72; Const. art. 6, § 8; Initiative Judicial Council Act [see St. 1925, p. 1369]).

The cited statute and constitutional provision, relating to appointment and authority of judges pro tempore, were repealed by implication by enactment of Initiative Judicial Council Act (see St. 1925, p. 1369). The Constitution was later amended to reinstate this provision, but too late, however, to affect the present litigation.

[Ed. Note.—For other definitions of "Judge Pro Tempore," see Words and Phrases.]

3. Reference ⟹35.

Repeal of authority to appoint pro tempore judge did not affect validity of appointment of referee to hear and decide long account (Code Civ. Proc. § 639, subd. 1, and § 72; Const. art. 6, § 8; Initiative Judicial Council Act [see St. 1925, p. 1369]).

4. Mechanics' liens ⟹271(6).

Allegation of complaint to foreclose mechanics' liens that each item was either agreed price or reasonable value of materials *held* sufficient compliance with statute, absent demurrer (Code Civ. Proc. § 1183).

Code Civ. Proc. § 1183, provides that the several liens shall not in any case exceed in amount the reasonable value of the labor done or material furnished, or both, for which the lien is claimed, nor the price agreed upon for the same.

5. Mechanics' liens ⟹154(1).

Failure of mechanics' lien claimants to verify statements of claims furnished owner on demand *held* not to waive liens (Code Civ. Proc. § 1184).

The cited statute provides that a materialman who shall, on owner's written demand, refuse to give notice that they have performed labor or furnished materials, or both, shall thereby deprive himself of the right to claim a lien. It further provides that such notice must be verified by claimant, and that no such notice shall be invalid by reason of any defect in form, provided it is sufficient to inform owner of substantial matters provided for. Written statements complying with owner's demand were promptly furnished by the several materialmen, except that the statements were not verified.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Mechanic's lien foreclosure action by Barker Bros., Incorporated, against Mannette S. Coates and others, consolidated with other similar actions. From an adverse judgment, named defendant and a certain other defendant appeal.

Reversed.

Courtney A. Teel, of Los Angeles, for appellants.

Culver & Nourse and Glen Behymer, all of Los Angeles, W. Claire Anspach, of Glendale, John F. Poole, of Los Angeles, G. H. Wende, of Glendale, and Charles Murstein, of Los Angeles, for respondent.

R. L. THOMPSON, J.

This is an appeal from a judgment foreclosing mechanics' liens which are involved in several consolidated cases.

It is contended the findings of a referee, to whom the entire cause was submitted, were not adequate to support the judgment; that one of the complaints failed to state a cause of action and that the liens were waived by failure on the part of the claimants to furnish the owner of the property with verified claims of services performed and materials supplied.

The appellants owned certain lots in Los Angeles upon which they were engaged in constructing a bungalow under contract. They demanded in writing of the materialmen, pursuant to the provisions of section 1184 of the Code of Civil Procedure, a state-

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 297 P. 8.

ment of the materials supplied for the structure. These statements were promptly furnished, except that they lacked the verification provided for by the statute. No objection to this omission, or to the sufficiency of the statements otherwise, was made by the owners. The claims were not paid. Several suits were thereupon instituted by materialmen to foreclose their mechanics' liens. These cases were consolidated for trial. Over the objection of appellants the court ordered the appointment of a referee under subdivision 1 of section 639 of the Code of Civil Procedure "to try any and all issues of fact and law arising under the issues made by the pleadings." The referee thereupon heard the evidence adduced by the respective parties and rendered his report to the court without adopting specific findings. In the several cases the referee submitted to the trial court his conclusions or recommendations with respect to judgment in language no more specific than the following which was used with respect to the first case numbered 179,663: "Referee finds that plaintiffs should have judgment as prayed for in the complaint in the sum of $576.78, and so recommends." Upon motion, over appellants' objection that the trial court was without jurisdiction to adopt findings independent of the referee, specific findings were adopted by the court and a judgment was entered accordingly. This appeal was thereupon perfected and is brought to this court on a bill of exceptions which contains none of the evidence adduced before the referee.

[1] A referee duly appointed pursuant to subdivision 1 of section 639 of the Code of Civil Procedure has the power to "hear and decide the whole issue" of a cause when it is submitted to him by order of the court. Under such circumstances the referee must adopt findings of fact, which "must stand as the findings of the court," and upon the referee's findings the judgment must be automatically entered either by the judge or by the clerk as an ordinary judgment is rendered and entered. Section 644, Code Civ. Proc.; 22 Cal. Jur. 697, § 14; National Brass Works v. Weeks, 92 Cal. App. 318, 268 P. 412; Lewis v. Grunberg, 205 Cal. 158, 270 P. 181. Where the entire cause is submitted to a duly appointed referee under subdivision 1 of section 639 of the Code of Civil Procedure, the trial court has no authority to modify or change the referee's findings nor to adopt findings independently of the referee. It follows in the present case that the findings which were adopted by the trial judge are ineffectual and void for the purpose of supporting the judgment, and since the referee failed to adopt findings, there are no valid findings to support a judgment which must, therefore, be reversed on that ground.

[2, 3] The appointment of a referee pursuant to subdivision 1 of section 639 of the Code of Civil Procedure does not constitute the referee a pro tempore judge as that term is defined in section 72 of the Code of Civil Procedure. This last-mentioned section and article 6, section 8, of the Constitution as it then existed, affecting the appointment and authority of judges pro tempore, were repealed by implication in the enactment of the Initiative Judicial Council Act of California [see St. 1925, p. 1369]. Martello v. Superior Court, 202 Cal. 400, 261 P. 476. The Constitution was subsequently amended to reinstate this provision too late, however, to affect this litigation. The repeal of the authority to appoint a pro tempore judge did not affect the validity of the appointment of a referee under section 639 of the Code of Civil Procedure. There is a clear distinction between the duties of a referee and those of a pro tempore judge. One significant difference is the fact that under no circumstances does a referee have the authority to render a judgment. The order appointing the referee in this case was therefore valid and binding.

[4] It is claimed that the complaint in the action No. 179,663, entitled Lounsberry et al. v. Coates et al., in which a judgment was rendered against the defendants for $576.78, fails to state a cause of action for the reason that it is not alleged with respect to the value of several of the items for materials furnished for which a lien is claimed, that the respective sums were a reasonable valuation therefor.

It is true that section 1183 of the Code of Civil Procedure does provide that "said several liens shall not in any case exceed in amount the reasonable value of the labor done or material furnished, or both, for which the lien is claimed, nor the price agreed upon for the same." The challenged complaint, however, does specifically allege with respect to each item, with the exception of one, that the sums for which judgment is asked, were the agreed prices thereof. With respect to the other one item it is specifically alleged that sum is a reasonable value thereof. The allegation with respect to each item, therefore, was either the agreed price or the reasonable value of the materials. This is a sufficient compliance with the statute. In the absence of a demurrer we are of the opinion the complaint sufficiently states a cause of action.

[5] By the bill of exceptions it appears without contradiction that the appellants demanded in writing of the several materialmen and laborers that they furnish the owner with a statement of all materials supplied and labor performed on the structure and that in compliance therewith "the materialmen * * * rendered statements * * * promptly * * * and that neither of the defendants Coates objected to the form of said statements and made no further demand upon any of the de-

fendants for any other statements or for a verified statement or notice."

It is conceded that the written statements in compliance with appellants' demand pursuant to section 1184 of the Code of Civil Procedure were furnished by the several materialmen, except that these statements were not verified as required by that section. It is contended that the liens of these materialmen were waived by their failure to verify the claims. We think not. This section provides that a materialman "who shall on the written demand of the owner refuse to give such notice [that they have performed labor or furnished materials, or both] shall thereby deprive himself of the right to claim a lien." This section further provides that "such notice must be verified by the claimant," and "no such notice shall be invalid by reason of any defect in form, provided it is sufficient to inform the owner of the substantial matters herein provided for." It will be observed that it is only the laborer or materialman who "*refuses* to give such notice" that forfeits the lien. It is contended that, to comply with the law "such notice" implies it must of necessity be verified. This construction is correct, where the verification is insisted upon. But the verification may be waived. Under the circumstances of this case we are of the opinion it was waived. The claimants did not refuse to furnish a verified notice. On demand they promptly furnished the notice of materials supplied. It was a mere defective notice. Their attention was not called to the omission of the verification. The mere omission of the verification may not be construed into a refusal to comply with the law, in an absence of evidence to support that theory. The prompt furnishing of the statement, defective as it was, is evidence of an effort and intention to comply with the law. It refutes the theory of a refusal. When there is ample opportunity for the owner to advise the materialman of the absence of a verification of his claim, he may not complain of this omission so long as the notice otherwise complies with the law and the owner fails to complain of the defect. The spirit of this law is to the effect that a laborer or materialman forfeits his lien by a *refusal* to furnish the statement. A prompt compliance with the demand by supplying a defective statement may not be construed into a refusal so long as the omission is not wilful and the defect is not called to the attention of the claimant.

For the reason that the entire cause was submitted to the referee for decision and that he failed to adopt any specific findings of facts, the judgment is unsupported by findings and, therefore, void.

The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

106 Cal. App. 636

CAINE v. FOREMAN.

Civ. 4130.

District Court of Appeal, Third District, California.

June 23, 1930.

1. Bills and notes ⟹387.

Statutory provisions relating to presentment of note for payment must be read together (Civ. Code, §§ 3153, 3156, 3168).

2. Banks and banking ⟹144.

Note payable at bank becomes order upon bank to pay same and is equivalent of check on bank signed by maker (Civ. Code, § 3168).

Civ. Code, § 3168, provides that, where instrument is made payable at bank, it is equivalent to order to bank to pay same for account of principal debtor thereon.

3. Banks and banking ⟹144.

Making note payable at bank constitutes undertaking that maker at maturity will have on deposit funds necessary to discharge note and also gives bank authority to make payment and charge maker (Civ. Code, § 3168).

4. Bills and notes ⟹402.

Presentment of note for payment at maturity to bank at which note was made payable *held* presentment to "person primarily liable" (Civ. Code, §§ 3153, 3156, 3168).

Note in controversy was made payable at designated bank, and on date of maturity was presented to bank for payment, which was refused because of insufficient funds of maker on deposit. Indorser when sued on note contended that, as note was only presented to bank and no inquiry or investigation made regarding whether maker was present and ready and willing to pay note, sufficient presentment for payment to "person primarily liable" had not been made, as required by Civ. Code, § 3153.

[Ed. Note.—For other definitions of "Person Primarily Liable," see Words and Phrases.]

5. Bills and notes ⟹401.

Bank designated for payment of note having refused payment because of insufficiency of maker's funds, indorser cannot subsequently contend agent for holder was not authorized to receive payment.

6. Bills and notes ⟹401.

Employees of collecting bank *held* agents of collecting bank for presenting note for payment.

Indorser when sued on note contended that note should have been presented for

payment by notary public of collecting bank, and that latter had no authority to direct another employee of same bank to present note for payment.

7. Bills and notes ⟹408.

Protest for nonpayment of note, if invalid, *held* immaterial to indorser's liability; protest not being required on note (Laws N. Y. 1897, c. 612, § 189; Civ. Code, § 3199).

Indorser, when sued on note, contended that protest for nonpayment was invalid, because note was not presented for payment in person by notary public making protest. Negotiable Instruments Act N. Y. § 189 (Laws 1897, c. 612, § 189) and Civ. Code, § 3199, provides that, where any negotiable instrument has been dishonored, it may be protested for nonacceptance or nonpayment as case may be, but protest is not required, except in case of foreign bills of exchange.

8. Bills and notes ⟹419.

Owner's telegram to indorser and registered letter by notary public of collecting bank to indorser *held* sufficient notice of dishonor, rendering indorser liable (Civ. Code, §§ 96, 3172, 3184, 3185).

Holder of note immediately upon notice of nonpayment telegraphed to indorser giving him notice of failure of payment and also fact that note had been protested. Notary public of collecting bank sent notice by registered mail to indorser informing him of nonpayment, and it was shown that registered package was received in due course of mail. Civ. Code, § 96, provides that notice may be in writing or merely oral and may be given in any terms which sufficiently identify instrument and indicate that it has been dishonored by nonacceptance or nonpayment.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by S. C. Caine against I. O. Foreman. Judgment for plaintiff, and defendant appeals.

Affirmed.

Stick, Moerdyke & Gibson and John C. Stick, all of Los Angeles, for appellant.

Youngworth, McClean & Hartman and Milton A. Krug, all of Los Angeles, for respondent.

PLUMMER, J.

The plaintiff, as assignee of the Credit Utility Corporation, obtained judgment in this action against the defendant, as an indorser, in the sum of $6,000, balance due upon a promissory note for the principal sum of $10,000, executed by the Cox-Klemin Aircraft Corporation. From this judgment the defendant appeals.

Upon this appeal two grounds are relied upon by appellant as sufficient reasons for reversal: 1st. That there is no evidence that the note in controversy was, at the date of its maturity, presented to the Cox-Klemin Aircraft Corporation, the party primarily liable for payment, or that demand for payment was made of the corporation at maturity, or at any other time. 2d. That there is no evidence that the alleged presentation to the Bank of Manhattan Company, College Point, Long Island, was made by the holder of the note, or one authorized to receive payment.

The note involved in this action was expressly made payable at the Bank of Manhattan Company, College Point, Long Island. It was indorsed by the defendant and forwarded to Nathan A. Smyth in New York City, for the uses and purposes of the Cox-Klemin Aircraft Corporation in its financial transactions. The note is in the following words and figures:

"10,000.00 New York, July 24, 1925.
"Sixty days after date we promise to pay to the order of Ourselves, Ten Thousand and no/100 Dollars at Bank of Manhattan Co., College Point, L. I.
"Cox-Klemin Aircraft Corp.,
"Value Received L. Charles Cox, Pres.
"Due 9-22-25."

On the reverse side it is indorsed as follows:

"Cox-Klemin Aircraft Corp.
"L. Charles Cox, Pres.
"L. Charles Cox
"I. O. Foreman."

Upon this note it appears that $4,000 only of the principal sum due has been paid.

The following facts, as stated by respondent's counsel, are practically uncontradicted: The note was signed and delivered as a valid obligation. It fell due on September 22, 1925. Prior to maturity it was deposited with the American Trust Company of New York for collection. On September 22, 1925, during business hours of that day, a notary public, being an employee of the American Trust Company of New York, the holder of said application, delivered the note to one Meehan, also an employee of the American Trust Company of New York, who carried the note to the Bank of Manhattan Company, College Point, Long Island, where the note was made payable, and there presented it to the Bank of Manhattan Company during business hours, and demanded payment. The note was delivered to the paying teller at the Bank of Manhattan Company, College Point, Long Island. Payment was refused for the reason that the Cox-Klemin Aircraft Corporation

did not have on deposit with the Bank of Manhattan Company sufficient funds to pay the same. The evidence clearly establishes that at no time during the day of September 22, 1925, did the Cox-Klemin Aircraft Corporation have on deposit in the said Bank of Manhattan Company any sum of money greater than $2.36. The note was not presented for payment to the makers thereof, other than at the Bank of Manhattan Company, where the makers agreed by the terms of the note that payment was to be made. When payment was refused, it appears that Meehan returned the note to Mulledy, heretofore referred to as the notary public, and an employee of the American Trust Company. Mulledy then wrote across the face of the note the following words: "Protested September 22, 1925. Walter F. Mulledy, Notary Public." Notices of protests were made out and mailed to the maker and the defendant in this action as an indorser of the note.

Upon this state of facts it is urged by the appellant that no sufficient presentation for payment was ever made upon the parties primarily liable, and also that no notice of dishonor or nonpayment was ever made to the defendant as an indorser.

[1-4] We will consider first the question of the presentation of the note for payment. Section 3153, Civil Code, reads as follows: "Presentment for payment, to be sufficient, must be made—(1) By the holder or some person authorized to receive payment on his behalf; (2) At a reasonable hour on a business day; (3) At a proper place as herein defined; (4) To the person primarily liable on the instrument or if he is absent or inaccessible, to any person found at the place where the presentment is made." Section 3156, Civil Code, reads as follows: "Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient." Section 3168, Civil Code, is also applicable to this case. This section reads: "Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." The contention is advanced by the appellant that section 3156 must be so read as to include within its meaning that there must not only not be sufficient funds deposited by the payee in the bank at which the note is made payable, but also that the payee, or someone representing the payee, is not to be found at the bank, ready and willing to pay the note. Hence, the conclusion that, as the note in question was only presented to the bank for payment, and no inquiry or investigation was made as to whether the payee was present, or whether someone representing the payee was present, ready, and willing to pay the note, sufficient presentment of the note for payment has not been shown. We do not think that the sections which we have read admit of any such construction. The sections are to be read together. By making the note payable at the bank, the note becomes, by the very terms of section 3168, Civil Code, an order upon the bank to pay the same. It is the equivalent of a check on the bank signed by the payee, and the argument that, if the bank were to pay the note under such circumstances, it would stand in the position merely of a holder in due course, is utterly without merit. By making the note payable at the bank, the whole intendment of the transaction is that, on the date of maturity, the payee will have on deposit at the bank the necessary funds to discharge the note, or the amount due thereon. And, likewise, that authority is given to the bank to make payment and charge the payee or maker of the note with the amount of such payment. There is no question in this case but that the note was presented to the Bank of Manhattan Company during business hours, and that there was no money in the bank during the business hours of that day, to the credit of the payee of the note, in excess of the sum of $2.36. By reason of the terms of the note, subdivision 4 of section 3153, Civil Code, has been complied with. The person primarily liable in the note in this case has designated where payment is to be made, and the paying agency and presentment to the payee's agent expressly designated in the note and under the sections referred to constitutes presentment to the principal or person primarily liable.

The objection that presentment of the note was not made by a proper person is clearly answered by the text found in 8 C. J. p. 565, § 785: "Presentment of a bill or a note for payment may be made by anyone legally in possession thereof, and possession, at the time and place of payment is prima facie evidence of authority to demand payment." Likewise, in the same volume, page 564, § 784: "Presentment and demand may be made not only by the holder of a bill or note himself, but also by anyone having possession and authority from him to receive payment, unless there is some stipulation to the contrary, and the authority of an agent need not be in writing. However, if the authority of a person presenting paper is questioned by the maker or the acceptor, and refusal to comply with the demand is based upon want of authority, such authority must be shown."

[5] The evidence in this case shows that the refusal to pay was on account of the insufficiency of funds. It nowhere appears in the record that the payee or the Bank of Manhattan Company made any such contention at the time of presentment. It is made for the first time upon this trial. Not having

been made at the time of presentment, and the refusal to pay having been based upon insufficiency of funds, we think it is now too late to question the authority of the employee of the Bank of Manhattan Company, who was given the note for the purpose of collection and receiving payment, to receive payment as the duly authorized agent of the holder of the note.

In addition to the sections of the Code and the text of Corpus Juris, which we have cited, we may list the following authorities which support the sufficiency of the presentment and demand for payment of the note involved in this action: Hoffman v. Hollingsworth, 10 Ind. App. 353, 37 N. E. 960; Thorpe v. Peck, 28 Vt. 127; Nelson v. Grondahl, 13 N. D. 363, 100 N. W. 1093. See, also, sections 72, 73, 75, and 87 of the Uniform Negotiable Instruments Act, which, during all the time involved in this action, was in full force and effect in the state of New York and in the state of California.

The authorities which we have cited and the facts set forth in the record from which we have quoted we think establish conclusively that the evidence is sufficient to show that the note was presented for payment at the proper place, and was also presented for payment by one who was properly authorized to receive payment. The holder of the note for collection was a corporation, and could only act by its officers and agents. The person presenting the note for payment was an employee of the corporation. The record shows that he was employed for the purpose, and, among other things, of going from place to place and presenting commercial paper for payment, and demanding payment.

[6] Under the second objection urged by appellant, it is contended that the note should have been presented for payment by a notary public. The argument is advanced that Mulledy, the notary public, had no authority to direct Meehan, another employee of the same company, to present the note for payment. The record shows, as we have stated, that both Mulledy and Meehan were employees of the corporation that held the note for payment. Thus, both Mulledy and Meehan were agents of the bank that held the note for collection, and whichever one presented the note for payment under such state of facts would be presenting the note for payment as the agent of the holding bank.

[7] Finally, it is argued that the protest of the note in question is invalid, in that the note was not presented for payment in person by the notary public making the protest. The language of appellant in this particular is as follows: "That presentment must be made by the notary public in person, and not by his agent, in order to support a valid protest. This rule is laid down in all of the following cases, and has been adhered to, so far as we have been able to discover, in every instance." A large number of authorities are listed in the appellant's brief as supporting this contention. All of the cases, however, are rendered inapplicable by reason of the provisions of the Uniform Negotiable Instruments Act and the statutes of this state and of the state of New York. Section 189 of the Negotiable Instruments Law of the state of New York, chapter 612, volume 1, General Laws of New York, 1897, page 743, reads as follows: "Where any negotiable instrument has been dishonored it may be protested for non-acceptance or nonpayment, as the case may be; but protest is not required, except in the case of foreign bills of exchange." Section 3199 of the Civil Code of this state is exactly in the same language. Section 118 of the Uniform Negotiable Instruments Law is couched in exactly the same words. From all of which it follows that, even though the protest by the notary public in this case were to be held invalid, it would not constitute any grounds of reversal herein. The record shows that immediately upon the dishonoring of the note, or the refusal to pay the same, the owner of the note was given notice of the nonpayment thereof; that the owner of the note, immediately upon receipt of notice of dishonor, telegraphed to the defendant in this action, giving him notice of the failure of payment, and also the fact that the note had been protested. The record also shows that Mulledy, the notary public to whom we have referred, and the employee of the bank holding the note for collection, sent a notice by registered mail to the defendant in this action, informing him of the nonpayment of the note, and the record shows that this registered package was received in due course of mail.

[8] Section 3172, Civil Code, reads as follows: "Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice." In this case notice was given by Mulledy, the agent of the holder of the note. Notice was also given by the owner of the note. Section 3184, Civil Code, permits notice to be given by mail. Section 3185, Civil Code, permits of notice being given otherwise than by mail. In this case, prompt notice was given by telegraph. The different sections of the Uniform Negotiable Instruments Act relating to notice show clearly that what was done in this case complies with all of the requirements of the act. In fact, the Uniform Negotiable Instruments Act provides that a notice may either be in writing or merely oral. Section 96 thereof reads as follows: "The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment." The fact of notice not being really disputed in this case, and protest not

being required by either the law of this state or the laws of New York, the validity of the notary's protest becomes merely academic, as the defendant is bound by the fact of receiving sufficient notice, as we have heretofore shown, irrespective of the notary's protest.

The judgment is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

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106 Cal. App. 599

SCHNEIDER et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

Civ. 7012.

District Court of Appeal, Second District, Division 1, California.

June 20, 1930.

Appeal and error ⚷554(2).

Appeal of defendants, waiving notice of order refusing to vacate judgment and presenting no exceptions or bill of exceptions, as properly dismissed (Code Civ. Proc. §§ 649–651, 953d).

Code Civ. Proc. § 651, provides that exceptions to any decision after judgment may be presented to judge at time thereof under section 649 or that bill of exceptions may be presented and settled afterwards under section 650, while section 953d provides that notice of entry of judgment or order granting or denying motion for new trial, required by section 650, must be given in writing, unless written notice thereof be waived in writing or by oral stipulation entered in court's minutes.

Application by Max Schneider and another for a writ of mandate to the Superior Court of Los Angeles County and the judges of the Appellate Department thereof.

Peremptory writ denied, and affirmative writ discharged.

Le Roy Reames and James R. Jaffray, both of Los Angeles, for petitioners.

Everett W. Mattoon, County Counsel, and S. V. O. Prichard, Deputy County Counsel, both of Los Angeles, for respondents.

YORK, J.

The petitioners here were defendants in an action brought in the municipal court of Los Angeles county, wherein judgment was rendered on March 13, 1929, in favor of the plaintiff. Said plaintiff caused execution to issue thereon, together with an order for examination of petitioners as judgment debtors. Petitioners then moved to vacate said order for examination, also to quash execution, to set aside the judgment and enter a different judgment, and to set aside the conclusions of law and to enter different conclusions. Each of said motions was denied by the court, and on June 18, 1929, defendants (petitioners) filed notice of appeal from such ruling.

On August 16, 1929, the plaintiff in the municipal court action and respondent in the superior court appeal made a motion to dismiss the appeal upon the ground that no bill of exceptions or record on appeal had been prepared. This motion was denied by the superior court. Thereafter, to wit, on September 19, 1929, plaintiff and respondent served notice upon defendants and appellants that he would move the court, on September 26, 1929, for an order dismissing the appeal upon the same grounds supporting the first motion—that of August 16. This motion was submitted upon a certified copy of the notice of appeal filed in the municipal court and upon no other record or certificate from the clerk, and under date of October 18, 1929, said motion to dismiss was granted by the superior court.

Appellants in that action then presented their petition to this court, and an alternative writ of mandate was issued.

Petitioners in said application allege that no notice of entry of the order of the municipal court denying their four motions was ever given by the plaintiff to the said petitioners, or either of them, and they maintain that section 953d of the Code of Civil Procedure, added to the Code in 1927, now provides a definite method by which appellate courts are to be governed in ascertaining whether a moving party has placed himself in a position to terminate litigation by having the appeal of the opposite party dismissed.

Section 953d of the Code of Civil Procedure provides as follows: "Any notice of entry of judgment, or of order granting or denying a motion for a new trial, required by the provisions of section 650, section 659 or section 953a of this code, must be given in writing, unless written notice thereof be waived in writing or by oral stipulation made in open court and entered in the minutes."

Respondents, in their amended answer to the alternative writ of mandate issued herein, set forth the minute order of the municipal court, entered at the time of the hearing upon the motions above referred to, in which it is shown that *notice was waived.*

Petitioners in their reply brief do not deny that notice was waived, but content themselves with setting forth a long list of questions, which, they assert, the examination of the record of the municipal court would require to be answered. They further confuse

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the issue by their assertion in their reply brief of the right to prepare a record under section 651 of the Code of Civil Procedure, in which case section 953d, supra, would be inapplicable. An examination of section 651, supra, will disclose the fact that exceptions to any decision made after judgment may be presented to the judge *at the time of such decision* for settlement, as provided by section 649 of the same Code, *or a bill thereof may be presented and settled afterward, as provided by section 650.* By this it will be noted that petitioners by their failure to present their exceptions to the judge at the time of decision, could thereafter avail themselves only of the method prescribed by section 650, which section is specifically covered by section 953d, supra.

In the cases relied upon by petitioners in support of their position, Attkisson v. Reynolds, 94 Cal. App. 185, 270 P. 686, 687, and Griffin v. Kent, 206 Cal. 263, 274 P. 56, the court stated: "The certificate does not show that any notice has been given in writing, nor does it show the entry of any oral stipulation made in open court and entered in the minutes thereof, or otherwise, as required by said section." Section 953d, Code Civ. Proc.

Since the minute order of the municipal court shows waiver of notice, and that fact is not denied by the petitioners, the dismissal was properly made by the respondent court upon the second motion made for that purpose.

The petition for a peremptory writ is denied, and the alternative writ is discharged.

We concur: CONREY, P. J.; HOUSER, J.

CRISTINA et al. v. MATTENBERGER.

Civ. 7092. *

District Court of Appeal, First District, Division 1, California.

June 18, 1930.

Rehearing Denied July 18, 1930.

Hearing Granted by Supreme Court Aug. 11, 1930.

1. Evidence ⟹458.

If there appears extrinsic ambiguity in instrument, other evidence may be introduced, including circumstances under which it was made, and situation of subject of instrument and of parties.

2. Evidence ⟹458.

Evidence of attorneys respecting execution and transfer of note *held* admissible, in view of ambiguity in assignment (Civ. Code, §§ 1639, 3119; Code Civ. Proc. §§ 1856, 1860).

It was necessary to determine whether words "this is a good valid and subsisting promissory note" were of similar import as words "without recourse."

3. Bills and notes ⟹287.

Indorsement on note *held* to render indorser qualified indorser without recourse of payment (Civ. Code, § 3119).

The indorsement provided that "this is a good, valid and subsisting promissory note."

4. Bills and notes ⟹296.

Indorsement *held* not to render indorser conditional guarantor of note (Civ. Code, § 1636).

The indorsement provided that "this is a good valid and subsisting promissory note." The words "good, valid and subsisting" refer to genuineness of document after it is free from any equities, claims, or defenses of maker or third party, and does not warrant solvency of maker or collectibility from party indorsing it.

5. Bills and notes ⟹400.

Plaintiff suing on note *held* not to have exercised reasonable diligence against maker so as to hold guarantor or indorser (Civ. Code, § 2800).

6. Bills and notes ⟹397.

Insolvency of maker of note, even if known to indorser, will not excuse formality of presentment, demand, and notice (Civ. Code, § 3154).

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Salvador P. Cristina and another against Irene Mattenberger, as executrix of the last will and testament of Frank Mattenberger, deceased, substituted in place and stead of Frank Mattenberger. Judgment for defendant, and plaintiffs appeal.

Affirmed.

John W. Sullivan, of San Jose, for appellants.

E. M. Rosenthal, of San Jose, for respondent.

WARD, Justice pro tem.

This is an action originally brought by the appellants against Frank Mattenberger for a balance due and unpaid upon a promissory note of one J. Cole, and the indorsement thereon signed by Mattenberger upon negotiating said note to appellants upon a trade for an equity in property owned by the ap-

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing granted 300 P. 450.

pellants. Subsequent to the commencement of this action Frank Mattenberger died, and Irene Mattenberger, administratrix of his will, was duly substituted as defendant in his stead, a creditor's claim was presented against the estate, and a supplemental complaint filed.

On October 7, 1924, Cole made and delivered to Mattenberger a promissory note for the sum of $6,500 payable in installments, and at the same time Cole executed and delivered to Mattenberger a chattel mortgage to secure the payment of the note. The note and the chattel mortgage on horses, mules, and other personal property was formally assigned to plaintiff. The mortgage provided that if the mortgagor should fail to take proper care of the property covered thereby, the mortgagee might take immediate possession of the property and proceed to sell the same. On October 18, 1924, Cole informed plaintiffs that he was unable to feed or take care of the horses and mules; thereupon plaintiffs notified Mattenberger that Cole was unable to feed the stock, and that it was plaintiffs' intention to take possession of and sell all of the stock and other property unless said horses and mules were at once provided for and fed; thereafter Cole surrendered all of the property to plaintiffs, who proceeded to and did duly sell the same at public auction. It is alleged in the complaint that on April 7, 1925, plaintiffs demanded of said Cole said balance so due on that day, and that then and there he failed and refused to pay the same, and thereupon plaintiffs declared the whole of the principal and interest due according to the terms of the note, demanded payment, and that he failed and refused to pay. The complaint also alleges that Cole was insolvent on the date of demand and that plaintiffs immediately, and continuously thereafter, attempted to collect said balance from Cole; that they began suit against him, took default judgment and caused execution to be issued, but that it was impossible for plaintiffs to collect anything because of his insolvency. Appellants gave notice of dishonor of the note to Mattenberger. The balance of $5,355.04, principal, and $1,173, interest, was never paid, and the complaint prayed for judgment therefor, together with attorney's fees and accruing interest.

Upon the trial, E. M. Rosenthal, attorney for Mattenberger, and Eli Wright, attorney for the Cristinas, were permitted to testify. Mr. Wright testified in part as follows: "On or about the 7th day of October, 1924, I was attorney for Mr. Cristina. I prepared the note, mortgage and assignment in question here, at the request of Mr. Cristina. He wanted the chattel mortgage drawn up on about 40 horses and mules and some other odds and ends in the way of an automobile and dump wagons and one thing and another that belonged to Jim Cole. Cole was to make the mortgage to Mattenberger and Mattenberger was to assign it to Mr. Cristina. I went out with Cristina and took an inventory of the stuff to incorporate in the chattel mortgage. No instruction was given to me by Mr. Cristina that Mr. Mattenberger was to guarantee the payment. My instructions were to draw up the mortgage from Jim Cole to Mattenberger and to draw an assignment from Mattenberger to Cristina. That was all the instruction. In accordance with those instructions I prepared the note, mortgage and assignment. I recall the time when it was finally consummated in your (Mr. Rosenthal's) office; I was present, you were present, Mr. Mattenberger and Mr. Cristina. * * * I don't remember any conversation taking place relative to the words 'without recourse' at the actual signing of the paper. When you and I were together I said 'Is this to be signed "without recourse"'? And you said 'Yes.' That was addressed to Mr. Rosenthal. The guarantee was that it was a good, valid and subsisting note. That guarantee was put in, as far as I know, because Jim Cole was dealing in horses and it might be that Jim Cole might be declared a horse merchant and if Jim Cole was a horse merchant he could not mortgage his horses, and he was bankrupt, and it was my idea that if the mortgage was made by Jim Cole and Mattenberger signed it to Cristina, we would at least have a guarantee that it was a good mortgage and that he had a right to mortgage it, and as far as I know that was the only guarantee talked about; if there was any other guarantee between Cristina and Mattenberger, I don't know what it was. I drew this guarantee myself. Mr. Cristina didn't give me to understand that Mr. Mattenberger was to guarantee the payment of this note." Mr. Rosenthal testified to the same effect, except that he remembered the conversation between Mattenberger and Cristina, before Cristina visited Wright, related as follows: "Mr. Cristina then said to Mattenberger, 'You are going to guarantee this, are you?' And Mr. Mattenberger said 'Not on your life; I guarantee nothing; you take that property as it is and we will go ahead and trade; when we make a trade I want to get through with it.'" The present attorney for the plaintiffs objected that the note could not be explained by oral testimony, which objection was overruled. Thereupon there was a motion to strike out the testimony of both Wright and Rosenthal as being inadmissible.

The indorsement in dispute is as follows: "For value received I hereby sell, set over and assign the within note, and the chattel mortgage securing the same, to Salvador P. Cristina and Tony R. Cristina, and hereby guarantee that this is a good, valid and subsisting promissory note; that it is secured by a good, valid and subsisting chattel mortgage; that all of the personal property de-

scribed in said mortgage is the property of J. Cole, signer of this note, and that it is fully paid for and unincumbered, except as to said mortgage, which is a first mortgage securing this note. Dated Oct. 7th, 1924, Frank Mattenberger."

[1-3] Appellants contend that the court erred in admitting the testimony of witnesses Rosenthal and Wright, and in refusing to strike out said testimony, and in finding that it was understood at the time of execution that Mattenberger did not guarantee payment or collectibility, and that the transfer was without recourse. "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title" (section 1639, Civ. Code). "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: 1. Where a mistake or imperfection of the writing is put in issue by the pleadings; 2. Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties" (section 1856, Code Civ. Proc). "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret" (section 1860, Code Civ. Proc.). In the case of a blank indorsement or an indorsement without limitation, qualification, or restriction, oral testimony is inadmissible to show any agreement between the indorser and the indorsee of a promissory note that the note was to pass without recourse. A qualified indorser, however, is limited as the terms of indorsement indicate. It may be an indorsement of the integrity of the maker that all prior indorsers had capacity to pay, or an indorsement of the validity of the instrument, etc. See Quatman v. Superior Court, 64 Cal. App., at page 208, 209, 221 P. 666. "A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words 'without recourse' or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument" (section 3119, Civ. Code). It becomes necessary, therefore, to determine if the words "this is a good, valid and subsisting promissory note" are words of similar import as the words "without recourse." In other states than California the courts have placed such construction as the words used indicated. Dunham v. Peterson, 5 N. D. 414, 67 N. W. 293, 36 L. R. A. 232, 57 Am. St. Rep. 556; Hendrix v. Bauhard Bros., 138 Ga. 473, 75 S. E. 588, 43 L. R. A. (N. S.) 1028, Ann. Cas. 1913D, 688; Mangold & Glandt Bank v. Utterback, 54 Okl. 655, 160 P. 713, L. R. A. 1917B, 364; Richmond Guano Co. v. Walston, 191 N. C. 797, 133 S. E. 196, 46 A. L. R. 1512. But no case has been called to our attention with the exact words used in connection with this indorsement or with such a similar wording that would warrant us in accepting as authority the ruling from another jurisdiction. If there appears "extrinsic ambiguity" other evidence may be introduced, including the circumstances under which it was made, the situation of the subject of the instrument and of the parties to it. In connection with the full assignment in this case, the words are ambiguous. The intent of the indorser then and the indorsee becomes a vital question. Counsel for appellants seems to have some doubt upon the correct interpretation to place upon these words, as he notes on page 9 of the opening brief, "A rule ought to be promulgated that would require one signing his name on the back of a note to use words that leave no doubt as to his intention in order to make him a qualified indorser." We must conclude that the evidence introduced to show the intent of the indorser was admissible, and that it was the only reasonable method of placing a proper construction upon the indorsement in dispute. The evidence clearly proves that Frank Mattenberger's indorsement on the back of the promissory note did not make him a general indorser, but that said indorsement was qualified, that is, that it was a mere assignment for the purpose of transferring the interest or title of Mattenberger to the Cristinas. Mattenberger was a qualified indorser without recourse of payment.

[4] Appellants also contend that Mattenberger was a conditional guarantor. To reach this conclusion it would be necessary to strike out the words "valid and subsisting," and likewise the entire indorsement and assignment, and consider only "this is a good * * * promissory note." The language used upon the assignment of the mortgage and upon the indorsement of the note is practically the same. We cannot separate the phrase "good, valid and subsisting" and hold that it was a subsisting note or a valid note or a good note. "Good, valid and subsisting" refers to the genuineness of the document after it is free from any equities, claims, or defenses of the maker or a third party, and does not warrant the solvency of the maker or its collectibility from the party indorsing

it. In this case appellants knew when the trade was made that Cole, the maker, was insolvent, and that no financial liability was to attach to Mattenberger except as specifically mentioned and limited. "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful" (section 1636, Civ. Code).

[5, 6] In view of all the evidence in this case, the court did not err in finding that Cole's bankruptcy was "a factor affecting the negotiation and consummation of the execution and delivery of the promissory note and mortgage of Frank Mattenberger and his endorsement and assignment to appellants." If it is necessary further to discuss this case, we may say that appellants did not use reasonable diligence against Cole, and that no proper demand was made on the maker as required by law. Nineteen months elapsed between the entry of the default and the entry of judgment and the issuance of execution. If Mattenberger could have been held as a guarantor, then as a condition precedent to a right of action against the indorser, appellants should have proceeded with "reasonable diligence." (See section 2800, Civ. Code.) Insolvency of the maker of a promissory note, even if known to an indorser, will not excuse the formality of presentment, demand, and notice. Roper v. Gould, 22 Cal. App. 114, 133 P. 622. In the present case the demand was not made as specified in the instrument (section 3154, Civ. Code). The trial court did not err in its decision, its rulings, or its findings.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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107 Cal. App. 76

PEOPLE v. GIBSON.

Cr. 1908.

District Court of Appeal, Second District, Division 1, California.

July 2, 1930.

Rehearing Denied July 15, 1930. Hearing Denied by Supreme Court July 31, 1930.

1. Criminal law ⟹369(1).

In criminal prosecution, evidence of other offenses cannot generally be introduced.

2. Criminal law ⟹369(2).

Evidence, although disclosing commission of another crime, is admissible if necessary or pertinent to proof of crime charged.

3. Criminal law ⟹369(5).

Evidence of other independent larcenies is inadmissible to establish larceny being tried.

4. Criminal law ⟹371(2).

Evidence of other independent larcenies is inadmissible to prove intent to commit larceny, even though such intent be specific intent of charge of burglary.

5. Burglary ⟹46(2).

In burglary prosecution instruction that "wilfully," when applied to intent, implies purpose or willingness to commit act, without necessarily implying intent to violate law, *held* proper (Pen. Code, § 7, subd. 1).

[Ed. Note.—For other definitions of "Willful; Willfully," see Words and Phrases.]

6. Burglary ⟹46(2).

Court in burglary prosecution, when correctly defining "wilfully," should have made jury understand definition applied only to general intent, not to specific intent (Pen. Code, § 7, subd. 1).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Bessie Gibson was convicted of burglary of the second degree, and she appeals.

Reversed and remanded.

Hearing denied by Supreme Court; WASTE, C. J., and SHENK, J., voting f- hearing.

Jesse R. Shafer, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

ELLIOTT, CRAIG, Justice pro tem.

Defendant and one Hazel Spaney were jointly charged with burglary, alleged to have been committed by them on May 23, 1929, in entering a store with intent to steal merchandise therein. During the trial, said Spaney withdrew her plea of "not guilty" and entered a plea of "guilty." The trial continued as to appellant Gibson and resulted in a conviction of burglary of the second degree. After denial of motion for new trial, appellant was sentenced to imprisonment for the period prescribed by law, and her appeal is from the order denying her motion for new trial and from the judgment.

P. H. Leslie, a witness called by the prosecution, testified that he saw appellant entering the Paris store around two o'clock p. m., on May 23, 1929; that he recognized her and followed her; that she was alone; that she went to the third floor of the store, walked around and inspected various merchandise and then went out of the store and around to Sixth street, where she met her codefendant Hazel Spaney. The latter was

then in an automobile which was parked at the curb; that appellant and Hazel Spaney together then entered the Paris store and went to the third floor, where appellant rolled up a coat, took it from the hanger and handed it to Mrs. Spaney, who put it under her clothing; that he followed them to the automobile; that Hazel Spaney opened the door of the car and pulled the coat out of her clothing, while appellant stood close to her; that he saw Mrs. Carpenter, a store detective, and Mrs. Ross, a policewoman, observing appellant and Hazel Spaney on their return to the automobile, and that, after conversation, the four women got in the car and started away; that he did not converse with any of them, but, after telephoning to the police station, went to the police station about twenty minutes later.

Mrs. Carpenter testified that as Mrs. Ross and she were leaving Bedell's store by its Sixth street door, they observed and recognized appellant and Hazel Spaney and that "Mrs. Spaney opened the door and stood with one foot on the running board and the other on the curbing, and Mrs. Gibson stood in back of her, held the door open. Mrs. Spaney pulled this coat out of her bloomers and put it in a leather bag that was on the floor of the car." Further, that after conversation with appellant and Hazel Spaney, Mrs. Ross and she took them to the police station.

Mrs. Mary Ross testified, in substance, the same as Mrs. Carpenter.

Mrs. Helen L. White, a saleswoman in the Paris store testified that she saw appellant on the third floor of the store twice on May 23, 1929; first early in the afternoon, at which time appellant was alone, and the second time about 2:30 or 3 p. m. with Mrs. Spaney.

In addition to the foregoing testimony, the prosecution was permitted to call witnesses concerning prior events. Mrs. Ethel Green testified that she was a house operator at the May company; that she saw Mrs. Gibson and another woman (not Mrs. Spaney) in the May company's store about October or the first part of November, 1928; that Mrs. Gibson then took a mandarin set, put it under her clothing, went to the basement, saw they were followed, went upstairs and put the mandarin set back on the table and "laughed at me"; that on February 13, 1929, Mrs. Gibson and Mrs. Spaney were in May company's store; that Mrs. Gibson took two hats, folded them with two other hats handed to her by Mrs. Spaney, and put the four hats under her coat; that on another occasion, she saw Mrs. Gibson with one Grace Walthers in the Broadway department store. Mrs. Agnes Armstrong testified that she was a house detective for May company; that she saw Mrs. Gibson about a year before the trial date in May company's store; that she answered a call bell and with Mrs. Green followed Mrs. Gibson and another woman to the basement and on return to the negligee department on the third floor where Mrs. Gibson took from under her clothing a garment and threw it upon a table and "turned around and laughed"; that she (Mrs. Armstrong) followed them out of the store to the curb where they spoke to a man in a Lincoln automobile, on to a drug store at 8th and Olive streets; they went in one entrance and Mrs. Gibson went on through and out on to another street, through a parking lot and came around the block back to the drug store, met the other woman and both got in the above-mentioned automobile as it drew up on 8th street; that she saw Mrs. Gibson together with one Grace Walthers on the third floor of the Broadway department store in the latter part of March or first of April, 1928; that Mrs. Green and she (Mrs. Armstrong) followed them out of the store to a car parked at the curb; that they got into the car and began pulling underwear out from under their clothing; and that the automobile was the same Lincoln car she had observed at the time of the May company episode.

Appellant testified that she had not been on the third floor of the Paris store on May 23, 1929; that she entered the store but once on that day and that that entering was with Hazel Spaney, who said she wished to purchase a little girdle; that Mrs. Spaney made her purchase on the first floor and then went upstairs to a rest room to put on the girdle because her stockings were dropping; that she (appellant) did not go upstairs, but waited on the millinery floor—a balcony floor just up the stairs from the first floor; that Mrs. Spaney returned in about five minutes; that they returned to the car and then were taken by the policewomen to the police station; that she did not enter the store to steal and knew nothing of the coat in question until she saw it in the automobile; that the sole purpose of her entry into the store was to accompany Mrs. Spaney while she purchased a girdle.

Hazel Spaney, called by the appellant, testified that she purchased a little garter belt and paid for it at the Paris store on May 23, 1929. She identified the receipt which she received at that time and the receipt was marked as an exhibit in the case.

Appellant's objections to this testimony of other offenses were overruled and her motions to strike out were denied. It is upon these rulings that appellant's principal claim of prejudicial error is founded. At the trial the prosecution stated that evidence of other offenses was being offered for the purpose of showing the intent with which appellant entered the store. The court instructed the jury on request of the prosecution "that evidence of other crimes near in time to the one alleged in the information are admitted for

the sole purpose of showing a plan or system of criminal action, and as indicating a knowledge and intent and that the act charged was not the result of accident or inadvertence."

Respondent cites only People v. McGill, 82 Cal. App. 98, 255 P. 261. That case is not in point because the facts are totally dissimilar to the facts of this case.

[1, 2] The general rule is that evidence of other offenses cannot be introduced, but there are exceptions to this general rule. "If the evidence of another crime is necessary or pertinent to the proof of the one charged, the law will not thwart justice by excluding that evidence, simply because it involves the commission of another crime. People v. Tucker, 104 Cal. 440, 38 P. 195. The general tests of the admissibility of evidence in a criminal case are: 1. Is it a part of the res gestæ? 2. If not, does it tend logically, naturally, and by reasonable inference, to establish any fact material for the People, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not." People v. Ellis, 188 Cal. 682, 690, 206 P. 753, 756; People v. Sanders, 114 Cal. 216, 46 P. 153.

[3] Testing the present case by above principle, it is at once apparent that we have but one question, to wit: Does the testimony of the other offenses "tend logically, naturally and by reasonable inference to establish" as a fact in this case that Mrs. Gibson entered the Paris store with intent to steal. The mandarin set episode of Mrs. Gibson and Grace Walthers indicates a larceny; the hat episode of Mrs. Gibson and Mrs. Spaney indicates a larceny, and possibly the pulling of underwear from under their clothing after having been in the Broadway department store indicates a larceny by Mrs. Gibson and Grace Walthers. To make this testimony admissible in this case, we would have to hold, in effect, that proof of an intent to commit a larceny may be made by proving other larcenies. Evidence of other and independent larcenies is not admissible to establish a larceny charged in a case on trial. People v. Barnes, 48 Cal. 551; People v. Hartman, 62 Cal. 562; 15 Cal. Jur. 936; 9 Cor. Jur., 1069.

[4] It would seem to follow then that such evidence is not admissible to prove an intent to commit larceny, and that this is true even though the "intent to commit larceny" is the *specific intent* of a charge of burglary.

We are aware of the many decisions in cases involving such offenses as embezzlement, forgery, and obtaining money or property by false pretenses, in which testimony of "other offenses" has been admitted to prove the specific intent to defraud, but an examination of those cases discloses in each some connection between the offense charged and the "other offense" other and more than the deduction (not recognized in law) that because the defendant committed *that offense* he must have committed *this offense.*

If such a conclusion were allowed by law, then every one who has committed a larceny, within such period of time as the trial judge might hold to be within a reasonable time prior to the offense charged, could be convicted of burglary upon entering any store, although such entry be in fact solely for the purpose of purchasing merchandise. We think the exception to the general rule of inadmissibility is not to be extended that far. Our conclusion is that the erroneous admission of testimony of other acts was prejudical to defendant in view of the conflicting testimony on the facts as stated above.

[5] Appellant claims that the court erred in giving the following instruction, to wit: "The word 'wilfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law or to injure another or to acquire any advantage." In this connection appellant cites People v. Maciel, 71 Cal. App. 213, 217, 234 P. 877, 879, wherein the court said: "Whenever a specific intent is an essential ingredient of the offense, no presumption of law can arise as to the existence of such intent, for it is a fact to be proved like any other fact in the case." Appellant Gibson contends that "the instruction complained of tells the jury in effect that if the appellant did at the time in question enter the Paris store and commit the theft of the coat in question, that she is guilty of burglary. In other words, it tells the jury that they can convict appellant of burglary without her having entered with the necessary intent" to steal.

[6] Standing alone the instruction, as to the meaning of "wilfully" is proper (Pen. Code, § 7, subd. 1); but a trial court, when giving this instruction, should make certain that the jury understands that this definition of "wilfully" applies only to "general" intent and not to "specific intent".

The court defined burglary and stated the law as to the burden of proof in the language of the statutes and further instructed that "the essence of the offense of burglary consists in the intent with which such entry is made."

We think that the jurors were not misled as to the burden of proof of the specific intent when the instructions are considered as a whole. However, on a retrial it is possible that the point may be covered by a revision

of the instructions to more clearly show the distinction between general intent and specific intent.

The judgment and order are reversed, and the cause is remanded for a new trial.

We concur: CONREY, P. J.; HOUSER, J.

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106 Cal. App. 518

GREEN v. STEWART.

Civ. 218.

District Court of Appeal, Fourth District, California.

June 17, 1930.

Rehearing Denied July 14, 1930. Hearing Denied by Supreme Court Aug. 13, 1930.

1. Malicious prosecution ⟹56.

Burden of proving malice and want of probable cause in action for malicious prosecution is on plaintiff.

2. Malicious prosecution ⟹64(2).

Malice may be proved by direct evidence or inferred from circumstances.

3. Malicious prosecution ⟹32.

Malice is not presumed as result of want of probable cause, but lack of probable cause is a circumstance from which jury may infer malice.

4. Malicious prosecution ⟹71(2).

Existence of probable cause is always fact question.

5. Appeal and error ⟹1010(1).

Where any material and competent evidence supports conclusion of trial court on fact question, appellate court is bound by such conclusion.

6. Malicious prosecution ⟹18(1).

True test of probable cause is whether reasonable man possessing knowledge of prosecutrix would be justified in entertaining suspicion that charge was true.

7. Malicious prosecution ⟹18(5).

In determining probable cause, knowledge of prosecutrix must be applied as of time when prosecution was instituted.

8. Malicious prosecution ⟹20.

To have probable cause for instituting prosecution, prosecutrix must actually believe that accused committed crime charged.

9. Malicious prosecution ⟹20.

Good faith should be considered in measuring belief of prosecutrix in guilt of accused in determining probable cause.

10. Malicious prosecution ⟹64(2).

Evidence supported conclusion that there was no probable cause for defendant charging plaintiff with perjury, and that defendant was actuated by malice (Pen. Code, §§ 118, 118a).

Under Pen. Code, §§ 118, 118a, it is not sufficient to support charge of perjury that accused swear to material fact that is false, but false swearing must be knowingly and willfully done. An act is "wilfully" done when done designedly, intentionally, or perversely, and without reasonable excuse. "Knowledge" has been defined as actual information of fact. For an act to be "knowingly" done, it must be done with knowledge of actual facts, and must be done intentionally.

[Ed. Note.—For other definitions of "Knowingly and Willfully"; "Knowledge"; "Wilfully" see Words and Phrases.]

11. Malicious prosecution ⟹21(2).

In malicious prosecution action, defendant, to avail herself of defense of advice of counsel, must show full fair disclosure of all facts.

Prosecutrix must also act upon the advice in good faith. The evidence showed that prosecutrix consulted her own attorney and one of the deputy district attorneys of the county before the complaint was signed, and was advised that perjury had been committed.

12. Appeal and error ⟹1002.

On conflicting evidence verdict of jury is conclusive.

13. Appeal and error ⟹1004(3).

It is province of jury and of trial court on motion for new trial to determine and fix amount of damages.

14. Appeal and error ⟹932(1).

All presumptions favor correctness of judgment as to amount of damages.

15. Malicious prosecution ⟹69.

$350 for attorneys' fees expended by plaintiff, $1,250 actual damages, and $500 exemplary damages *held* not excessive in action for malicious prosecution for perjury.

Defendant was on criminal jury venire and was arrested when leaving jury box after participating in verdict in criminal case, and was placed in felon's tank of

county jail, where were confined convicts on whose cases he had sat as juror. The circumstances of his arrest were so unusual that it was given considerable publicity in the daily papers. Defendant testified that he suffered humiliation and chagrin and that his business was seriously damaged.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Harry B. Green against Margaret E. Stewart to recover damages for malicious prosecution. Judgment for plaintiff, and defendant appeals.

Affirmed.

Arthur F. H. Wright, of San Diego, for appellant.

R. A. McKay and F. D. Culver, both of San Diego, for respondent.

MARKS, Acting P. J.

Respondent filed his action in the court below to recover damages against appellant and Sidney Cole, Roger E. Jones, and Roswell C. Jones, for malicious prosecution. A judgment of nonsuit was entered in favor of all defendants except Margaret E. Stewart. The case against her was submitted to the jury, which returned a verdict in the sum of $350 for attorney's fees expended by respondent in defending the criminal proceedings instituted against him, $3,750 for other actual damages, and $500 exemplary damages. Upon motion for new trial the actual damages were reduced by the court in the sum of $1,250, which reduction was accepted by respondent.

Both appellant and respondent were engaged in the business of buying and selling real estate in the city of San Diego. Sidney Cole, Roger E. Jones, Roswell C. Jones, and H. E. Christian were buyers and subdividers of real property, and up to on or about June 17, 1926, were copartners conducting their business under the fictitious name of the Seaboard Realty Company. In June, 1926, the copartners organized a corporation called the J. C. C. Company, and operated under this corporate name from on or about the 17th day of June, 1926. The partners were the officers, directors, and stockholders of the corporation.

Anna B. Bunce was the owner of pueblo lot No. 1213, in the city of San Diego, county of San Diego, state of California. Early in April, 1926, appellant negotiated with Anna B. Bunce for the purchase of this property and entered into an escrow agreement with her to consummate the sale. Five hundred dollars in cash was paid on account of the purchase price. Appellant gave an option to purchase the property to respondent, who, in turn, gave H. E. Christian an option of purchase for the named price of $20,000. This last instrument was dated April 13, 1926. The option from Stewart to Green was dated April 15, 1926. Each option acknowledged the receipt of $500. This money was obtained from the funds of the Seaboard Realty Company. Christian gave Green his check for this amount dated April 16, 1926, the check bearing the successive indorsements of Green and Stewart. It was presumably paid to Bunce on account of the purchase price of the property. The option from Stewart to Green resulted in two separate escrow instructions to the Union Title Insurance Company of San Diego. The time for completing the sale to Green was finally fixed as June 18, 1926, "and for such time thereafter as shall be necessary for a full compliance herewith, unless after such period I shall have notified you in writing that I have revoked the same. Signature Margaret E. Stewart." The original option from Stewart to Green was extended to June 5, 1926, and it appears that on or before this date Green was to pay her an additional $4,500. We have not been able to find the original option in the record. The first escrow instruction signed by Green and approved in writing by Margaret E. Stewart contains the following:

"San Diego, Cal. June 1, 1926. $5,000. 6–14–26 I will hand you herewith $5,000 and will hand you a trust deed and notes totaling $1,600 as described below 6–14–26."

The second instruction signed by Margaret E. Stewart alone contains the following:

"San Diego, Cal. 6–14–26. * * * I will hand you a deed executed by Margaret E. Stewart to H. B. Green of Pueblo Lot #1213 which you are authorized to record or deliver to grantee upon payment to you of the sum of $5,000."

This particular instruction contained the reference to June 18, 1926, before quoted. Both of these instructions undoubtedly form parts of the writings which set forth the terms of the agreement of the sale from Stewart to Green.

The time to exercise the option of purchase given Christian by Green was extended to June 20, 1926. This option was secured by Christian for the benefit of the copartners doing business under the name of the Seaboard Realty Company. Under date of June 17, 1926, this option was assigned by the partners to the J. C. C. Company. The J. C. C. Company completed the purchase of this property from Margaret E. Stewart shortly after the 22d day of June, 1926. Under date of June 18, 1926, Margaret E. Stewart and Sidney Cole executed a contract of purchase and sale of the property at the expressed price of $15,500. In this contract Cole was acting for the J. C. C. Company. Appellant testified that the actual selling price to this company was $16,000. She had already received $500 from the funds of the Seaboard Realty Company by the check from Christian to Green, which was indorsed and given her.

Considerable litigation arose out of these transactions. Perhaps the principal cause for this is found in the fact that, as the transaction was originally planned, Bunce sold the land to Stewart for about $60 per acre. Stewart agreed to sell to Green for about $70 per acre. Green agreed to sell to Christian for the named sum of $125 per acre, but Christian was only going to pay Green $100 per acre, proposing to make a secret profit from his partners of $25 per acre. This was discovered and appellant sold to the J. C. C. Company direct for $100 per acre, the company saving about $4,000 and Stewart making about $4,000 more than she would have made had she sold to Green. Green was left out of the transaction and received nothing.

On July 2, 1926, respondent filed in the superior court of the county of San Diego a verified complaint in which he named Margaret E. Stewart and Anna C. Bunce as defendants, alleging breach of contract to convey pueblo lot No. 1213 to him, and seeking recovery of money alleged to have been paid to Margaret E. Stewart, together with damages. He filed a lis pendens in the office of the county recorder of San Diego county, clouding the title to the real property. This action was tried on November 3, 1926, and judgment was rendered in favor of the defendants named in the complaint. It was signed and filed on December 3, 1926.

The partners operating under the name of Seaboard Realty Company commenced selling lots in pueblo lot No. 1213, immediately upon Christian securing the option of purchase from Green. The J. C. C. Company continued selling these lots when it succeeded to the rights of the Seaboard Realty Company. The corporation found that it could not convey a clear record title to the purchasers of these lots because of the lis pendens filed by Green. It filed an action against Green in the superior court of San Diego county to quiet its title to pueblo lot No. 1213. The case was tried on November 4, 1926, and on December 2, 1926, judgment was signed and filed in favor of the corporation.

On October 14, 1926, appellant swore to a complaint charging respondent with perjury, alleged to have been committed in connection with his verification of the complaint filed by him against Stewart and Bunce on July 2, 1926. The criminal complaint was filed in the justice's court of San Diego township, county of San Diego, state of California. A warrant of arrest was issued and respondent was placed under arrest on October 15, 1926, and confined in the felons' tank of the county jail of San Diego county, where he remained for about four and one-half hours, when he was released upon giving bail in the sum of $2,000. On a preliminary examination held on November 10, 1926, the case was dismissed, and appellant was released and his bond exonerated. The parts of the criminal complaint material to this appeal are as follows:

"That said Harry B. Green on or about the 2nd day of July, 1926, in the said County of San Diego, State of California, and before the making or filing of this complaint, then and there came before M. D. Frye, a Notary Public in and for the County of San Diego, State of California, and thereupon, before said M. D. Frye, who was at the time aforesaid a Notary Public of said County of San Diego, State of California, as aforesaid, and who then and there had authority of law and was competent to administer oaths, he, the said Harry B. Green, after being duly sworn, then and there deposed and said that he was the plaintiff named in the complaint entitled 'In the Superior Court of the State of California in and for San Diego County, No. 48749. Dept. No. —, *Harry B. Green Plaintiff, v. Margaret E. Stewart* and *Anna C. Bunce*, formerly Anna C. Christian, defendants', and that he had read the said complaint and knew the contents thereof and that the same was true of his own knowledge except as to matters therein stated to be upon information and belief, and as to those matters he believes them to be true. That the said complaint alleged in part as follows:

"That the said plaintiff, above named, purchased from the said defendant, Margaret E. Stewart, on April 15th, 1926, Pueblo Lot No. 1213 of the Pueblo Lands of the city of San Diego, San Diego County, State of California, as per recorded Plat thereof on file in the office of the County Recorder of said San Diego County, embracing 160 acres of land, for the sum of Eleven Thousand Seven Hundred ($11,700.00) Dollars, payable as follows: Five Hundred ($500.00) Dollars, cash, which was paid on said date, Forty-five Hundred ($4500.00) Dollars, which was paid on June 3rd, 1926, and the balance of said purchase price to be paid in instalments of Fifteen Hundred ($1500.00) Dollars on July 1st and Fifteen Hundred ($1500.00) Dollars on October 1st, 1926; Fifteen Hundred ($1500.00) Dollars on January 1st, Twelve Hundred ($1200.00) Dollars on April 1st, and the balance thereof of One Thousand ($1,000.00) Dollars of aforesaid total consideration on July 1st, 1927. Said defendant, Margaret E. Stewart, thereby agreeing to convey to said plaintiff, or to whom he might designate, a valid merchantable title of said premises, free and clear of incumbrances, and upon said April 15th, 1926, delivered to plaintiff herein her written receipt in acknowledgment of the payment of the first instalment of Five Hundred ($500.00) Dollars upon said consideration of said purchase price for said land.'

"That the allegation in the words and figures following, to-wit: 'Forty-five Hundred ($4500.00) Dollars, which was paid on June 3rd, 1926', which allegation was then and there material to said action, was in truth and in fact, as he, the said Harry B. Green, then and there well knew, wholly false, * * * That the said complaint alleged in part as

follows: 'That thereafter, defendant, Margaret E. Stewart, extended, in writing, the time for making payment of the remaining partial payment of said consideration, amounting to the sum of Forty-five Hundred ($4500.00) Dollars, to and including June 5th, 1926', and said sum of Forty-five Hundred ($4500.00) Dollars was paid in accordance therewith on June 3rd, 1926, and said transaction was placed in Escrow with the Union Title Company of San Diego, State of California, in accordance with the aforesaid agreement'.

"That the allegation in the words and figures following towit: 'and said sum of Forty-five Hundred ($4500.00) Dollars was paid in accordance therewith on June 3rd, 1926', which allegation was then and there material to said action, was in truth and in fact, as he, the said Harry B. Green, then and there well knew, wholly false, * * * That the said complaint alleged in part as follows: 'That by reason of the conduct and actions of the defendant, Margaret E. Stewart, in the premises, as aforesaid, plaintiff has suffered damage in the sum of Five Thousand ($5,000.-00) Dollars, already advanced and paid defendant, Margaret E. Stewart, on the consideration price of Eleven Thousand Seven Hundred ($11,700.00) Dollars, and in accordance with the aforesaid agreement and, without the specific performance of said agreement upon the part of defendant, Margaret E. Stewart, plaintiff has been and will be further damaged in the additional sum of Ten Thousand ($10,000.00) Dollars, as a result of the losses sustained by plaintiff by virtue of Defendants' Margaret E. Stewart, failure and refusal to perform and carry out the terms of the purchase and sale of said premises, in accordance with the aforesaid agreement with plaintiff.'

"That the allegation in the words and figures following, towit, 'plaintiff has suffered damage in the sum of Five Thousand ($5,000.-00) Dollars, already advanced and paid defendant, Margaret E. Stewart', which allegation was then and there material to said action, was in truth and in fact, as he, Harry B. Green, then and there well knew, wholly false."

Appellant presents numerous assignments of error upon which she relies for a reversal of the judgment against her. They may be grouped under four general classifications as follows: First, that respondent failed to prove either malice on the part of appellant or want of probable cause in instituting the criminal charges against him; second, that the evidence does not support the verdict; third, that the verdict and judgment were so excessive as to indicate passion and prejudice against her; fourth, errors of law occurring during the trial in the court's sustaining and overruling various objections to questions propounded to witnesses. An added specification of error occurs in the bill of exceptions concerning certain instructions given by the court to the jury. However, this seems to have been abandoned as no mention is made of any erroneous instruction in any of the briefs before us. We have examined all the instructions given and find them fair, full and complete. As we find no error in them, we will not consider them further.

[1-5] The burden of proving malice and want of probable cause in an action for malicious prosecution rests upon the plaintiff. Like any other fact in issue, malice may be proved by direct evidence, or it may be inferred from all the circumstances of the case. While malice is not presumed as a result of the want of probable cause, the lack of probable cause is a circumstance from which the jury may infer malice. Burke v. Watts, 188 Cal. 118, 204 P. 578; McKenna v. Heinlen, 128 Cal. 97, 60 P. 668; Vesper v. Crane Co., 165 Cal. 36, 130 P. 876, L. R. A. 1915A, 541. In this case there was no direct evidence of malice on the part of appellant. Malice, if any, must be inferred from a lack of probable cause and from the other circumstances of the various transactions of the parties surrounding the filing of the criminal complaint against respondent. We must therefore first determine whether or not there was sufficient evidence in the court below to support the conclusion that there was no probable cause for filing the criminal complaint against respondent. It must be admitted that the question presented here is a close one. The existence of probable cause, or its lack, is always a question of fact in cases of this kind, and if there is any material and competent evidence in the record to support the conclusions reached in the trial court on a question of fact, the appellate court is bound by such conclusions and cannot set them aside.

[6-8] What is or is not probable cause is measured and determined by the usual and common standard of human judgment and conduct. Griswold v. Griswold, 143 Cal. 617, 77 P. 672. The true test is whether or not a reasonable man, possessing all of the information within the knowledge of the prosecutrix, would be justified in entertaining the suspicion that the charge is true. This measure of the knowledge of the prosecutrix must be applied as of the time that the prosecution was instituted which, in the case before us, was on October 14, 1926. McKenna v. Heinlen, supra; Ball v. Rawles, 93 Cal. 222, 28 P. 937, 940, 27 Am. St. Rep. 174. To this rule must be added the further requirement that the prosecutrix did, at the time she verified the criminal complaint, actually believe that the crime charged had been actually committed by the accused. As was said in the case of Ball v. Rawles, supra:

"As a principle of law this instruction was erroneous in omitting to include therein the further element that the defendant did in fact believe that a crime had been committed by

the plaintiff. The circumstances in themselves might be such as ordinarily to create such belief in the mind of a person; yet the defendant might not have that belief, for the reason that he had knowledge of other facts or circumstances which would destroy such belief. While it is not necessary to show that the crime has in fact been committed, it is necessary to show, not only that the defendant had reasonable ground to believe, but that he did in fact believe, that the crime had been committed, and that the plaintiff had committed the crime."

[9, 10] With these rules of law in mind we must determine whether or not appellant, on October 14, 1926, as a reasonable person, had probable cause to believe, and did actually believe that respondent committed the crime of perjury in verifying his complaint filed on July 2, 1926. It must be borne in mind that the criminal complaint was filed more than three months after the perjury was alleged to have been committed and three weeks before the civil action was tried, in which respondent was endeavoring to collect considerable damages from appellant. It was also three weeks prior to the trial of the action to quiet title, brought by the J. C. C. Company against respondent, involving the title to the land sold by appellant to the corporation. Upon the results of these actions would depend the considerable profit to appellant from the sale of the land to the corporation instead of respondent. Of course, this would not show lack of probable cause, but it would shed considerable light upon the motive of the prosecutrix in filing the criminal complaint. The motive which actuates a person in performing an act has an important bearing upon the state of mind and the good faith of the person so acting. While good faith or the lack of it bears principally upon the question of malice, it should also be considered in measuring the belief of the person in the rectitude of the act in question. If the prosecutrix was moved by a bad motive in filing the criminal complaint against respondent, the trial court could take this fact into serious consideration in determining whether or not appellant believed that perjury had been committed when the criminal complaint was sworn to by her.

The portions of the complaint in the civil action verified by respondent, which appellant maintains were false, are the allegations that $5,000 was paid to appellant on the purchase price of pueblo lot No. 1213 on June 3, 1926, and that respondent willfully swore to such fact, knowing it to be false at the time he made the oath. Here again we must measure the state of mind of the respondent, for it is not sufficient to support the charge of perjury that the accused swears to a material fact that is false; the false swearing must be knowingly and willfully done. Sections 118, 118a, Pen. Code; People v. Wong Fook Sam, 146 Cal. 114, 79 P. 848; People v. Von Tiedeman, 120 Cal. 128, 52 P. 155. The word "willful" has been defined as a synonym of "voluntary" or "intentional." Pfitzer v. Candeias, 53 Cal. App. 737, 200 P. 839; Parsons v. Smilie, 97 Cal. 647, 32 P. 702. An act is said to be willfully done when it is done designedly, intentionally, or perversely, Lynch v. Commonwealth, 131 Va. 762, 109 S. E. 427; State v. Smith, 159 Minn. 511, 199 N. W. 427; Gatewood v. Commonwealth, 215 Ky. 360, 285 S. W. 193, and without reasonable excuse. Cover v. Taliaferro, 142 Md. 586, 122 A. 2. Knowledge has been defined as actual information of a fact; the actual state of knowing, and not speculation, opinion, or constructive notice. Witherow v. United American Insurance Co. of Pennsylvania (Cal. App.) 281 P. 668. For an act to be knowingly done it must be with a knowledge of the actual facts (People v. McCalla, 63 Cal. App. 783, 220 P. 436), and must be done intentionally. State v. Wilson, 41 Idaho, 598, 242 P. 787; U. S. v. Hughes (D. C.) 278 F. 262. Therefore, when appellant accused respondent of the crime of perjury, she must have had probable cause to believe, and must have actually believed, that respondent not only swore to something that was false, but did so willfully and knowingly.

That the sum of $500 was actually paid to appellant shortly after April 15, 1926, there seems to be no reasonable question. The check of Christian to Green bears her indorsement, and the check was paid. She evidently received and retained this money and credited to the J. C. C. Company with this payment on the purchase price of the property in her sale to it. Forty-five hundred dollars was actually deposited in the Union Trust Company of San Diego, a branch of the Union Title Insurance Company of San Diego, on June 3, 1926. At the suggestion of an officer of the title company, handling the escrow for appellant and respondent, it was deposited with the trust company and not the title company, because of the several trust deeds that would have to be prepared in the completion of the sale from Stewart to Green under the escrow instructions held by the title company. While appellant was present at the offices of the title company and the trust company during this transaction, and at the time the money was deposited, she denied actual knowledge of the deposit. Her testimony in this regard was flatly contradicted by other witnesses. The fact remains that this money was actually deposited on account of the purchase price of the property by the Seaboard Realty Company under Christian's option of purchase from Green, and was actually paid to appellant through escrow at a later date as part of the purchase price on her sale to the J. C. C. Company. This is not disputed. The money was received by the Seaboard Realty Company from sales of lots in Pueblo lot No. 1213, between the date of the Green-Christian option and June 3, 1926, and during the time that appellant was dealing with respondent as the pur-

chaser of the property. The trial court's conclusion that, under these facts, respondent's statements in his complaint, that the $5,000 was paid to appellant on June 3, 1926, was not willfully and knowingly false and therefore not perjury, cannot be disturbed by this court. Appellant attempted to rely upon the findings of the trial court in the cases of Green v. Stewart and Bunce, and J. C. C. Company v. Green, to the effect that this money was not actually paid by Green to Stewart, to rebut and overcome this conclusion in the case before us. We may adopt these findings and still not change our conclusions, because the question of whether or not Green's sworn statement was willfully and knowingly made was not involved in either of these cases, and therefore was not covered by these findings and judgments.

As additional circumstances in further support of the determination of the trial court that appellant did not have probable cause for charging respondent with perjury, we find that on the 18th day of June, 1926, she entered into a written contract with Sidney Cole, who was acting for the J. C. C. Company, agreeing to sell the real property involved to Cole for $20,000. The day before, the J. C. C. Company had received an assignment of the rights of Christian and the Seaboard Realty Company under the Green option, under which Cole, Christian, and Roger E. and Roswell C. Jones, under the name of the Seaboard Realty Company, had been selling parts of pueblo lot No. 1213, and collecting money therefor. On June 18, 1926, Green's rights under his option of purchase and the escrow instructions were in full force and effect. Appellant did not attempt to terminate them until the next day. She had knowledge of all of these facts long before she swore to the criminal complaint on October 14, 1926. She also had received the very $5,000 that was paid or deposited under the Green option and escrow several months before this date although she actually received it under the terms of her contract with Cole dated June 18, 1926. Under all the circumstances of the case, we believe the trial court was justified in concluding that there was no probable cause for appellant charging respondent with perjury, and that the jury had ample grounds upon which to base its verdict, finding that appellant was actuated by actual malice in so doing.

[11, 12] Appellant seeks to escape the results of her acts by maintaining that she relied upon the advice of counsel in becoming the prosecutrix of respondent. She did consult her own attorney and one of the deputy district attorneys of San Diego county before the complaint was signed by her, and was advised that perjury had been committed by respondent. In order to avail herself of this defense the evidence must show that the advice she relied upon was given her after a full and fair disclosure to the attorney of all the facts within her knowledge tending to prove or to disprove the claim that there was probable cause to believe respondent was guilty of the crime charged. Williams v. Casebeer, 126 Cal. 77, 58 P. 380; Stone v. Wolfe, 168 Cal. 261, 141 P. 1190. She must also act upon the advice in good faith. Burke v. Watts, supra; Murphy v. Davids, 181 Cal. 706, 186 P. 143. While appellant testified that she made a full, fair, and complete statement of all the facts of the case within her knowledge to the attorneys, her testimony is contradicted. On this point the weight of evidence is against her. There being a conflict in the evidence, the verdict of the jury resolved it in favor of respondent, which is binding on this court.

Our conclusion that the evidence shows malice on the part of appellant and a want of probable cause for her swearing to the criminal complaint against respondent disposes of her contention that the evidence does not support the verdict of the jury.

[13-15] She next maintains that the verdict and judgment were so excessive as to indicate passion and prejudice against her. Respondent had been a resident of San Diego for several years prior to his arrest, and was in business there. He was on the criminal jury venire and was arrested when leaving the jury box after participating in a verdict in a criminal case. He was placed in the felons' tank of the San Diego county jail, where were confined convicts upon whose cases he had sat as a juror. After four and one-half hours' confinement he was released on $2,000 bail. The circumstances of his arrest were so unusual that it was given considerable publicity in the daily papers of San Diego. He paid $350 to his attorneys for his defense against the charge. He testified that he suffered humiliation and chagrin, and that his business was seriously damaged.

It is the province of the jury, and then of the trial court, upon motion for a new trial, to determine and fix the amount of damages awarded a litigant. They have the witnesses before them and can weigh and consider all the circumstances of the case. All presumptions are in favor of the correctness of the judgment, and under the circumstances of this case we cannot hold it excessive. Scott v. Times-Mirror Co., 181 Cal. 366, 184 P. 672, 12 A. L. R. 1007.

A careful review of the record before us leaves the conclusion that both appellant and respondent, together with certain others connected with the transaction, need schooling in the elementary principles of ordinary honest business ethics. The facts have been resolved in favor of the respondent in the court below, and this court will not disturb the judgment in view of the conflicting evidence

and the inferences, presumptions, and conclusions to be drawn from it. Certainly appellant is not the least blameworthy of the participants in the transactions which led up to the filing of this case. Her motives in instituting the criminal action which caused the arrest of respondent are not above serious suspicion, in view of the impending trials of two civil actions in the superior court of San Diego county upon the results of which would depend a profit of $4,000 to herself. If she was attempting to force a settlement of the civil actions through a criminal prosecution this fact should, and undoubtedly did, have a strong influence upon the trial court and jury in finding against her. In appellant's own testimony she gave color to such suspicion by the following:

"Q. Why did you wait from July 2nd until the 14th day of October before you made your criminal complaint against Green for verifying his complaint in the action against you? A. Because Mr. Green had brought suit against me and there was no—I didn't know he had committed perjury until he did swear to his complaint against me. * * *

"A. Well the title had to be cleared up and they came to me to see if I could do anything about clearing it up. Then after that the criminal case was started."

If the attorneys who advised her that perjury had been committed had known all of the facts of the case within the knowledge of appellant, we do not believe the criminal complaint against respondent would have been filed.

We have examined all of the rulings of the trial court in sustaining or overruling objections to questions asked of witnesses, which appellant has assigned as error, and can find no prejudicial error in any of them. An extended review of these rulings would unduly extend this opinion and could serve no good purpose.

Judgment affirmed.

We concur: BARNARD, J.; AMES, Justice pro tem.

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106 Cal. App. 574

CLARK v. OCEANO BEACH RESORT CO. et al.

Civ. 4123.

District Court of Appeal, Third District, California.

June 19, 1930.

Rehearing Denied July 18, 1930. Hearing Denied by Supreme Court Aug. 18, 1930.

1. Corporations ⚷289.

One elected director to succeed director orally resigning at previous meeting of board and immediately commencing discharge of duties was de facto director at time of subsequent meeting, at which stock assessment was levied.

2. Corporations ⚷320(11).

Evidence *held* not to show conspiracy by certain directors to get control of corporation by levying stock assessment.

The evidence showed that corporation had only $12.09 on hand and owed over $13,000, including $2,500 to director complaining of assessment, at time thereof, and had a few town lots, which could have been sold, and a permit to sell additional stock to its stockholders, but that amount which could have been realized from such sources was insufficient to pay indebtedness.

3. Corporations ⚷393.

Whether stock assessment shall be levied or corporation's property sold to meet its obligations is for corporation and its officers, not court, to determine.

4. Evidence ⚷73.

It will be presumed that stock assessments were made in good faith and for proper purpose.

5. Corporations ⚷175.

Directors' motive in levying stock assessment for proper purpose is immaterial.

6. Corporations ⚷320(11).

Evidence in suit to enjoin sale of stock for nonpayment of assessments *held* to justify court's findings that corporation had principal place of business in its pavilion at certain beach.

The evidence showed that corporation owned pavilion, in which there was office specially prepared for meetings thereof, at certain beach; that certain directors' and stockholders' meetings were held thereat; that plaintiff attended and participated in one of them and notified other directors that official meeting elsewhere would be illegal until proper procedure was taken to change office; that other directors met thereat on day assessment was voted and, finding doors locked, met on sidewalk and adopted resolution changing location of office to place at which meeting was held; and that they adopted resolution thereat authorizing president to do all things necessary to recover possession of pavilion from plaintiff.

7. Corporations ⚷298(3).

No notice of adjournment of regularly called meeting of corporation's directors need be given.

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8. Corporations ⟹298(2).

It was not necessary for board of directors, in taking adjournment of meeting at corporation's only office, to designate place of adjourned meeting (Civ. Code, § 319).

Civ. Code, § 319, requires that stockholders' and directors' meetings be held at corporation's office or principal place of business.

9. Evidence ⟹65.

Corporation director is presumed to have known that president had no power to change place for adjourned directors' meeting (Civ. Code, § 319).

10. Corporations ⟹298(2).

Directors' meeting at corporation's only office on day set in president's notice of meeting elsewhere in same town *held* lawful (Civ. Code, § 319).

11. Corporations ⟹298(2).

Directors' meeting at corporation's only office on day set by notice of meeting elsewhere in same town being lawful, subsequent meeting at new location on same day, pursuant to resolution at former meeting, was lawful, and stock assessment voted thereat valid (Civ. Code, § 319).

12. Corporations ⟹175.

Stock assessment can be levied legally only by strict compliance with statutory provisions or corporation charter.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by W. J. Clark against the Oceano Beach Resort Company, a corporation, and others. Judgment for plaintiff, and defendants appeal.

Reversed.

M. R. Van Wormer, of San Luis Obispo, for appellants.

S. V. Wright, of San Luis Obispo, for respondent.

FINCH, P. J.

The defendant Oceano Beach Resort Company is a corporation with issued capital stock of 36,525 shares, of which the plaintiff owns 7,250 shares. On April 5, 1926, the board of directors of the company levied an assessment of 10 cents a share on the capital stock. The plaintiff, who is one of the directors, did not pay the assessment on his stock, but brought this action to enjoin the sale thereof for nonpayment of the assessment. Judgment was entered in his favor as prayed for, and the defendants have appealed on a record prepared in accordance with the provisions of section 953a of the Code of Civil Procedure.

The reporter's transcript contains 475 pages; much of the evidence included therein being immaterial. The respondent has not complied with the requirement of section 953c of the Code of Civil Procedure, that "the parties must * * * print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court," nor has he stated therein, in lieu of such printing, "the substance of such record, parenthetically referring to the line and page of the typewritten transcript for verification," as permitted by rule VIII of the Supreme Court and District Courts of Appeal. It does not clearly appear, therefore, upon what part of the evidence the respondent relies in support of the findings and judgment.

In appellants' opening brief it is said: "By the findings fourteen reasons are assigned as making the assessment null and void." Respondent admits that some of these assigned reasons are groundless and several others are manifestly without sufficient merit to warrant a discussion thereof.

[1] At the directors' meeting of April 5, 1926, Elmer Ware acted as one of the directors as the successor in office of S. G. Dillashaw. The court found that Ware was not a director at that time, but that Dillashaw was then a director. At a meeting of the board on February 15, 1926, Dillashaw orally resigned his office, and thereafter he did not participate or attempt to participate in the meetings of the board. There is a conflict in the evidence as to whether the board formally accepted his resignation at the meeting of February 15, but at a meeting of the board on March 8, 1926, Ware was elected a director to fill the vacancy caused by Dillashaw's resignation. Ware at once entered upon the discharge of his duties as a director and as such participated in the conduct of the business of that meeting and of the subsequent meeting of April 5. It has been held that "an oral resignation is sufficient" and that "an acceptance is not necessary to render the resignation effective, unless it is tendered to take effect on acceptance." 14a C. J. 73. In any event, Ware was clearly a de facto director, and his acts as such were valid. San Joaquin L. & W. Co. v. Beecher, 101 Cal. 70, 80, 35 P. 349.

The court found "that a portion of a former assessment * * * remained unpaid" at the time the assessment involved herein was levied. The respondent has not called attention to any evidence supporting this finding, and a careful search of the record fails to disclose any such evidence.

[2-5] The court found "that said assessment was not made, or levied, in good faith

to pay the debts or expenses of said corporation or to conduct the business of the corporation, but that the same was made and levied pursuant to an understanding and conspiracy between the defendants J. M. Long, C. H. Marshall, H. S. Dole and Elmer Ware with the intent to oust the other stockholders and to get control of the corporation and its assets for their own personal gain and advantage and to the detriment and injury of such other stockholders," and "that it is not true that the financial condition of said corporation was the sole or only reason for levying the said pretended assessment or that it was the reason for levying the same." There is no evidence of a conspiracy between the directors named in the finding. At most, the evidence raises a suspicion that one of the motives of the defendant Long was to gain control of the corporation. The evidence shows that, at the time the assessment was levied, the corporation had on hand only $12.09 and was in debt over $13,000 including an indebtedness to the plaintiff of $2,500. It appears that it had a few town lots which could have been sold, and that it had a permit to sell additional shares of stock to its own stockholders; the amount which could have been realized from both sources, however, being insufficient to pay the indebtedness. Whether an assessment shall be levied or the property of a corporation shall be sold to raise funds which which to meet its obligations is a question for the determination of the corporation and its officers and not for the courts. "It will be presumed that assessments were made in good faith and for a proper purpose. And, if the purpose is a proper one, the motive of the directors in levying it is immaterial." Fletcher's Cyclopedia of Corporations, § 4273.

[6-11] The only serious question to be determined is whether the meeting of April 5 was held at a proper place. The articles of incorporation provide: "That the place where the principal business of the corporation is to be transacted is in Oceano, County of San Luis Obispo." The by-laws are silent as to the location of the office or place of business of the corporation.

The corporation was organized about January 1, 1921. Prior to August 1, 1925, the meetings of the board of directors were held in Bakersfield, Kern county. The corporation owned a pavilion in Oceano in which there was "an office specially prepared for meetings of the corporation and the keeping of the records of the secretary." The board of directors held meetings in the pavilion on the following days: August 14, 1925, February 5, February 15, and March 8, 1926, and a stockholders' meeting for the election of directors was held there February 15, 1926. The plaintiff attended the meeting of March 8 and participated therein. The minutes of that meeting contain the following: "The meeting adjourned to meet on April 5, 10 a. m., 1926." Thereafter notices, signed by the president and secretary, were sent to the plaintiff and the other directors stating: "You are hereby notified by the president that the next meeting of the board of directors of the Oceano Beach Resort Co., Inc., will be held at the company's office, corner of Fifth and Beach streets, Oceano, * * * on the 5th day of April, 1926, at ten a. m., for the purpose of acting on and transacting and disposing of any business that comes before said board of directors."

The place designated as "the company's office, corner of Fifth and Beach streets," was the secretary's residence. On April 2 the plaintiff sent letters to the other directors stating: "This will notify you that any official meeting of the Oceano Beach Resort Company held in any other place except the official office of the Oceano Beach Resort Company at the pavilion will be illegal until the proper procedure has been taken to change the office."

The plaintiff was in charge of the pavilion, and it appears that he resided therein with his family. On April 5, prior to the time set for the meeting, he left Oceano and remained away therefrom until after the final adjournment of the meeting. The other directors met at the pavilion at 10 o'clock a. m. on that day and, finding the doors locked, they held a meeting on the sidewalk adjacent to the building and adopted the following resolution: "Be it resolved, that the board of directors ratify and confirm the permanent location of the Oceano Beach Resort Company's office at Fifth and Beach streets as published in the Arroyo Grande paper."

The board then "adjourned to meet at the office of the company at 10:45 a. m., April 5, 1926." All the directors except the plaintiff met at the time and place last mentioned and adopted a resolution levying the assessment in dispute. No question is raised as to the sufficiency in form of the proceedings at this meeting.

As throwing light upon the acts and conduct of the parties, it may be stated that the plaintiff and his wife were in possession of the pavilion under a lease from the defendant corporation, and that controversies had arisen between the parties in connection therewith. At the second meeting of April 5 the following resolution was adopted: "Be it resolved: That the president be and he hereby is authorized and empowered to do all things necessary to recover the possession of the pavilion and premises surrounding the same now held by Margaret C. Clark and or W. J. Clark under a purported lease dated August 1, 1925."

The by-laws make no provision for the time or place of meetings of the board of directors or for any regular meetings thereof, and all

the meetings of the directors were special. The by-laws provide that the president "shall call the directors together whenever he deems it necessary. * * * The president or two of the directors may call special meetings of the directors at any time."

The court found that the corporation had "its principal place of business at and in the pavilion of said corporation at Oceano Beach in the County of San Luis Obispo." It cannot be held that the evidence is insufficient to justify this finding. 14a C. J. 86.

In Thompson on Corporations (2d Ed.) § 496, it is said: "The president may call special meetings of the board of directors at places other than the principal place of business of the corporation, where the by-laws authorize him to call such meetings but prescribe no particular place."

But at the time of the assessment in question section 319 of the Civil Code read as follows: "The meetings of the stockholders and board of directors of a corporation must be held at its office or principal place of business."

In Seal of Gold Mining Company v. Slater, 161 Cal. 621, 626, 120 P. 15, 17, after quoting section 319, it is said: "We need not inquire what is meant by the phrase 'principal place of business' in this section. Apparently it is not used in a sense synonymous with that of 'office.' * * * The location and removal of the office of the corporation was equally a matter committed to the discretion of the directors. Under section 321a of the Civil Code, the principal place of business of a corporation can be changed only with the consent of the holders of two-thirds of the stock, and upon publication of a notice of the intended change. But, even if the 'office' be treated as equivalent to the 'principal place of business,' these requirements of consent, notice, and publication do not, by the express terms of the section, apply to a removal from one location to another in the same city." See, also, Moreno Mutual Irr. Co. v. Jordan, 197 Cal. 69, 239 P. 716.

On the authority of the cases cited, it may be said that, if the meeting at the pavilion on April 5 was properly held at that place, then the second meeting on that day at the newly located office was a lawful one, and the assessment is valid. Prior to that time the office of the corporation and its principal place of business were at the pavilion.

At the special meeting of March 8, all the directors were present. At the close of that meeting the board took an adjournment to April 5, at 10 o'clock a. m. "No notice of adjournment of a meeting regularly called need be given." Seal of Gold Mining Co. v. Slater, 161 Cal. 627, 120 P. 15, 18. The corporation then having but one office, which was also its principal place of business, it was not necessary for the board of directors, in taking the adjournment, to designate the place at which the adjourned meeting would be held. The plaintiff is presumed to know the law and therefore to have known that it was not within the power of the president to change the place of meeting, and the plaintiff's letter of April 2 shows that he actually had such knowledge. He knew that the directors could lawfully meet at the pavilion, pursuant to adjournment of March 8, and transact business there, but, notwithstanding this knowledge, he voluntarily absented himself therefrom. He was not justified in assuming that the meeting would not be held at the pavilion merely because of the president's unauthorized notice. The situation is somewhat analogous to the one considered in Seal of Gold Mining Co. v. Slater, supra, where it is said that the mere circumstance that a director failed to attend a special meeting, in the belief that a quorum would not be present, based upon the statement of another director that he would not attend, but who "did nevertheless, at the request of other directors, attend and participate, * * * is not enough to make it a fraud for a majority of the board, including the director who had stated that he would be absent, to meet pursuant to proper call and notice." That case is authority for the action of the directors, on finding the doors of the pavilion locked, in holding the meeting on the adjacent sidewalk. It follows from what has been said that the meeting at the pavilion was lawful, as was also the subsequent meeting on the same day at the new location, and that consequently the assessment is valid.

[12] While the levy of such an assessment can only be accomplished legally by a strict compliance with the statutory provisions relative thereto, or with the provisions of the charter of the corporation upon the subject (Cheney v. Canfield, 158 Cal. 342, 346, 111 P. 92), there appears to have been such a compliance in the levy involved herein. The plaintiff is in no worse position than the other stockholders who have paid their assessments, because he still has the right to avoid the sale of his stock by paying the assessment.

The judgment is reversed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

106 Cal. App. 582

OCEANO BEACH RESORT CO. v. CLARK.

Civ. 4124.

District Court of Appeal, Third District, California.

June 19, 1930.

As Modified on Denial of Rehearing July 18, 1930.

1. Corporations ⟹298(5).

Directors had no power to adopt resolution declaring corporation's indebtedness to president at meeting attended by only three of five directors, including president.

2. Trial ⟹404(2).

Court's finding that corporation was indebted to its former president in stated sum *held* mere conclusion of law.

3. Appeal and error ⟹1140(1).

Judgment for more than testimony justified affirmed for amount to which testimony showed respondent entitled on condition that he file release of judgment for excess.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by the Oceano Beach Resort Company, a corporation, against W. J. Clark. Judgment for defendant, and plaintiff appeals.

Affirmed conditionally.

M. R. Van Wormer, of San Luis Obispo, for appellant.

S. V. Wright, of San Luis Obispo, for respondent.

PLUMMER, J.

This action was begun by the plaintiff against the defendant to obtain an accounting of all moneys received and expended by the defendant, and of all charges by the defendant against the plaintiff, for and on account of his administration of the affairs of the company. Judgment was entered in favor of the defendant for the sum of $5,462.28 and $59 costs. From this judgment the plaintiff appeals.

The record shows that the defendant was the duly elected, qualified, and acting president of the plaintiff corporation from the 1st day of June, 1924, until about the 16th day of February, 1926. It appears also from the record that the plaintiff corporation had an office in Bakersfield, in the county of Kern, and that its principal place of business, or the place where the property belonging to the corporation was situate and where it was transacting business in relation thereto, was at Oceano Beach, in the county of San Luis Obispo. The business of the corporation appears to have been that of conducting a beach resort at Oceano and the selling of lots in connection therewith. The defendant, during the time he was acting as president of the corporation, appears also to have been acting as general manager, spending his time at Oceano Beach, at which place the defendant and his family had established residence.

[1] The complaint alleges that the defendant has received of the funds of the plaintiff the sum of $11,116.13. The answer admits the receipt of $6,355.79 of money belonging to the company from the Hellman Bank & Trust Company of Los Angeles, and also the further sum of $2,382.29 of other funds belonging to said corporation, derived from rents and profits of the business of the corporation during the defendant's administration of its affairs. The answer then alleges that on the 1st day of February, 1926, the plaintiff was indebted to the defendant in the sum of $5,238.37. The court found that the defendant had received from the Hellman Bank & Trust Company of Los Angeles, of funds belonging to the plaintiff, the sum of $6,355.79, and also the further sum of $7,261.93; that the funds collected by the defendant were received and the funds expended by him were expended pursuant to resolutions adopted by the corporation authorizing such action on the part of the defendant. The court found: "That defendant advanced certain moneys to plaintiff, and earned wages, and on the 1st day of February, 1926, plaintiff was indebted to defendant in the sum of $2,565.57." The court further found that the indebtedness just mentioned, of the plaintiff to the defendant, was duly found to exist by a meeting of the board of directors of plaintiff held on the 6th day of February, 1926.

It may here be stated, in connection with what is said in the finding as to the action of the board of directors is shown by the minutes to have been taken at a meeting of the directors of the corporation at which only three of the five directors of the corporation were present, one of whom was the defendant, from which it follows that this part of the finding of the court must be disregarded, as the board of directors had no power to adopt such a resolution, not having a quorum present exclusive of the defendant, who appears to have voted for the adoption of this resolution. The complaint further alleges that the defendant, after the termination of his office as president of the company, continued to collect, without authority, moneys due the plaintiff. In this particular the court found as follows: "It is not true that the defendant continues to collect the debts due the plaintiff, without any authority whatsoever, or that he continues to appropriate the moneys so collected to his individual use; but on the contrary plaintiff is indebted to the defend-

ant in a large sum of money, to-wit, $5,462.28."

Upon this appeal the appellant challenges the sufficiency of the evidence to support the finding that on the 1st day of February, 1926, the plaintiff was indebted to the defendant in the sum of $2,565.57 for wages earned. Likewise, two objections are made to what the trial court set forth as a finding "that plaintiff is indebted to the defendant in a large sum of money, to-wit, $5,462.28"; that there is no testimony in the record to support such a finding, and also that the purported finding is in truth only a conclusion of law and is not a finding at all.

After referring to certain statements showing receipts, expenditures, and claims for salary rendered by the defendant to the plaintiff, the appellant concludes its brief as follows: "We respectfully submit that the proper judgment in this case would be wages for the defendant at the rate of $5.00 per day from June 15, 1925, until February 15, 1926, less the amount of his collections made after February 15, 1926, amounting to $478.49, and that any judgment in excess of this amount is unsupported by the evidence." In response to this statement in appellant's brief, the respondent's reply advances the answer that $2.50 per day for expenses, in addition to the $5 per day, is not unreasonable, and that, if expenses were allowed, it would bring the judgment up to $4.021.50. Outside of this statement the respondent makes no pretense that the testimony supports the judgment for any greater sum.

As heretofore stated, the record shows that the defendant acted as president and managing agent of the plaintiff from June, 1924, until about the middle of February, 1926. The record further discloses that a resolution was adopted by the board of directors of the corporation providing for compensation of any officers who were looking after the business of the company at the rate of $5 per day, and also that expenses in the sum of $2.50 per day were to be allowed when the officer so looking after the affairs of the company was away from home. The resolution relative to expenses was adopted by the corporation on February 4, 1922, and reads as follows: "That any member of the Board of Directors that is appointed to attend to official business of the Company shall receive the sum of $5.00 per day, and expenses when they have to leave the city." On the part of the appellant it is claimed that this resolution in relation to expenses applies only, and was intended to apply only, to such officers of the company who had to leave the city of Bakersfield in looking after the affairs of the company, and that, as the defendant Clark moved from the city of Bakersfield and established his residence at Oceano Beach, expenses should not be allowed. However, in the statements rendered by the defendant Clark to the corporation, expenses at the rate specified in this resolution were always set forth as a part of his salary. No objection appears to have been made thereto until the trial of this action. The construction of this resolution given by the corporation appears to have been that expenses in the sum of $2.50, as well as salary in the sum of $5 per day, should be allowed the defendant while engaged in looking after the affairs of the company. As we have stated, the official connection of the defendant with the company as its president and managing agent appears to have been terminated on or about the 16th day of February, 1926, and, though he continued to collect some moneys due the plaintiff thereafter, to wit, the sum of $478.49, he really performed no services thereafter, and our attention has not been called to anything in the record from which it could be found or concluded that the defendant was in the employ of the plaintiff company after the 16th day of February, 1926.

[2] While we agree with the appellant that the words in the court's findings, as follows: "But on the contrary plaintiff is indebted to the defendant in a large sum of money, to-wit, $5,462.28"—are only a conclusion of law, as shown by the following cases: Adams-Campbell Co. v. Jones, 71 Cal. App. 723, 236 P. 322; Lynip v. Alturas School District, 24 Cal. App. 426, 141 P. 835; Wood v. Mesmer, 46 Cal. App. 257, 189 P. 134, and not a finding of fact at all, the conclusion at which we have arrived in this case is not influenced thereby. We may state that, if the conclusion of law had been preceded by a statement of facts, showing the indebtedness of $5,462.28, as set forth in the case of Wood v. Mesmer, supra, then it would have constituted a finding of fact.

[3] By reason of the failure of respondent to call to our attention any testimony supporting the finding in the sum of $5,462.28, and being unable to discover in the record any testimony supporting either a finding or a judgment for such sum, the judgment must be reduced irrespective of whether the language used in the finding is a finding of fact or a conclusion of law.

What appears to be a final statement rendered by the defendant to the plaintiff, which is supplemented by some additional testimony not materially changing the statement, we find the defendant charging the plaintiff with the sum of $3.937.50, the amount claimed to be due to the defendant from the plaintiff as of the 1st day of February, 1926.

In pursuance of the offer of the appellant, and likewise the estimate of the defendant as to what is due from the plaintiff to the defendant, we have taken this sum as a basis of the amount due the plaintiff from the defendant as of the 1st day of February, 1926,

and, while our calculations in taking figures from the record would show an indebtedness from the plaintiff to the defendant on the 16th day of February, 1926, of the sum of $4,062.50, in view of the fact that the defendant, in his brief, figures the amount, when expenses are allowed as well as salary, at $4,021.50, we will accept such figures as stating the correct amount.

While there is no finding by the court that such sum is due, the testimony in the record is sufficient to support such a finding, and, in view of the statements contained in the briefs of both appellant and respondent, to which we have referred, a reversal of the judgment herein may be avoided by directing a modification thereof so as to award the defendant a judgment to which the testimony shows him to be entitled.

It is therefore ordered that, if the respondent shall, within thirty days after going down of the remittitur herein, file in the court below a written release of the judgment for any and all sums in excess of $4,021.50, then and in that event the judgment shall stand affirmed for the said sum of $4,021.50. If such release be not filed within said time, the judgment shall stand reversed. It is further ordered that neither party recover costs on appeal.

We concur FINCH, P. J.; R. L. THOMPSON, J.